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LEGISLATION

A New Proposal for a Uniform Real Estate Mortgage Act

Early efforts to draft a uniform mortgage act were abandoned because of the apparent impossibility of drawing a semblance of order out of the complications and differences of form and procedure in the various states.¹ However, in 1927

1. See 36 A. B. A. REP. (1911) 950; 1920 HANDBOOK OF COMM'RS ON UNIFORM STATE LAWS 165.

the Commissioners on Uniform State Laws succeeded in drafting an act which was approved by the American Bar Association.² Despite other influential endorsement,³ no state has adopted the 1927 proposal.⁴ The new act was instigated by the experiences of the Home Owners' Loan Corporation, the Federal Housing Administration and the Reconstruction Finance Corporation in conducting foreclosures under a variety of state laws.⁵ While primarily based on the 1927 proposal, it has incorporated provisions which, it is hoped, will avoid many bitter depression experiences in mortgage lending and foreclosures. The present draft is not final⁶ but it is expected that the final draft will be presented to the American Bar Association for approval at its 1938 meeting.⁷

The provisions of the act are prospective only, but the mortgagor and mortgagee may agree, in a recorded writing, that they shall apply to prior mortgages.⁸ Constitutional questions based on impairment of contract obligations are thereby avoided.⁹ Section 2 defines words and phrases used in the act and section 22 expounds the meanings of covenants in a recommended statutory mortgage.¹⁰ The power of a legislature to define its own language and thereby bind the courts is well established, and, for the sake of clarity, desirable.¹¹

Lien or Title

Of particular interest is the definition of the term "mortgage".¹² Although the majority of states in this country have adopted the lien theory of mortgages,¹³ a considerable number still purport, at least, to follow the common law or title theory.¹⁴ The law in the various states is confused and irregular so that writers fail to agree on classifications of states as either lien or title.¹⁵ However, the basic difference between the two views is that under the lien theory the mortgagee is not entitled to possession¹⁶ and usually not to rents and profits¹⁷ of the mortgaged premises until foreclosure, while under the modern common law theory the mortgagee is entitled to possession and rents and profits on the mortgagor's default with respect to any condition of the mortgage.¹⁸

The 1927 proposal expressly adopted the lien theory¹⁹ and stipulated that the mortgagor should have no right to possession or to rents and profits until

2. 52 A. B. A. REP. (1927) 402.

3. See Pomeroy, *The Uniform Mortgage Act* (1926) 34 J. POL. ECON. 383, 386. See also MACCHESNEY, REAL ESTATE LAW (1927) § 491; Legis. (1927) 27 COL. L. REV. 861, (1925) 38 HARV. L. REV. 651, (1926) 15 KY. L. J. 22, (1930) 17 VA. L. REV. 179.

4. Only § 36, providing for a uniform short form mortgage, has been enacted in Minnesota. MINN. STAT. (Mason, Supp. 1936) § 8204-9.

5. The chairman of the committee drafting the act is Horace Russell, general counsel to the Home Loan Bank Board.

6. Draft of August 31, 1937.

7. Phila. Legal Intelligencer, Dec. 21, 1937, p. 2, col. 6.

8. § 10.

9. U. S. CONST. Art. I, § 10.

10. § 21.

11. See Legis. (1937) 86 U. OF PA. L. REV. 189, 195.

12. § 2 (d).

13. E. g., FLA. GEN. LAWS (1927) § 5725; MINN. STAT. (Mason, 1927) § 9572. See WALSH, MORTGAGES (1934) § 5; 1 JONES, MORTGAGES (8th ed. 1928) § 67.

14. Mallory v. Agee, 226 Ala. 596, 147 So. 881 (1932); Cook v. Curtis, 125 Me. 114, 131 Atl. 204 (1925). See WALSH, MORTGAGES (1934) § 5; 1 JONES, MORTGAGES (8th ed. 1928) § 67.

15. Compare WALSH, MORTGAGES (1934) 27 with 1 JONES, MORTGAGES (8th ed. 1928) § 67. An intermediate view exists in Delaware, Mississippi and Missouri. *Ibid.*

16. See MACCHESNEY, REAL ESTATE LAW (1927) §§ 342, 343.

17. The right to rents and profits apparently depends on possession. See 2 JONES, MORTGAGES (8th ed. 1928) § 827.

18. *Supra* notes 16 and 17.

19. 1927 proposal, § 2 (1).

foreclosure and expiration of the redemption period.²⁰ However, the act has been criticized²¹ because of other provisions inconsistent with the lien theory. The chief inconsistency was the provision that tender of the amount due on a mortgage when made after maturity, if not accepted, did not of itself discharge the lien of the mortgage.²² The prevailing view, under the lien theory, is that a mortgage continues to be a lien even after default, and therefore the mortgagee is bound to accept valid tender of the debt made after default the same as on the due day, and if he rejects the tender he loses his lien.²³ A lesser inconsistency was the provision for appointment of a receiver, where necessary, to prevent loss of security.²⁴ The lien theory states are evidently not agreed on this policy,²⁵ although some allow it by statute.²⁶

The new act adopts neither view. Section 2 (d) defines a mortgage as any "instrument whereby a lien is created upon real estate . . . or whereby title to real estate is conveyed to another person." Section 40 (a) provides that the mortgagee gets no right to possession or rents and profits of the mortgaged premises except as provided by the mortgage. The exceptions referred to are section 22 (5) which enumerates certain contingencies in which the mortgagee shall have a right to possession, and section 22 (9) which provides that on the breach of any covenant of the mortgage, the mortgagee shall have a right to collect and receive on behalf of the mortgagor all the rents and profits. Although both these sections violate the lien theory, they deal with interpretations of covenants in a statutory mortgage recommended,²⁷ and under section 11 may either be added to or entirely omitted. In view of the flexibility provided, no objections should be raised in lien jurisdictions.

The new act makes no mention of the effect of tender after maturity of the obligation and, therefore, questions concerned therewith are to be determined, under section 61, by the law of the particular state, while section 40 (b) allows the court to appoint a receiver of mortgaged premises for the benefit of any mortgagee entitled thereto. Objections raised to positive provisions of the old act regarding these questions are thus avoided. Moreover, the diverse interests of mortgagor and mortgagee are adequately handled. Sections 22 (5) and 22 (9) furnish attractions and security to lenders, while section 40 affords adequate protection to the mortgagor.

A Statutory Form of Mortgage

In Article III, simplification of mortgage forms is sought. Section 21 suggests a statutory form of mortgage which contains ten covenants by which, in addition to warranting title, the mortgagor promises to pay both the obligation secured and the taxes, to keep buildings insured, to avoid waste and to keep the premises in repair, to defend the mortgage, to pay prior mortgages or other liens,

20. *Id.*, § 2(2).

21. See Legis. (1930) 17 VA. L. REV. 179, 181.

22. 1927 proposal, § 5.

23. *Davies v. Dow*, 80 Minn. 223, 83 N. W. 50 (1900); *Kortright v. Cady*, 21 N. Y. 243 (1860), modified by *Tuthill v. Wheeler*, 81 N. Y. 94 (1880) which requires the mortgagor to give sufficient time to the mortgagee to ascertain the amount due; cf. *Knollenberger v. Nixon*, 171 Mo. 445, 72 S. W. 41 (1902). *Contra*: *Himmelmann v. Fitzpatrick*, 50 Cal. 650 (1875) (tender after the due date does not discharge the lien). See Legis. (1930) 17 VA. L. REV. 179, 181.

24. 1927 proposal, §§ 4 (1), (2).

25. Compare *Interstate Bus. Men's Ass'n v. Nichol's Estate*, 213 Iowa 12, 238 N. W. 435 (1931) and *Nielsen v. Heald*, 151 Minn. 181, 186 N. W. 299 (1922) with *Olson v. Union Central Life Ins. Co.*, 60 N. D. 671, 235 N. W. 722 (1931) and *State ex rel. Allen v. Superior Ct. for King County*, 164 Wash. 515, 2 P. (2d) 1095 (1931).

26. IDAHO CODE ANN. (1932) tit. 6, § 601.

27. § 21.

and to assign rents and profits of the mortgaged premises to the mortgagee. It is also provided that the mortgagee may advance up to the maximum amount fixed in the mortgage on the security of the mortgage, and on breach of any covenant in the mortgage, shall have the statutory right of sale. The costs of foreclosure are to be paid out of the proceeds of the sale. As drafted, the statutory mortgage is extremely favorable to the mortgagee.²⁸ However, this advantage is tempered and desirable flexibility is provided inasmuch as any of these covenants may be omitted or other clauses added, which are to be designated as "non-statutory".²⁹ Moreover, the use of other lawful forms of mortgage instruments is not prohibited.³⁰ Many advantages may be had by the use of the type of mortgage provided by the act. The length of the ordinary mortgage deed is reduced with resultant savings in both labor and recordation expenses.³¹ Furthermore, the covenants are more intelligible to the layman and their statutory exposition³² will do much to eliminate the uncertainties of judicial construction. The 1927 proposal, in addition to a uniform short form mortgage,³³ provided a similar uniform short form trust mortgage.³⁴ The statutory mortgage may easily be converted into a deed of trust form³⁵ and used under the act inasmuch as the term "mortgage" is defined by the act to include deeds of trust.³⁶

Foreclosure by Power of Sale

The main provisions of the act are contained in Article IV. By the power of sale, it is aimed to provide a cheap and quick method of foreclosure, with an absolute clarification of title³⁷ and, at the same time, to protect mortgagors from unconscionable exercises of the power of sale and excessive deficiency judgments.³⁸

Except in a few states where the exercise of the power is expressly forbidden by statute,³⁹ foreclosure by power of sale in a mortgage is recognized as valid⁴⁰ and the procedure is regulated in varying detail.⁴¹ Where allowed, however, the power of sale is optional with the mortgagee⁴² and does not exclude other methods of foreclosure.⁴³ Recognizing this, section 12 stipulates that a power of sale in a mortgage must be exercised by the procedure prescribed by the act, but, by appropriate court action, any mortgage may be foreclosed by the mortgagee at his option.

28. See § 22.

29. § 11.

30. *Ibid.*

31. See Roberts, *Uniform Mortgage Act (1927)* 15 KY. L. J. 22, 28; MACCHESNEY, REAL ESTATE LAW (1927) § 333.

32. *Supra* note 28.

33. 1927 proposal, § 36.

34. *Id.*, § 36a.

35. Under a deed of trust, conveyance is made to a trustee who holds legal title until the mortgage debt is paid. The form is usually used to secure an issue of corporate bonds, or in cases where a mortgage is made, to secure debts owing to a number of creditors. See WALSH, MORTGAGES (1934) § 13.

36. § 2 (d).

37. For an analysis of the advantages of foreclosure by power of sale, see Legis. (1925) 38 HARV. L. REV. 651, 658.

38. The objections to unrestricted exercise of the power of sale are discussed in MacChesney and Leesman, *Mortgages, Foreclosures and Reorganization* (1936) 31 ILL. L. REV. 287, 289.

39. E. g., ARIZ. CODE ANN. (Struckmeyer, 1928) § 2322; ILL. REV. STAT. (Cahill, 1933) c. 95, § 24; IOWA CODE (1931) § 12372; ORE. CODE ANN. (1930) § 6-501.

40. *Blackshear v. First Nat. Bank*, 261 Fed. 601 (C. C. A. 5th, 1919); *Roberge v. Cyr*, 84 N. H. 204, 147 Atl. 901 (1929).

41. E. g., MICH. COMP. LAWS (1929) §§ 14425 *et seq.*; MINN. STAT. (Mason, 1927) §§ 9602 to 9631; N. Y. CONS. LAWS (Cahill, 1930) c. 51, §§ 540 *et seq.*

42. See *Lang v. Stansel*, 106 Ala. 389, 396, 17 So. 519, 521 (1895).

43. *Dupee v. Rose*, 10 Utah 305, 37 Pac. 567 (1894).

A mortgagee or his agent⁴⁴ may foreclose a mortgage in the manner provided by the act, if (1) any covenant of the mortgage has been breached, (2) the mortgage contains a power of sale and is recorded together with all assignments thereof, and (3) no action at law or equity is pending to secure a judgment on any part of the obligation secured by the mortgage.⁴⁵ Proceedings are instituted by recording,⁴⁶ and publishing⁴⁷ notice of the sale⁴⁸ 90 days before its date. It is required that at least 60 days prior to the sale all interested persons be given notice⁴⁹ by registered mail.⁵⁰ However, failure to give such notice will not invalidate the foreclosure sale.⁵¹ The latter provision evidently has been inserted to avoid jeopardizing title procured through foreclosure. In view of the short period of redemption,⁵² failure to mail a notice may result practically in a forfeiture of interest. Of course, there is a published notice but its chances of attracting the attention of interested parties are slight. However, assurance of good title at foreclosure not only will induce mortgage loans at a greater percentage of property value, but also should stimulate higher bidding at foreclosure sales, so that the advantages of the last mentioned provision would appear to outweigh its disadvantages.

The sale is made by the sheriff and any person having an interest in the mortgaged premises may bid.⁵³ Should the premises consist of more than one parcel, they must be offered, first, in parcels, then as an entirety, and sold finally according to the method returning the highest gross price.⁵⁴ The manner of selling premises in most states is prescribed by statutes.⁵⁵ The one provided in the present proposal is similar to that used in Mississippi⁵⁶ and is preferable since it results in getting the highest possible price for the property.

The sale is not complete until the sheriff has collected the purchase price.⁵⁷ The proceeds are then applied, first, to payment of statutory costs and attorneys' fees,⁵⁸ secondly, to the mortgage debt and finally the balance, if any, is paid over to the mortgagor.⁵⁹

Court Review of Foreclosure Under Power of Sale

In order to bring foreclosure under a power of sale within the surveillance of the court, thus avoiding objections that have been raised against an unrestricted power of sale,⁶⁰ actions to enjoin a proposed foreclosure⁶¹ and to rescind a completed sale⁶² are allowed those having an interest in the mortgaged premises or in the obligation secured by the mortgage, while the mortgagee or the purchaser is given the right to an action to confirm a completed sale.⁶³

44. § 45.

45. §§ 30 and 30a.

46. § 31a (1).

47. § 31a (2).

48. § 31 (provides a statutory form of notice).

49. § 31a (3).

50. § 43.

51. § 31a (3).

52. § 35 (redemption period of 30 days after foreclosure sale).

53. § 33a.

§31b and c provide methods for postponing the foreclosure sale. Postponements are within the control of the sheriff and mortgagee.

54. § 33b.

55. WALSHE, MORTGAGES (1934) § 75, n. 1. See MINN. STAT. (Mason, 1927) § 9636.

56. MISS. CONST. § III. See ETHRIDGE, MISSISSIPPI CONSTITUTIONS (1928) 225.

57. § 33c.

58. § 38 (stipulates costs and attorneys' fees to be allowed).

59. § 33c.

60. See Legis. (1925) 38 HARV. L. REV. 651, 658.

61. § 32.

62. § 34.

63. § 35a.

A petition to enjoin a foreclosure sale may be presented at any time after notice of and before the date set for the sale and the facts which must be set forth in such a petition are specified in the act.⁶⁴ Although the right to such an action is necessary for the protection of the mortgagor, its utility may be negated, in many cases, by the requirement that the petitioner pay into court \$250 or a sum equivalent to one-tenth of the unpaid balance of the obligation.⁶⁵ Obviously, this provision was inserted in the act to discourage the bringing of such actions on slight pretense. It seems, however, that the usual cost of court proceedings would sufficiently deter the use of the privilege to avoid its abuse. In the 1927 proposal, not even a bond was required of the petitioner;⁶⁶ in order to effectuate the purpose of allowing an action to enjoin, in this respect, the new act might have followed the old to better advantage.

An action to rescind a foreclosure sale must be brought within 30 days after the sale and must be based on specific violations of the act at or after the foreclosure sale.⁶⁷ This section of the act is clearly superior to the corresponding sections of the 1927 proposal. In the old proposal the period of limitation on an action to set aside was from three to five years.⁶⁸ By thus limiting the period in which an action may be brought, the new act avoids the disadvantages to mortgagor and mortgagee alike of an insecure foreclosure title, and at the same time offers the mortgagor and diligent lienors sufficient time in which to take advantage of the privilege.

The mortgagee or purchaser may petition for confirmation of the foreclosure sale within 30 days after its date.⁶⁹ While conceivably it might be advantageous for the mortgagee or purchaser to establish the validity of the sale, it is improbable that the action would be widely used since the sale becomes final within 30 days if no action to rescind it is brought by the mortgagor.⁷⁰

Redemption

Section 35e allows a statutory period of redemption to the mortgagor of 30 days and on tender to the sheriff of the foreclosure sale price the mortgagor becomes entitled to the interest of the purchaser.⁷¹ Although originally a mortgagor's equity of redemption was barred by foreclosure,⁷² more than one-third of the states have enacted statutes creating a right to redeem after the foreclosure sale, the usual period being one year.⁷³ Recognizing the trend, the 1927 proposal suggested a redemption period of one year.⁷⁴ Moreover, the movement to aid the mortgagor by allowing statutory redemption periods has gained impetus during

64. § 32.

65. *Ibid.*

66. 1927 proposal, § 33.

67. § 34.

68. 1927 proposal, § 30.

69. § 35a.

70. If either the action to enjoin or the action to set aside are successful, the mortgagee does not lose his right of sale. "Any attempted exercise of the right of sale shall not exhaust it until the title to the mortgaged property has effectively passed as a result of such foreclosure sale." § 30a.

71. The effect of redemption under the earlier proposal was to annul the sale and leave the premises subject to all the liens that would have existed if no sale had been made, except the lien of the foreclosed mortgage which was discharged by the sale. 1927 proposal, § 27. But see Durfee and Doddridge, *Redemption From Foreclosure Sale—The Uniform Mortgage Act* (1925) 23 MICH. L. REV. 825, in which this was severely criticized and the so-called Iowa rule, giving the redemptioner the title of the purchaser, was advanced. The Iowa rule has been enacted into the present proposal in the sections indicated.

72. *Eiceman v. Finch*, 79 Ind. 511 (1881).

73. SURVEY OF FORECLOSURE OPERATIONS (H. O. L. C. 1937).

74. 1927 proposal, § 24 (1). See 1929 HANDBOOK OF COMM'RS ON UNIFORM STATE LAWS 690, where it is indicated that the redemption period was not intended to be uniform.

the depression.⁷⁵ However, such statutes materially impair the mortgagee's security since outside purchasers will not bid freely for property, the title to which is subject to redemption for a long period of time and, as a consequence, the tendency is to encourage the mortgagee's bidding in the property at a nominal amount. Moreover, it is doubtful whether a longer period of redemption is of any advantage to the mortgagor. Borrowing on the security of his property may become more difficult and expensive. Furthermore, a recent study indicates that this right is seldom utilized even in cases where substantial periods of redemption are allowed.⁷⁶ Under the provisions of the new act, the one month redemption period after sale, in addition to the necessary notice three months prior to the sale,⁷⁷ gives the mortgagor 120 days in which to redeem. As has been indicated, a longer period would be disadvantageous to both mortgagor and mortgagee.

Section 37 provides a form for a statutory certificate of sale. The sheriff cannot issue the certificate of sale to the purchaser until the 30 day redemption period has run and if actions either to confirm or rescind the sale have been brought, then not until the validity of the sale has been determined. On delivery, the certificate of sale vests complete title in the purchaser, subject to prior encumbrances or liens.⁷⁸ Under the old act the certificate of sale, as evidence of good title, meant little.⁷⁹ The new act thus remedies the defects of the old by assuring the purchaser of a clearer title at an earlier date.

Deficiency Judgments

Section 36 governs deficiency judgments. It provides methods whereby an action for a deficiency judgment may be combined or included by intervention with a petition for confirmation of a foreclosure sale or entered by a cross-bill in an action by the mortgagor to rescind a foreclosure sale. The purpose of these provisions is to speed up litigation.

The remaining provisions of the section are a direct outgrowth of depression experiences.⁸⁰ With the depression has come a scarcity of available funds, resulting in defaults and a cataclysmic increase in foreclosures.⁸¹ Moreover, the collapse of the real estate market has forced mortgagees generally to bid in the property at foreclosure sales,⁸² usually without competition and at their own prices. As a consequence, mortgagors, in addition to losing their land, have become saddled with deficiency judgments approximating the original debts.⁸³ The apparent injustice of the situation not only has resulted in deficiency judgment acts,⁸⁴ but some equity courts have exercised their discretionary powers in

75. E. g., Iowa Laws 1933, c. 179; N. D. Laws 1933, c. 157, § 1; Vt. Laws 1933, no. 30, § 3; Wis. Laws 1933, c. 11.

76. Statistics of the Home Owners' Loan Corporation show that out of 22,000 properties foreclosed, only 204 were redeemed despite the substantial periods of redemption permitted in most of the cases. Phila. Legal Intelligencer, Dec. 21, 1937, p. 2, col. 6.

77. § 31a.

78. Seven days after recordation of the certificate of sale the mortgagor shall be deemed a trespasser and may be ejected by an appropriate action. § 37e.

79. 1927 proposal, § 18. See Legis. (1925) 38 HARV. L. REV. 651, 656. § 30 of the 1927 proposal allowed from three to five years in which to bring an action to rescind the sale. The efficacy of the certificate of sale, as evidence of good title, therefore was diminished. In the new proposal, the certificate of sale cannot be issued until the mortgagor's right of action has expired.

80. The old proposal had no provision concerning deficiency judgments.

81. See Note (1933) 42 YALE L. J. 1236.

82. Phila. Legal Intelligencer, Dec. 16, 1937, p. 6, col. 4.

83. See Note (1933) 47 HARV. L. REV. 299.

84. E. g., Tex. Gen. Laws 1933, c. 92, declared unconstitutional in *Langever v. Miller*, 124 Tex. 80, 76 S. W. (2d) 1025 (1934). PA. STAT. ANN. (Purdon, Supp. 1936) tit. 21, §§ 808-820, declared unconstitutional in *Shallcross v. North Branch-Sedgwick B. & L. Ass'n*, 123 Pa. Super. 593, 187 Atl. 819 (1936), 85 U. OF PA. L. REV. 321 (1937). Wis. Laws 1933, c. 125, declared unconstitutional in *Hanauer v. Republic Bldg. Co.*, 216 Wis. 49, 255 N. W.

an effort to protect the mortgagor.⁸⁵ However, attempts by legislatures to solve the problem have been declared unconstitutional almost without exception,⁸⁶ while the majority of equity courts quite uniformly have held that mere inadequacy of price is immaterial in the absence of mistake, misconduct or fraud.⁸⁷

The act provides that where the obligor appears and answers, and a deficiency judgment is entered, the amount of the deficiency shall be the difference between the fair market value of the premises at the time of the foreclosure sale and the sum of the unpaid balance of the obligation—fair market value to be determined by the court or, on agreement of the parties, by a majority vote of three appraisers.⁸⁸ As a measure to prevent the recurrence of the existing undesirable situation which finds between one and two million people facing possible deficiency judgments should they ever reestablish themselves financially, the provision is not only commendable but necessary.⁸⁹

It is further provided that no action to obtain a deficiency judgment may be brought later than six months after the date of the foreclosure sale.⁹⁰ It is difficult to see how this provision will have any ameliorating influence inasmuch as, except in isolated instances, its only probable effect will be to stimulate the recording of such judgments within the stipulated period. Some commentators have suggested the complete abolition of deficiency judgments as a method to avoid the worst results of the present system.⁹¹ Several states bar a subsequent action on the debt by provisions that only one action can be had to enforce a debt secured by a mortgage.⁹² However, it would have been poor diplomacy had the act adopted such an extreme view inasmuch as mortgagee interests would probably be irreconcilably opposed to such a provision.

Limitations on Foreclosure

Section 50 limits the period within which foreclosure proceedings may be resorted to. The existing state law on the point is confused. In some jurisdictions, periods of limitation are fixed by statute.⁹³ In others, it is held that foreclosure will be denied where the original debt is barred by the statute of limitations.⁹⁴ Where there is an unfair delay, the proceedings may be barred by laches.⁹⁵

The act provides that where the maturity of an obligation is ascertainable, the period of limitations is ten years after maturity and where the date of the maturity is unascertainable, it is fifty years from the date of the mortgage.⁹⁶ By a prescribed procedure, the mortgagee may extend the period of limitations for ten

136 (1934). N. Y. CIV. PRAC. CODE (Cahill, Supp. 1936) § 1083, held constitutional in *Klinke v. Samuel*, 264 N. Y. 144, 190 N. E. 324 (1934).

85. *Suring State Bank v. Giese*, 210 Wis. 281, 246 N. W. 556 (1933), 81 U. OF PA. L. REV. 883; *Federal Title and Mortgage Guaranty Co. v. Lowenstein*, 113 N. J. Eq. 200, 166 Atl. 538 (1933). For a discussion of the point, see Note (1937) 24 VA. L. REV. 44.

86. *Supra* note 84.

87. *First Nat. Bank v. Cahill*, 160 Atl. 649 (N. J. Ch. 1932); *Roberson v. Matthews*, 200 N. C. 241, 156 S. E. 496 (1931); cf. *John Hancock Mutual Life Ins. Co. v. Baldwin*, 107 S. W. (2d) 1035 (Tex. Civ. App. 1937).

88. §§ 36b and c.

89. See *Phila. Legal Intelligencer*, Dec. 21, 1937, p. 6, col. 4.

90. § 36a.

91. See *MacChesney & Leesman, The Mortgage Foreclosure Problem* (1937) 23 A. B. A. J. 41, 47.

92. ILL. CODE ANN. (1932) tit. 9, § 101; MONT. REV. CODE ANN. (1935) § 9467.

93. CAL. CIV. CODE (Deering, 1931) § 2911; MICH. COMP. LAWS (1929) § 13976; N. C. CODE ANN. (1935) § 437; *Bondy v. Percival*, 99 N. J. L. 309, 123 Atl. 873 (1924).

94. *Lord v. Morris*, 18 Cal. 482 (1861); *Fitzgerald v. Flanagan*, 155 Iowa 217, 135 N. W. 738 (1912); *Allen v. Shepherd*, 162 Ky. 756, 173 S. W. 135 (1915).

95. *Scott v. Scott*, 20 Ala. 244, 80 So. 82 (1918); *Bur v. Bong*, 159 Wis. 498, 150 N. W. 431 (1915).

96. § 50a.

years and a similar extension may also be made by an agreement between mortgagor and mortgagee.⁹⁷ By section 50e the running of the statute of limitations is tolled by publication of a notice of foreclosure sale or by commencing an action to foreclose, and the action or proceeding to foreclose may be completed notwithstanding the period of limitations has, in fact, run. In this latter instance, the 1927 act made the sale void as against a person who, in good faith, became a purchaser or encumbrancer of the premises between the lapse of the limitations period and the foreclosure sale.⁹⁸ The purpose of the statute is to outlaw the mortgage as a cloud on title so that if the mortgage appears to be invalid by the record it may not be saved by facts not appearing thereon. The provision of the old act seems to approach more nearly this end than that of the new.

The 1927 act differs from the new in another important respect in that under it the statute of limitations was made retroactive,⁹⁹ thus raising a possible constitutional question.¹⁰⁰ The new act includes no retroactive provision with respect to section 50, although the authors of the act evidently intended it to have such an effect.¹⁰¹ Clarification on this point would be desirable in removing a possible subject of future litigation.¹⁰²

Conclusion

It was said of the 1927 act:

"The proposed act not only makes for uniformity; it promotes brevity and certainty in mortgage instruments, simplicity of procedure, and validity of title. It enables the mortgagee to realize readily on his security; yet it protects the mortgagor against forfeiture. It relieves court congestion and shortens registry records."¹⁰³

The new act accomplishes these same ends, but to a greater degree. It insures a greater validity of title; it enables the mortgagee to realize more quickly on his security; it preserves a simple and cheap method of foreclosure by power of sale; and yet, at the same time, it affords more substantial protection to the mortgagor and represents a more practical compromise of the interests of the mortgagor and mortgagee. But because of the diversity of the law in the states and their natural unwillingness to slough off old habits and because of present tendencies to suspend the mortgagee's normal rights,¹⁰⁴ the new act may suffer the same fate as its predecessor in spite of its many advantages. Yet, several factors constrain a belief that it will meet with favorable response. First, now more than ever before, the problems surrounding mortgage loans and foreclosures have become problems of public concern. The depression has brought about a general collapse in our credit structure and land values, as a source of credit, have suffered in particular. In addition, costs and delay in foreclosure, uncertainty of procedure and security, together with various other factors, have made it almost impossible to secure loans on property except in amounts far below the value of the property and then only at high rates of interest. Thus for the rehabilitation of our credit structure, uniformity of the type provided by the act is clearly desirable. Secondly, the depression has witnessed the birth and growth of gov-

97. §§ 50b and c.

98. 1927 proposal, § 12 (3).

99. *Id.*, § 42.

100. Frank v. State Bank & Trust Co., 263 S. W. 255 (Tex. 1924); LeSage v. Switzer, 116 W. Va. 657, 182 S. E. 797 (1935).

101. See outline material of Article II on page 1 of the act.

102. The remaining provisions of the act do not warrant discussion. § 51 covers criminal offenses. Article VII deals with the interpretation and effect of the act.

103. See Legis. (1925) 38 HARV. L. REV. 651, 660.

104. See Legis. (1938) 86 U. OF PA. L. REV. 295.