

Memorandum 77-80

Subject: Study 39.220 - Enforcement of Judgments (Redemption From Execution Sales)

This memorandum provides background requested by the Commission at the November meeting in connection with the consideration of the staff draft of the Tentative Recommendation Relating to Redemption From Execution and Foreclosure Sales of Real Property. A copy of a revised staff draft of the tentative recommendation is attached, and some of the revisions are discussed briefly at the end of this memorandum.

Right to Possession

The statutory right of redemption provided by Code of Civil Procedure Sections 700a-707 (copy attached as Exhibit 1) permits the redemption of real property and leasehold estates of at least two years' unexpired term from an execution or foreclosure sale for one year after the sale. The redemption period is three months where a deed of trust or a mortgage with a power of sale is foreclosed and the property is sold for an amount equal to or greater than the judgment plus interest, costs, and expenses. See Code Civ. Proc. § 725a in Exhibit 1. There is no right of redemption where mortgaged property is sold under a power of sale. The purchaser at the sale acquires legal and equitable title, but it is subject to a condition subsequent--the right of redemption.

Prior to levy or sale on execution, the judgment debtor's possession may not, of course, be disturbed. Levy on real property is accomplished by recording the writ with the county recorder; there is no need to take exclusive possession as there is where moveable tangible personal property in the possession of the judgment debtor is to be levied upon.

From the time of the sale until the expiration of the redemption period, the debtor or a person claiming under the debtor is entitled to remain in possession as against the purchaser. See Code Civ. Proc. § 706; Peterson v. Jurras, 2 Cal.2d 253, 40 P.2d 257 (1935); First Nat'l Trust & Sav. Bank v. Staley, 219 Cal. 225, 227, 25 P.2d 982, 982 (1933). The purchaser may not interfere with this possession but may seek an order restraining waste or may recover damages for injury to the property. See Code Civ. Proc. §§ 706, 745, 746 in Exhibit 1.

At the end of the redemption period, the purchaser is entitled to possession. Where there has been a sale under a power of sale in a mortgage, the purchaser is entitled to immediate possession. The right to possession may be enforced by a writ of assistance, an action to recover possession, an action to quiet title, or unlawful detainer. See J. Hetland, Secured Real Estate Transactions § 5.15 (Cal. Cont. Ed. Bar 1974); 5 B. Witkin, California Procedure Enforcement of Judgment § 122, at 3486 (2d ed. 1971).

Right to Rents and Profits

Code of Civil Procedure Section 707 provides that the purchaser or redemptioner is "entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof." See Section 707, in Exhibit 1, and the excerpt from Comment, The Statutory Right of Redemption in California, 52 Calif. L. Rev. 846, 865-69 (1964), in Exhibit 2. The "tenant in possession" includes the judgment debtor or mortgagor, as well as a lessee of the judgment debtor or mortgagor. *Carpenter v. Hamilton*, 24 Cal.2d 95, 100-03, 147 P.2d 563 (1944). Under Section 707, the tenant of a mortgagor is liable to the purchaser even where the tenant has prepaid the rent to the mortgagor, assuming that the mortgage was of record before the lease. *Harris v. Foster*, 97 Cal. 292, 295, 32 P. 246 (1893). A receiver may be appointed for the purpose of collecting rent, as will be discussed below.

Rents and profits received by the purchaser or redemptioner are a credit on the redemption price. See Section 707. Otherwise, there would be a double recovery by the purchaser upon redemption. If the rents and profits received by the purchaser exceed the redemption price, the purchaser is not entitled to the excess amount. *Christensen v. Forst*, 153 Cal. App.2d 465, 471, 314 P. 746 (1957). If the purchaser has been in possession during the redemption period, the value of the occupancy is a credit on the redemption price, just as are rents and profits actually paid. *House v. Lala*, 214 Cal. App.2d 238, 245-46, 29 Cal. Rptr. 450 (1963) (free use of property is "arguably" profits under Section 707).

If there is no redemption, the purchaser may retain the rents and profits received and may attempt to recover the value of the debtor's occupancy. Correspondingly, in the absence of redemption, a purchaser

in possession would not have to account to the debtor for the value of the occupancy. Redemption by the debtor terminates the effect of the sale and the debtor is restored to his estate. Code Civ. Proc. § 703. Hence, it is as if there had never been a sale, and those who have benefited must account. Consistent with this, if the redemption period runs without a redemption by the debtor, the sale is final and the debtor must account for benefits received from the land which, from the time of sale, has belonged to the purchaser.

Availability of Receivers

Subdivision 4 of Code of Civil Procedure Section 564 specifically authorizes the appointment of a receiver during the redemption period after an execution or foreclosure sale "to collect rents . . . , and to expend and disburse such rents as may be directed by the court or otherwise provided by law." See Exhibit 1. Apparently, a receiver appointed pursuant to this provision has power only to collect rent from a tenant of the mortgagor or judgment debtor. See *Boyd v. Benneyan*, 204 Cal. 23, 25-27, 266 P. 278 (1928) (no right to receiver to collect profits to which purchaser is entitled); cf. *First Nat'l Trust & Sav. Bank v. Staley*, 219 Cal. 225, 226-28, 25 P.2d 982 (1933) ("scramble for rents" from tenement tenants; receiver inappropriate, however, since purchaser-mortgagee bid entire amount of obligation for property and did not ask for deficiency judgment).

Prior to foreclosure of a mortgage, a receiver may be appointed pursuant to subdivision 2 of Code of Civil Procedure Section 564 where it appears that the property is probably insufficient security for the debt. See *Hibernia Sav. & Loan Soc. v. Belcher*, 4 Cal.2d 268, 271-72, 48 P.2d 68(1935). However, it appears that there must be a rents and profits clause in the mortgage, which gives the mortgagee a lien, in order for the receiver to be able to act. *Locke v. Klunker*, 123 Cal. 231, 235-39, 55 P. 993 (1898). Even where no foreclosure action is pending, a receiver may be appointed in an action for specific performance of a rents and profits clause pursuant to subdivision 7 of Section 564. See J. Hetland, *Real Estate Secured Transactions* § 5.6 (Cal. Cont. Ed. Bar 1974). After the exercise of a power of sale, a receiver may be appointed pursuant to subdivision 6 of Section 564 in an unlawful detainer proceeding to obtain possession of the real property. Id. § 5.15.

The situation is ambiguous, but it appears that under existing law there is no general authority for the appointment of a receiver to collect rent other than during the redemption period. Subdivision 3 of Section 564 authorizes appointment of a receiver "[a]fter judgment, to carry the judgment into effect" and subdivision 4 authorizes appointment in supplementary proceedings. Section 568 provides that receivers have the power to "receive rents". Civil Code Section 4380 specifically authorizes the appointment of a receiver to enforce support orders under the Family Law Act; however, there is no mention of rents. In *Steinberg v. Goldstein*, 145 Cal. App.2d 692, 699, 303 P.2d 80 (1956), it was held that the court had discretion pursuant to Section 568 to empower a receiver to collect rent on equipment leased by a partnership in a proceeding for dissolution of a partnership. In *Bruton v. Tearle*, 7 Cal.2d 48, 58, 59 P.2d 953 (1936), a receiver was appointed to receive future earnings of a husband to satisfy a support obligation. In *Hustead v. Superior Court*, 2 Cal. App.3d 780, 786, 83 Cal. Rptr. 26 (1969), it was held that a garnishment of a sublessee could not reach future rents; there was apparently no attempt to obtain a receiver. The court gave as the reason why garnishment could not reach future rents that

the obligation to pay future installments of rent is generally dependent upon the continuance of possession and enjoyment of the premises, and since it cannot be determined prospectively whether there will be any interference with that possession, the obligation of the tenant to the landlord falls within the first category of cases [contingent debts which may never become due and payable] and cannot be reached by garnishment.

The court's reasoning is inapplicable to collection by a receiver, however, since there need be no sale of the contingent debt, but only collection as long as the possession and enjoyment of the premises continue. Garnishment would involve the sale of the right to receive rent. This rule forbidding garnishment has been criticized on the grounds that, since the landlord's rights may be voluntarily assigned, they should be subject to being forceably assigned. See King, The Enforcement of Money Judgments in California, 11 So. Cal. L. Rev. 224, 231, 233 (1938). The Commission has already decided that future rents should be reachable by a judgment creditor. Draft Section 705.710 provides for issuance of an assignment order to reach rents. In draft

Section 705.310, the Commission has approved the following standard for appointment of a receiver, which would authorize the collection of rent in appropriate cases:

705.310. (a) The court may appoint a receiver to enforce the judgment where the judgment creditor shows that, considering the interests of both the judgment creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment.

Levies Involving Leasehold Interests

At the November meeting, the Commission decided that the 90-day delay of sale provision should not apply to the sale of a leasehold estate with less than a two years' unexpired term. The Commission also discussed the possibility of providing that rents and profits should not be subject to enforcement of a judgment during the 90-day period during which the sale is delayed.

When considering levies involving leaseholds, three situations should be distinguished:

(1) Judgment debtor is lessor. Where the judgment debtor is the owner of real property which is subject to a lease, the judgment creditor may levy upon the land and cause it to be sold subject to the rights of the lessee under the lease. Under existing law, the judgment debtor may redeem the property from the sale. During the time of redemption, the lessee may remain in possession, but the purchaser at the sale may have a receiver appointed to collect rents from the lessee. The Commission has taken the position that the right to future rents should be reachable by receiver or assignment as discussed above.

(2) Judgment debtor is lessee. The leasehold interest of the judgment debtor may be levied upon and sold. If the leasehold estate has an unexpired term of two years or more, it is subject to the right of redemption. In theory, a receiver could be appointed to operate a business conducted on leased premises rather than selling the leasehold interest outright.

(3) Judgment debtor is lessee and sublessor. The judgment creditor may levy upon and sell the leasehold estate as in the second situation subject, of course, to the rights of the sublessee. If the sale is subject to the right of redemption, the judgment creditor may have a receiver appointed to collect rents from the sublessee as in the first situation.

Revised Draft of Recommendation

The draft tentative recommendation has been revised to incorporate the decisions made at the November meeting. We have the following additional comments:

[\$ 703.515] Possession before sale; restraint of waste

The Commission approved this provision in substantially the following form:

[\$ 703.515.] Right of possession before sale; restraint of or damages for waste

[703.515.] (a) Where real property has been levied upon, the judgment debtor, or a successor in interest or a tenant of the judgment debtor, is entitled to the possession of the real property from the date of levy until the date of sale.

(b) The judgment creditor may apply on noticed motion for an order restraining waste and may bring an action for damages for waste committed between the date of levy and the sale.

Comment. Subdivision (a) of Section 703.515 makes clear that the judgment debtor, or a successor in interest or a tenant of the judgment debtor, may remain in possession of the real property until it is sold. Levy under a writ of execution establishes the lien of the judgment creditor if an earlier judgment or attachment lien has not already been created, and notice of levy begins the running of the 90-day grace period before notice of the sale of real property on execution or foreclosure can be given under Section [703.630(f)]. This right of possession is analogous to the right of possession during the period of redemption under former Section 706. See also Section [703.310] (notice of levy on real property to be mailed to debtor within 15 days after levy).

Subdivision (b) makes explicit the right of the judgment creditor to enjoin waste or seek damages for waste already committed. See also Sections 732, 745. This right corresponds to the similar rights applicable during the redemption period under former Section 706 and Section 732. Cf. Mitchell v. Amador Canal & Mining Co., 75 Cal. 464, 495, 17 P. 246, 257 (1888) (equitable remedy of injunction and accounting in action by mortgagee against mortgagor's assignee in possession).

We have not included this provision in the revised draft, however, because subdivision (a) states what is obvious under existing law and so is unnecessary. There is no doubt that the possessory interests of the judgment debtor or a tenant is not disturbed until sale. If needed, a statement to this effect could be added to a Comment, where appropriate. Subdivision (b) would be a departure from existing law. The provision represents an over-extension through analogy of the existing law relating to remedies for waste during the period of redemption. See Sections

706, 732. Present statutes provide no waste remedy for creditors having only an execution or judgment lien on real property. Accordingly, we have not continued this subdivision in the draft.

[\$ 706.770] Absolute sales

The last paragraph of the Comment to this section has been added to implement a decision made in response to a point made by Professor Riesenfeld in the memorandum attached to the First Supplement to Memorandum 77-40. It is not apparent, however, how the federal exemption referred to would be affected by the repeal of the statutory redemption provisions in California. The federal statute examined does not appear to depend in any way on state redemption provisions.

Respectfully submitted,

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EXHIBIT 1

STATUTES CONCERNING RECEIVERS AND REDEMPTION

[Code Civ. Proc. §§ 564, 568, 568.5, 700a-707, 725a, 732, 745, 746 and Civil Code § 4380]

§ 564. Appointment; cases in which authorized

A receiver may be appointed, in the manner provided in this chapter, by the court in which an action or proceeding is pending in any case in which such court is empowered by law to appoint a receiver.

In superior courts a receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in the following cases:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment; or after sale of real property under execution of a judgment or pursuant to a decree of foreclosure and sale, during the period provided by law for the redemption thereof from sale, to collect rents thereon, and to expend and disburse such rents as may be directed by the court or otherwise provided by law;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In an action of unlawful detainer;

7. In all other cases where receivers have heretofore been appointed by the usages of courts of equity. (Enacted 1872. As amended Stats.1919, c. 166, p. 251, § 1; Stats.1933, c. 744, p. 1867, § 85a; Stats.1941, c. 444, p. 1736, § 1.)

§ 568. Powers

POWERS OF RECEIVERS. The receiver has, under the control of the Court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the Court may authorize. (Enacted 1872.)

§ 568.5 Sales; authority; manner; confirmation; no redemption

A receiver may, pursuant to an order of the court, sell real or personal property in his possession as such receiver, upon the notice and in the manner prescribed by law for the sale of such property under execution. The sale shall not be final until confirmed by the court. Sales made pursuant to this section shall not be subject to redemption. (Added Stats.1939, c. 374, p. 1709, § 1.)

§ 700a. Absolute sales; property subject to redemption; certificate of sale, contents; notice of right of redemption; liability of officer

(a) Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, which certificate must state the date of the judgment under which the sale was made and the names of the parties thereto, and contain:

1. A particular description of the real property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. If the property is subject to redemption, the certificate must so declare, and if the redemption can be effected only in a particular kind of money or currency, that fact must be stated.

(b) If the property is subject to redemption the officer shall inform the judgment debtor, by certified mail or personal service, of his right of redemption. Failure to give such notice within one week after the sale shall make the officer liable to the judgment debtor for actual damages, in addition to a penalty of one hundred dollars (\$100).

(Amended by Stats.1971, c. 1312, p. 2613, § 2.)

§ 701. Redemption; persons entitled to; redemptioners defined

REAL PROPERTY SO SOLD, BY WHOM IT MAY BE REDEEMED. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this Chapter, termed redemptioners. (Enacted 1872.)

§ 702. Redemption; time; payment; disagreement as to amount; proceedings for determination; notice and hearing; certificate

The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within 12 months after the sale on paying the purchaser the amount of his purchase, with two-thirds of 1 percent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance, maintenance, upkeep, or repair of the improvements upon the property, and any sum paid on a prior obligation secured by the property to the extent such payment was necessary for the protection of his interest, which the purchaser may have paid thereon after purchase, and interest on such amounts, and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest. If judgment debtor, redemptioner, or tenant in possession, refuse the right of entry to the purchaser, his agent or contractor, such purchaser may petition the court, out of which execution or order authorizing the sale, was issued, in the same manner as hereafter provided for determining the amount due to the purchaser in the event of a disagreement, and the court may issue an order authorizing purchaser, his agent or contractor, during reasonable hours, to repair and maintain the premises.

In the event there shall be a disagreement between the purchaser and redemptioner as to whether any sum demanded by the purchaser is a proper charge to be added to the amount required for redemption, the proposed redemptioner shall thereupon pay to the clerk of the court out of which execution, or order authorizing the sale, was issued the amount necessary for redemption, less the amount in dispute, and shall at the same time file with said clerk a petition in writing setting forth specifically the item or items demanded to which he objects, together with his reason for such objections, and asking that such amount be determined by the court; said clerk shall thereupon fix a day, not less than 5 nor more than 10 days from the date of such filing, for the hearing of said objections; a copy of said petition, together with a notice of hearing giving the time and place thereof, shall be served by the person seeking redemption, or his attorney, upon the purchaser not less than two days before the day of hearing; upon the day fixed the court in

which the order of sale or execution was originally issued shall determine, by order duly entered in the minutes of said court, the amount required for redemption, either upon affidavit or evidence satisfactory to the court; and when the amount has been so determined, in the event the amount theretofore deposited with the clerk shall be sufficient the same shall be forthwith paid to the purchaser upon his execution of a proper certificate of redemption; in the event an additional amount to that theretofore paid to the clerk is requisite, the redemptioner shall forthwith pay such additional amount to the clerk who shall then pay the whole amount necessary to the purchaser upon his execution of a proper certificate of redemption; the certificate of redemption so issued may be deposited with the clerk for delivery to the redemptioner, or given to the redemptioner at the time of payment. (Enacted 1872. As amended Code Am.1875-76, c. 84, p. 96, § 1; Stats. 1895, c. 184, p. 226, § 1; Stats.1897, c. 44, p. 41, § 1; Stats.1933, c. 911, p. 2364, § 1; Stats.1937, c. 175, p. 473, § 1; Stats.1937, c. 584, p. 1628, § 1; Stats.1963, c. 204, p. 941, § 1.)

§ 703. Redemption; proceedings by second redemptioner; disagreement as to amount; subsequent redemptions; notice; sheriff's deed; certificate

If property be so redeemed by a redemptioner, another redemptioner may, within 60 days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with 2 percent thereon in addition, and the amount of any assessment or taxes, and any reasonable sum for fire insurance, maintenance, upkeep, or repair of any improvements upon the property, and any sum paid on a prior obligation secured by the property to the extent such payment was necessary for the protection of his interest, which the last redemptioner may have paid thereon after the redemption by him, with interest on such amounts, and, in addition, the amount of any liens held by such redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. In the event there shall be a dispute or disagreement as to whether any sum demanded by the last redemptioner is a proper charge to be added to the amount required to be paid by the subsequent redemptioner, the amount to be paid shall be determined in a like manner as provided in Section 702 for the determination of such amount in the event of disagreement between the original redemptioner and purchaser.

The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within 60 days after the last redemption, on paying the sum paid on the past previous redemption, with 2 percent thereon in addition, and the amounts of any assessments or taxes, and any reasonable sum for fire insurance, maintenance, upkeep, or repair of any improvements upon the property, and any sum paid on a prior obligation secured by the property to the extent such payment was necessary for the protection of his interest, which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own with interest. In the event there shall

be a dispute or disagreement as to whether any sum demanded by the last redemptioner to be added to the amount required to be paid by the subsequent redemptioner, the amount to be paid shall be determined in a like manner as provided in Section 702 for the determination of such amount in the event of disagreement between the original redemptioner and purchaser.

Written notice of redemption must be given to the sheriff and a duplicate recorded with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if any sum for fire insurance, maintenance, upkeep, or repair of any improvement upon the property, is paid by the redemptioner, or if any sum is necessarily paid by the redemptioner on a prior obligation secured by the property, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and recorded with the recorder; and if such notice be not recorded, the property may be redeemed without paying such tax, assessment, sum, or lien.

If no redemption be made within 12 months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever 60 days have elapsed and no other redemption has been made, and notice thereof given and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but, in all cases, the judgment debtor shall have the entire period of 12 months from the date of the sale to redeem the property.

If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate.

Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgements of conveyances of real property. Such certificate must be recorded in the office of the recorder of the county in which the property is situated. (Enacted 1872. As amended Code Am.1873-74, c. 383, p. 323, § 97; Stats.1895, c. 184, p. 226, § 2; Stats.1897, c. 44, p. 41, § 2; Stats.1933, c. 911, p. 2365, § 2; Stats.1957, c. 1865, p. 3268, § 10; Stats.1963, c. 204, p. 942, § 2.)

§ 704. Redemption; persons to whom payments made; specie payments; tender

IN CASES OF REDEMPTION, TO WHOM THE JUDGMENTS ARE TO BE MADE. The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment. (Enacted 1872.)

§ 705. Redemption; instruments to be produced by redemptioner

A redemptioner must produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff making the sale, or his successor in office;

1. A copy of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is entered; or, if he redeems upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

3. An affidavit by himself or his agent, showing the amount then actually due on the lien. (Enacted 1872. As amended Stats. 1909, c. 632, p. 967, § 1; Stats. 1945, c. 828, p. 1526, § 4.)

§ 706. Waste; restraint until expiration of redemption time; acts not considered waste

UNTIL THE EXPIRATION OF REDEMPTION TIME, COURT MAY RESTRAIN WASTE ON THE PROPERTY. WHAT CONSIDERED WASTE. Until the expiration of the time allowed for redemption, the Court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property. (Enacted 1872.)

§ 707. Rents and profits; rights of purchaser and redemptioner; credit upon redemption money to be paid; accounting

RENTS AND PROFITS. The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse

to give such statement, such redemptioner or debtor may bring an action in any Court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor. (Enacted 1872.)

§ 725a. Mortgage or trust deed with power of sale; parties entitled to sue; redemption

The beneficiary or trustee named in a deed of trust or mortgagee named in a mortgage with power of sale upon real property or any interest therein to secure a debt or other obligation, or if there be a successor or successors in interest of such beneficiary, trustee or mortgagee, then such successor or successors in interest, shall have the right to bring suit to foreclose the same in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage upon such property, except that real property, when the estate therein is more than a leasehold of two years unexpired term, sold under a decree in an action brought pursuant to this section, may be redeemed from such sale any time within three months after the sale in the manner and upon the terms provided by law for the redemption of real property sold under execution; provided, however, that in any case wherein the property shall be sold for a sum less than the judgment sum, in addition to interest thereon and costs of action and expenses of sale, the period for redemption shall be one year. (Added Stats.1933, c. 642, p. 1673, § 7. Re-enacted Stats.1935, c. 650, p. 1807, § 7. As amended Stats.1939, c. 584, p. 1990, § 1; Stats. 1941, c. 446, p. 1738, § 1.)

§ 732. Waste; parties to action; right of action; treble damages

WASTE, ACTIONS FOR. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages. (Enacted 1872.)

§ 745. Injunction against injury to property

WHEN COURT MAY GRANT INJUNCTION; DURING FORECLOSURE; AFTER SALE ON EXECUTION, BEFORE CONVEYANCE. The Court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance. (Enacted 1872.)

§ 746. Damages for injury to property; recovery by purchaser at execution sale

DAMAGES MAY BE RECOVERED FOR INJURY TO THE POSSESSION AFTER SALE, ETC. When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale, and before possession is delivered under the conveyance. (Enacted 1872.)

CIVIL CODE

§ 4350. Methods

Any judgment, order, or decree of the court made or entered pursuant to this part may be enforced by the court by execution, the appointment of a receiver, contempt, or by such other order or orders as the court in its discretion may from time to time deem necessary. (Added by Stats.1970, c. 8, p. 706, § 1, urgency, eff. July 6, 1970. Amended by Stats.1974, c. 1510, p. 3337, § 5, operative Jan. 1, 1976.)

EXHIBIT 2

[Comment, The Statutory Right of Redemption in California,
52 Calif. L. Rev. 846, 865-69 (1964).]

B. Value of Use of Property During Redemption Period

Although the judgment debtor is entitled to possession during the period of redemption,¹¹³ Section 707 of the California Code of Civil Procedure provides that the purchaser or redemptioner is entitled to the rents of the property, or the value of its use and occupation, from the tenant in possession¹¹⁴ from the time such purchaser or redemptioner acquires his interest until he is redeemed from. Any rents or profits so received, however, are a credit on the amount which must be paid in order to accomplish a subsequent redemption.¹¹⁵ If the purchaser himself takes possession after the sale he is liable to a subsequent redeemer or redemptioner for the value of his own occupancy.¹¹⁶ If there is a tenant on the property under a lease, he is liable to the purchaser for the rents.¹¹⁷

¹¹³ *Peterson v. Jurras*, 2 Cal. 2d 253, 40 P.2d 257 (1935). See also cases cited note 24 *supra*.

¹¹⁴ The purchaser is entitled to the fair rental value of the property from whomever is in actual possession. *Carpentier v. Hamilton*, 24 Cal. 2d 95, 147 P.2d 563 (1944) (judgment debtor himself); *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723 (1887) (whomever is in actual possession); *Walls v. Walker*, 32 Cal. 424 (1869) (personal representative of deceased mortgagor); *Shores v. Scott River Co.*, 21 Cal. 135 (1862) (principal, if agent is in possession); *Knight v. Truett*, 18 Cal. 113 (1861) (junior mortgagee); *Bessinger v. Grotz*, 66 Cal. App. 2d 947, 153 P.2d 369 (1944) (vendee). "The word tenant as used in section 707 is not used in the specific sense, as referring to the relation of landlord and tenant, but is employed in its generic sense, indicating one who holds possession of land by any kind of title." *Bessinger v. Grotz*, *supra* at 947, 153 P.2d at 370.

¹¹⁵ CAL. CODE CIV. PROC. § 707 provides for no extension of the period of redemption until after an accounting pursuant to a written demand made during the period of redemption by one entitled to redeem.

If the rents during the period of redemption exceed the amount needed to redeem and the judgment debtor or his successor in interest redeems, the redeemer, and not the purchaser, is entitled to the excess. *Christensen v. Forst*, 153 Cal. App. 2d 465, 314 P.2d 746 (1957).

¹¹⁶ *House v. Lala*, 214 Cal. App. 2d 238, 29 Cal. Rptr. 430 (1963).

¹¹⁷ *Munzinger v. Caffrey*, 49 Cal. App. 2d 180, 121 P.2d 13 (1942).

even though the rent has been prepaid to the mortgagor-lessor.¹¹⁸ If the mortgage was executed before the lease, a rental payment not due until after the sale which covers a period including time both before and after the sale must be apportioned between the mortgagor-lessor¹¹⁹ and the purchaser at the sale.¹²⁰ If the lease precedes the mortgage, the interest which is mortgaged does not include the right to possession of the land for the term of the lease; it is rather the mortgagor's reversion and his right to the rents under the lease when they become due which are given as security.¹²¹ Therefore, if the mortgage is foreclosed and the mortgaged

¹¹⁸ *Harris v. Foster*, 97 Cal. 292, 32 Pac. 246 (1893) (purchaser of a one-half interest gets one-half of the rents); *Webster v. Cook*, 38 Cal. 423 (1869); *Munkelt v. Kumberg*, 22 Cal. App. 2d 369, 70 P.2d 997 (1937).

When the rent is to be paid in crops, the designated crops belong to the purchaser and are treated as rent, not as crops. *Shintaffer v. Bank of Italy*, 216 Cal. 243, 13 P.2d 668 (1932); *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74 (1898). This is to be distinguished from the usual case in which crops are considered as part of the realty until severed, and if severed during the period of redemption, they are subject to disposition by the person entitled to possession during the period of redemption. See generally *Silveira v. Olin*, 33 Cal. 2d 272, 201 P.2d 387 (1949); *Clarke v. Cobb*, *supra*; *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45 (1896); *Smith, Security Interests in Crops*, 10 *Dartmouth L. J.* 156 (1958).

¹¹⁹ *Hecker v. Munkelt*, 27 Cal. App. 2d 761, 81 P.2d 1041 (1938).

¹²⁰ *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74 (1898).

¹²¹ See *Smith*, *supra* note 119, at 164-65.

interest sold prior to the payment of the rent under such a lease, the *entire* rental payment belongs to the purchaser.¹²²

A tenant does not become the tenant of the purchaser by virtue of the sale, but remains the tenant of his lessor.¹²³ Thus, a problem arises after the sale and during the period of redemption if the mortgagor-lessor seeks to collect the payments due to him under the lease contract. While the purchaser is entitled to the rents, he cannot enjoin the mortgagor from collecting them.¹²⁴ In order to protect the tenant, who in the absence of interpleader is liable to two persons for the same rent, Section 564(4) of the California Code of Civil Procedure was amended in 1941 to allow for the appointment of a receiver to collect the rents and to disburse them as directed by the court. Prior to this amendment no receiver could be obtained for the collection of rent.¹²⁵

While the availability of a receiver eased the situation where a lease is involved, the purchaser still cannot get a receiver to collect the profits, or to preserve the value of the use by the mortgagor.¹²⁶ Although provision is made for the enjoining of waste,¹²⁷ there may be use of the land by the person in possession not amounting to waste which nevertheless should be restrained, or at least made subject to a receiver in order to protect the interests of the purchaser.¹²⁸ Courts should be allowed to exercise discretion in determining whether an injunction or a receiver is merited by the facts of the individual case. While the policy of allowing the mortgagor to retain and use the land should be preserved, such use should not be permitted to work to the detriment of the purchaser, who is entitled by law to the beneficial interest in the land from the time of his purchase.

¹²² Cf. *Fowler v. Lane Mortgage Co.*, 56 Cal. App. 66, 207 Pac. 919 (1932).

¹²³ *McClintock v. Powley*, 218 Cal. 333, 291 Pac. 831 (1930). If the tenant paid his lessor before he had actual or constructive notice of the sale, he apparently would be held harmless, and the lessor alone would be liable for the rents received. *Title Ins. & Trust Co. v. Pfennighausen*, 59 Cal. App. 688, 207 Pac. 927 (1922).

¹²⁴ *First Nat'l Trust & Sav. Bank of San Diego v. Staley*, 219 Cal. 225, 25 P.2d 982 (1933).

¹²⁵ *Boyd v. Behneyson*, 204 Cal. 23, 266 Pac. 279 (1928); *Mau, Sadler & Co. v. Kearney*, 143 Cal. 506, 77 Pac. 411 (1904); *West v. Conant*, 100 Cal. 231, 34 Pac. 705 (1893).

¹²⁶ *Ibid.*

¹²⁷ CAL. CODE CIV. PROC. § 706.

¹²⁸ An example is where there are crops on the land which are in themselves insufficient to cover the value of the use of the land, and there is a threat that they will be removed by an insolvent mortgagor and given to a third person. See *West v. Conant*, 100 Cal. 231, 34 Pac. 705 (1893).

The result of the statutes as they stand is to allow the judgment debtor or his assignee to get all he can out of the land before he is required to turn it over to the purchaser. The developments in this area may depend upon whether the court which is called upon to interpret the statutes is debtor or creditor oriented.

The case of *Bessinger v. Grotz*¹²⁹ raises the question of just how far the court will go in finding that proceeds obtained by the purchaser in an attempted sale of the purchased land are rents and profits which can be used as a set-off against the redemption price. The *Bessinger* case involved an installment land contract entered into during the period of redemption by the purchaser as vendor and the person who was in actual possession of the purchased land as vendee. Under the contract the vendee was to pay the vendor seventy-five dollars per month until the total purchase price was paid, at which time the vendor was to transfer title to the property to the vendee. The court held that the payments under the contract during the period of redemption were profits from the land, and, therefore, were a credit on the amount required for redemption by the mortgagor.¹³⁰

Specifically, the problem is whether the sale of the land by the purchaser can be confirmed by the mortgagor, or even by a redemptioner, thereby allowing the vendee to take or retain possession, and entitling the mortgagor or redemptioner to treat the amount received by the purchaser as a credit on the redemption price. Any amount over the redemption price would be the profit of the person who redeemed. This situation probably will seldom arise: if the prospective buyer checks the record, he will discover that his prospective vendor has only a conditional title, and it is unlikely that he will be willing to purchase such an interest. If the vendee is satisfied with the conditional title, however, the sale of such title by the purchaser should be regarded as an assignment of the certificate of sale, just as in the case of a volunteer redemption.¹³¹ The vendee would then stand in the shoes of the purchaser, and would be liable to the mortgagor for the rents and profits as a "tenant in possession."¹³² The mortgagor should not have any claim to the proceeds from such a transaction since the payment was for the assignment and not for the use of the land. Similarly, if during the period of redemption the purchaser enters into a contract by which he agrees to sell the land upon his receipt of the sheriff's deed, any consideration for such an agreement would not be for the use of the land. Even if the purchaser purported to sell the land outright to a vendee who was unaware that the purchaser's title was conditional,¹³³ the mortgagor should not be

¹²⁹ 86 Cal. App. 2d 947, 153 P.2d 169 (1944).

¹³⁰ The court in *Bessinger* said that since the vendee was a tenant in possession "the sums received by [the selling purchaser] . . . from his vendee during the period of redemption constituted rents and profits received from a tenant in possession, and that therefore [he] . . . should have furnished plaintiff with a verified statement of the amount of the same." *Id.* at 949, 153 P.2d at 170.

¹³¹ See notes 98-99 *supra* and accompanying text.

¹³² See note 114 *supra* and accompanying text.

¹³³ The remedy which the vendee may have against the purchaser-vendor would probably

allowed to claim the proceeds of the sale as rents and profits of the land since such proceeds are not in fact rents and profits but are consideration for the sale.¹⁸⁴ Before the mortgagor is allowed to reap the benefits of the purchaser's bargain, he should be made to raise the redemption money, redeem, and then attempt to find a buyer for the property. Certainly nothing stops the mortgagor from contacting the purchaser's potential vendee and agreeing to sell him the property after he, the mortgagor, redeems.¹⁸⁵

In *Bessinger* the amounts of the installment payments may have been close to the reasonable rental value of the premises so that in allowing the mortgagor to redeem by paying the difference between the redemption price and the amount received by the purchaser the decision worked no injustice. However, calling *any* payments made pursuant to a purported sale rents and profits would work an injustice because the sale proceeds are not derived from the use of the land, but rather are consideration for the transfer of the title of the purchaser-vendor. The court should clarify whether *Bessinger* held that *any* contract payments are rents and profits or whether the *Bessinger* payments were called rents and profits simply because they approximated the reasonable rental value of the property. If the payments were contract payments as such and not mere rent, the case should be disapproved in that particular.

depend on the representations made to him regarding the title held by the purchaser-vendor, and the form of the deed which he was given. See generally 6 POWELL, REAL PROPERTY ¶ 904-11 (1956); PROSSER, TORTS 692-753 (3d ed. 1954).

¹⁸⁴ "Rents" is usually defined as the consideration paid by a tenant to his landlord for the use and enjoyment of the land. See LURRY, REAL PROPERTY 230 (2d ed. 1954); 2 POWELL, REAL PROPERTY ¶ 72B (1956); SMITH, REAL PROPERTY 335 (1956). "Profits" as used in this sense means "The benefit, advantage, or pecuniary gain accruing to the owner or occupant of land from its actual use; as in the familiar phrase 'rents, issues, and profits.'" BLACK, LAW DICTIONARY (4th ed. 1951). See also *People v. Gustafson*, 33 Cal. App. 2d 230, 239, 127 P.2d 627, 632 (1942).

¹⁸⁵ It has been pointed out that as a practical matter if the vendee of the purchaser is willing to accept the same or even slightly better terms from the mortgagor, the mortgagor could probably more readily obtain enough money to effect a redemption and then re-sell the property to the vendee. Holland, *The California Land Contract*, 48 CALIF. L. REV. 729, 732 n.100 (1960).

¹⁸⁶ Compare MICH. STAT. ANN. § 27A.6062 (1962) which provides that payments may be made to the purchaser, his personal representatives, his assigns, the officer who made the sale, or the registrar in whose office the certificate of sale is recorded.

Revised

Staff Draft

TENTATIVE RECOMMENDATION

relating to

REDEMPTION FROM EXECUTION AND FORECLOSURE SALES OF REAL PROPERTY

INTRODUCTION

The Law Revision Commission is currently preparing a proposed revision of the laws pertaining to the enforcement of judgments.¹ This tentative recommendation involves one aspect of the overall study--judicial sales of real property and redemption from sale. This tentative recommendation is being separately distributed for review and comment in order to determine the reaction to these proposals which represent a significant departure from existing law.

BACKGROUND

Statutory Redemption From Judicial Sales

In California, statutes providing a right of redemption from execution sales were first enacted in 1851.² This system, patterned after

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1. The full recommendation will be primarily concerned with the general laws pertaining to enforcement of judgments contained in Title 9 (Sections 681-724e) of the Code of Civil Procedure. The Commission is authorized to study creditors' remedies in general, and the enforcement of judgments and the right of redemption in particular, by 1972 Cal. Stats., Res. Ch. 27, at 3227.
 2. 1851 Cal. Stats., Ch. 5, §§ 229-236. Statutory redemption from execution and foreclosure sales is currently governed by Code Civ. Proc. §§ 700a-707.

the provisions of the Field Code proposed for New York,³ has been described as the "scramble" type of redemption.⁴ Under this system, the right to redeem is afforded the judgment debtor who owns the land, the successors in interest of the judgment debtor, and persons holding liens on the land which are subordinate to the lien under which the sale takes place.⁵ Redemption may take place at any time within twelve months after the sale of the property.⁶ Redemption is accomplished by paying the execution sale purchaser or prior redemptioner the amount paid to

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3. See New York Commissioners on Practice and Pleading, *The Code of Civil Procedure of the State of New-York* §§ 844-850 (1850). Although the redemption system proposed in the Field Code was not enacted in New York, it became the prevailing type of redemption in the United States. S. Riesenfeld, *Creditors' Remedies and Debtors' Protection* 150-51 (2d ed. 1975). The California statute in turn became the model for redemption laws in the western states. See Durfee & Doddridge, Redemption From Foreclosure Sale--The Uniform Mortgage Act, 23 Mich. L. Rev. 825, 866 n.93 (1925).
 4. See generally, J. Hetland, *Secured Real Estate Transactions* §§ 7.7-7.19 (Cal. Cont. Ed. Bar 1974); S. Riesenfeld, *Creditors' Remedies and Debtors' Protection* 149-54 (2d ed. 1975); 5 B. Witkin, *California Procedure Enforcement of Judgment* §§ 98-102, at 3464-68 (2d ed. 1971); Comment, The Statutory Right of Redemption in California, 52 Calif. L. Rev. 846 (1964).
 5. Code Civ. Proc. § 701. Creditors entitled to redeem are termed "redemptioners" by this section.
 6. Code Civ. Proc. § 702. A redemption by a redemptioner must occur within 60 days after a redemption by a prior redemptioner. Code Civ. Proc. § 703. It has been suggested that these 60-day redemption periods conceivably may continue to run after the 12-month period as long as there are qualified redemptioners prepared to redeem within 60 days after a prior redemption. See Comment, The Statutory Right of Redemption in California, 52 Calif. L. Rev. 846, 852-53 (1964).

purchase or redeem the property plus the amount of a prior redemptioner's lien and specified amounts of interest and other expenses.⁷ Redemption by the judgment debtor or a successor in interest terminates the effect of the sale so that the judgment debtor or successor in interest is restored to his estate.⁸ However, liens which have not been paid off in the process of redemption reattach,⁹ and a judgment lien under which the property is sold reattaches to the extent it has not been satisfied when the debtor redeems.¹⁰ Redemption by a junior lienholder has the effect of satisfying the prior lien which is a part of the redemption price and preserving the junior lienholder's security in the property which would otherwise be lost at the conclusion of the redemption period as a result of the sale under a superior lien.¹¹

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7. See Code Civ. Proc. §§ 702-703. A person redeeming from the purchaser must pay two-thirds of one percent per month interest. Code Civ. Proc. § 702. A person redeeming from a redemptioner must pay, in addition, two percent of the amount paid by the prior redemptioner. Code Civ. Proc. § 703. The other items making up the redemption price specified in the statute are assessments, taxes, reasonable sums for fire insurance, maintenance, upkeep, or repair of improvements on the property, and sums necessarily paid on a prior obligation secured by the property. Code Civ. Proc. §§ 702-703. Rents and profits or the value of the use and occupation of the property may be set off against the redemption price. Code Civ. Proc. § 707; *House v. Lala*, 214 Cal. App.2d 238, 245-46, 29 Cal. Rptr. 450, 454 (1963). Section 702 provides a summary hearing procedure in the event of a disagreement over the redemption price. As the discussion in Comment, The Statutory Right of Redemption in California, 52 Calif. L. Rev. 846, 863-69 (1964), fully demonstrates, the determination of the redemption price frequently is not an easy matter.
 8. Code Civ. Proc. § 703; *Bateman v. Kellogg*, 59 Cal. App. 464, 474-78, 211 P. 46, 51-52 (1922).
 9. Code Civ. Proc. § 703; *Kaiser v. Mansfield*, 160 Cal. App.2d 620, 628-29, 325 P.2d 865, 870-71 (1958).
 10. See *Fry v. Bihr*, 6 Cal. App.3d 248, 251, 85 Cal. Rptr. 742, 743 (1970); *Moore v. Hall*, 250 Cal. App.2d 25, 29, 58 Cal. Rptr. 70, 72 (1967).
 11. *Bank of America v. Hill*, 9 Cal.2d 495, 502, 71 P.2d 258, 261 (1937).

These provisions apply as well to foreclosure sales under a mortgage or deed of trust.¹² If the property is sold for less than the amount of the obligation, the redemption period is 12 months, as in the case of redemption from an execution sale.¹³ If the property is sold under a deed of trust or a mortgage with the power of sale at a price sufficient to satisfy the judgment, including interest, costs, and expenses of sale, the redemption period is three months.¹⁴ There is, however, no statutory right of redemption after sale under a power of sale in a mortgage or deed of trust.¹⁵

Where a right of redemption exists, the judgment debtor or a tenant of the debtor is entitled to remain in possession of the real property during the redemption period.¹⁶ The purchaser is entitled to receive

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12. Subdivision (a) of Code of Civil Procedure Section 700a provides in relevant part:

Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter.

Similar language in the law in effect in 1852 was termed "inapt" but found to be sufficiently comprehensive to apply to foreclosure sales. *Kent & Cahoon v. Laffan*, 2 Cal. 595 (1852).

13. Code Civ. Proc. § 725a. Even if there is a power of sale in the mortgage or deed of trust, a mortgagee or trustee must follow the judicial foreclosure procedures in order to be able to obtain a deficiency judgment for the difference between the fair market value of the property and the total debt. See Code Civ. Proc. §§ 580b, 580d, 726; *Roseleaf Corp. v. Chierighino*, 59 Cal.2d 35, 40, 378 P.2d 97, 99-101, 27 Cal. Rptr. 873, 875-77 (1963).
14. Code Civ. Proc. § 725a.
15. *Penryn Fruit Co. v. Sherman-Worrell Fruit Co.*, 142 Cal. 643, 645, 76 P. 484, 485 (1904); *Py v. Pleitner*, 70 Cal. App.2d 576, 579, 161 P.2d 393, 395 (1945); *Hetland*, Land Contracts, in *California Real Estate Secured Transactions* § 3.78, at 130 (Cal. Cont. Ed. Bar 1970).
16. Code Civ. Proc. § 706; *First Nat'l Trust & Sav. Bank v. Staley*, 219 Cal. 225, 227, 25 P.2d 982, 982 (1933).

rent or the value of the use and occupancy of the property from the tenant in possession until a redemption takes place.¹⁷ If the debtor redeems, rents and profits paid to the purchaser are a credit on the redemption price.¹⁸ If the purchaser or redemptioner has occupied the property, the debtor who redeems is entitled to the value of the use and occupancy of the property.¹⁹

Purpose of Statutory Redemption

The primary purpose of statutes permitting redemption from judicial sales of real property is to force the purchaser at the sale (almost always the judgment creditor or mortgagee)²⁰ to bid an amount near the property's fair value.²¹ The theory behind permitting other lien creditors to redeem is that the property should be used to satisfy as many

17. Code Civ. Proc. § 707; see *Carpenter v. Hamilton*, 24 Cal.2d 95, 101-03, 147 P.2d 563, ___ (1944) ("tenant in possession" includes judgment debtor occupying property during redemption period; Comment, The Statutory Right of Redemption in California, 52 Calif. L. Rev. 846, 865-69 (1964). A redemptioner has the same rights to rents and profits from the time such person redeems until a later redemption.
18. Code Civ. Proc. § 707.
19. *House v. Lala*, 214 Cal. App.2d 238, 245-46, 29 Cal. Rptr. 450, 454 (1963) (free use of property by judgment creditor is a "profit" within meaning of Section 707).
20. The defeasible title obtained at a sale subject to redemption, the lack of notice, and the requirement of cash payment by outside bidders, while the judgment creditor or mortgagee can bid the amount of the judgment, are the major factors discouraging bidding. See National Conference of Commissioners on Uniform State Laws, Handbook 258-59 (1922); G. Osborne, Handbook on the Law of Mortgages § 8, at 18 (2d ed. 1970); Durfee & Doddridge, Redemption From Foreclosure Sale--The Uniform Mortgage Act, 23 Mich. L. Rev. 825, 832-33 (1925); Madsen, Equitable Considerations of Mortgage Foreclosure and Redemption in Utah: A Need for Remedial Legislation, 1976 Utah L. Rev. 327, 335; Note, Redemption From Judicial Sales: A Study of the Illinois Statute, 5 U. Chi. L. Rev. 625, 626 (1938). In a study in New York in 1938, it was reported that, out of 40,853 foreclosures, the mortgagee bid in the amount of the obligation in 40,570 cases. Murray, Statutory Redemption: The Enemy of Home Financing, 28 Wash. L. Rev. 39, 40 n.13 (1953).
21. See *Moore v. Hall*, 250 Cal. App. 25, 29, 58 Cal. Rptr. 70, 73 (1967); Durfee & Doddridge, Redemption From Foreclosure Sale--The Uniform Mortgage Act, 23 Mich. L. Rev. 825, 839-41 (1925); Comment, The Statutory Right of Redemption in California, 52 Calif. L. Rev. 846, 848 (1964).

creditors as possible.²² If the property is valuable enough, subordinate lienholders are enabled to protect security that they would otherwise lose.²³ Statutory redemption also has the purpose of giving the debtor another chance to save the property by refinancing or otherwise finding assets sufficient to pay off the debt.²⁴

It is impossible to assess with certainty the actual effect of statutory redemption. The states are almost evenly divided between those which permit redemption from execution or foreclosure sales and those which do not;²⁵ however, there do not appear to be any studies comparing the results in redemption states as opposed to nonredemption states. It is certain that very few redemptions take place.²⁶

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22. S. Riesenfeld, *Creditors' Remedies and Debtors' Protection* 149 (2d ed. 1975).
 23. See Comment, The Statutory Right of Redemption in California, 52 Calif. L. Rev. 846, 848 (1964).
 24. See G. Osborne, *Handbook on the Law of Mortgages* § 8, at 17-18 (2d ed. 1970); Durfee & Doddridge, Redemption From Foreclosure Sale--The Uniform Mortgage Act, 23 Mich. L. Rev. 825, 839 (1925). The one-year redemption period has been termed a "farm mortgage proposition . . . based on the allowance to the mortgagor of possession of his farm for another crop year after default, to see if conditions will not better and he be able to save the farm." National Conference of Commissioners on Uniform State Laws, *Handbook* 270 (1922).
 25. See G. Osborne, *Handbook on the Law of Mortgages* § 307 (2d ed. 1970); S. Riesenfeld, *Creditors' Remedies and Debtors' Protection* 150-51 (2d ed. 1975). Although there are some exceptions, redemption states usually permit redemption from both execution and foreclosure sales. Of the 27 states permitting redemption from execution sales, five permit only the judgment debtor to redeem, three permit redemption by the debtor and by creditors in order of priority, 13 provide "scramble" redemption, and six have some other variation. Among the states without redemption are Florida, Georgia, Missouri, New Jersey, New York, Ohio, Pennsylvania, Texas, and Virginia. Approximately 17 states have neither redemption nor any other special provisions designed to prevent sacrifice sales of real property.
 26. G. Osborne, *Handbook on the Law of Mortgages* § 8, at 18 (2d ed. 1970); Brodkey, Current Changes in Illinois Real Property Law, 10 DePaul L. Rev. 567, 578 (1961) (fewer than one percent of foreclosed properties are redeemed); Murray, Statutory Redemption: The Enemy of Home Financing, 28 Wash. L. Rev. 39, 42 n.25 (1953) (reporting a 1938 study showing that, out of 22,000 properties foreclosed, only 204 were redeemed); Prather, Foreclosure of the Security Interest, 1957 U. Ill. L. F. 420, 432, 452; Stattuck, Washington Legislation 1961--Real Property Mortgage Foreclosure--Redemp-

RECOMMENDATIONS

The Commission has concluded that statutory redemption from execution and foreclosure sales has failed to achieve its purposes. The very existence of the right of redemption operates as the greatest impediment to the achievement of the primary purpose of obtaining a fair bid at the sale because the purchaser can only obtain title which is defeasible for another year.²⁷ The right of redemption thus makes "sacrifice" sales

tion, 36 Wash. L. Rev. 239, 309, 311 n.3 (1961) (reporting a four-year study showing that, out of 276 foreclosures, one redemption was made by a mortgagor and two by other persons). The records of the San Francisco Sheriff's Department from mid-1970 through mid-1975 show that there were three redemptions out of 86 sales of real property. Letter from Carl M. Olsen, County Clerk, City and County of San Francisco (October 20, 1975) (on file at office of California Law Revision Commission). It is interesting to note that one commentator has argued that, if the redemption statute works properly, there will be no redemptions because the possibility of a redemption acts as a threat to coerce adequate bids at the sale. See Note, Redemption From Judicial Sales: A Study of the Illinois Statute, 5 U. Chi. L. Rev. 625, 627 (1938). However, for redemption to work in this model fashion, the complicated scheme would have to be understood by the parties involved, there would have to be adequate notice, and potential redeemers would have to have adequate resources so that they can make the threat of redemption meaningful.

27. The commentators are nearly unanimous in recognizing the drastic effect the nature of the title obtained at a sale subject to redemption has on bidding. See G. Osborne, Handbook on the Law of Mortgages § 8, at 19 (2d ed. 1970); Carey, Brabner-Smith, & Sullivan, Studies in Foreclosures in Cook County: II. Foreclosure Methods and Redemption, 27 Ill. L. Rev. 595, 615 (1933); Durfee & Doddridge, Redemption From Foreclosure Sale--The Uniform Mortgage Act, 23 Mich. L. Rev. 825, 841 n.51 (1925) (Redemption "certainly caps the wall we have built to keep the public away from the public sale. The best market for land is found among those who desire it for immediate use, and to them, obviously, the redemption feature is prohibitive."); Madsen, Equitable Considerations of Mortgage Foreclosure and Redemption in Utah: A Need for Remedial Legislation, 1976 Utah L. Rev. 327, 353 (The "statutory right of redemption in reality tends to depress foreclosure sale prices and to create other inequities."); Madway & Pearlman, A Mortgage Foreclosure Primer: Part III Proposals for Change, 8 Clearinghouse Rev. 473, 478-79 (1975) ("Protecting the title of the bid purchaser and eliminating post-sale redemption rights . . . would meet one of the major objections of mortgagees because these practices tend to depress foreclosure sale prices significantly."); Murray, Statutory Redemption: The Enemy of Home Financing, 28 Wash. L. Rev. 39, 40 (1953) ("A person's desire for a particular piece of property would have to be very strong to cause him to bid for it, as he knows he is buying a mere expectation. Public participation at the sale was one of the chief benefits that was expected to follow when foreclosure by judicial sale was first originated, but it is clear that

even more sacrificial. There are, no doubt, exceptional cases in which the purchase price is oppressively low and in which the debtor manages to obtain the money necessary to save the property. The Commission is not of the opinion that the protection afforded by the right to redeem in these exceptional cases justifies the detrimental effect of the existence of the right to redeem in most other cases.

Accordingly, the Commission recommends that the statutory right of redemption be eliminated. Elimination of redemption will remove the greatest obstacle to obtaining a fair price at an execution or foreclosure sale of real property.

The Commission recognizes, however, that a hurried, forced sale of real property may result in a depressed price despite the sale being made absolute. Consequently, a 90-day grace period should be provided between the time when notice of a levy of a writ of execution is given or service of an order of sale is made and the time when notice of sale is first given.²⁸ This 90-day period is analogous to the three-month period afforded the mortgagor or trustor for the purpose of curing the default under a mortgage or deed of trust containing a power of sale.²⁹

long redemption statutes have eliminated this benefit."); Prather, Foreclosure of the Security Interest, 1957 U. Ill. L. F. 420, 432 ("When [the redemption period] is added to the period required to foreclose, the period of suspense in times of economic uncertainty can become an almost intolerable burden."); Shattuck, Washington Legislation 1961--Real Property Mortgage Foreclosure--Redemption, 36 Wash. L. Rev. 239, 309, 310-11 (1961) ("Persons interested in buying land are not attracted to the sale. . . . The most they can acquire is a chance. Bidding is stifled by the risk, however remote, of redemption."); Comment, The Statutory Right of Redemption in California, 52 Calif. L. Rev. 846, 848 (1964) (The "conditional title is not attractive to investors."). It is interesting to note that the commentary following the redemption provisions in the Field Code, which served as the model for the California statute, questions whether redemption affords any benefit to the debtor. New York Commissioners on Practice and Pleading, The Code of Civil Procedure of the State of New-York 359 (1850).

28. At least 20 days' notice of sales of real property is required by subdivision 3 of the Code of Civil Procedure Section 692. Hence, under this proposal, the property could not be sold sooner than 110 days after notice of levy of execution is given to, or an order of sale is served upon, the judgment debtor.

29. Civil Code § 2924.

During this time, the judgment debtor may refinance the property in order to pay off the lien under which it would otherwise be sold, sell the property privately subject to valid liens in order to realize a higher price than would be obtained at a forced sale, or acquiesce in the judicial sale but seek potential buyers by advertising and personal contact.

The delay of sale provision should not apply to leasehold estates with less than two years' unexpired term at the time of levy. This exception is consistent with existing law which provides that sales of such interests are absolute (not subject to redemption) and which provides no delay of sale.³⁰

The proposed scheme should better achieve the main purposes of the redemption statute--to obtain a higher price at execution and foreclosure sales and to provide the debtor with an opportunity to retain the property. The proposal would benefit judgment creditors and mortgagees since they would have to wait only 90 days rather than a year before receiving satisfaction in the amount of the value of the property. Junior lienholders may protect their interests by redeeming from the superior lien before the property is sold.³¹ The proposal would also eliminate the speculative aspect of current law which results from the fluctuation in land values during a year's time. The proposed statute would balance the interests of both debtor and creditor and has the added virtues of being simple to understand and easy to administer.³²

30. See Code Civ. Proc. § 700a.

31. Civil Code Section 2904 provides:

2904. One who has a lien inferior to another, upon the same property, has a right:

1. To redeem the property in the same manner as its owner might, from the superior lien; and,

2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby.

32. Indiana recently enacted a statute providing a six-month delay of execution sales coupled with an upset price of two-thirds the appraised value of the property. Ind. Code Ann. § 34-1-37-1, T.R. 69(a) (Burns 1973). One commentator suggested in 1938 that California substitute a grace period of a year for the one-year redemption period. King, The Enforcement of Money Judgments in California, 11 So. Cal. L. Rev. 224, 228-29 (1938).

In the course of preparing this recommendation, the Commission considered several other alternatives to statutory redemption--most importantly, requiring court confirmation of sale,³³ fixing an upset price,³⁴ allowing advance bidding,³⁵ and extending antideficiency legislation to cover execution sales.³⁶ Although some of these options may be preferable to statutory redemption as it exists in California, they have their own drawbacks that are avoided in the proposed statute. Generally speaking, these alternatives would require a court hearing in every case, thereby increasing the expenditure of time and resources by the parties and the judicial system. The Commission is mindful of the fact that the costs incurred in such additional proceedings would also be borne by the judgment debtor and ultimately by borrowers and consumers in general. The proposed statute is most likely to forward the interests of both debtors and creditors.

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33. Court confirmation, in the absence of an upset price feature, would be intended to protect against oppressively low sale prices. It does not appear that any state provides for court confirmation of execution sales without combining it with an upset price or advance bid procedure. In California, Code of Civil Procedure Section 568.5 provides for court confirmation of sales by receivers. There is no right of redemption after a sale by a receiver. Code Civ. Proc. § 568.5.
 34. Five states have a procedure for appraising the property and setting an upset price, usually two-thirds of the appraised value. E.g., Ohio Rev. Code Ann. §§ 2329.17, 2329.20 (Page 1954). California law provides an upset price of 90 percent of the appraised value in private probate sales by an executor or administrator. Prob. Code § 784. Appraisals are a matter of course in probate for tax purposes but would be an additional expense in execution and foreclosure sales.
 35. Only North and South Carolina provide for continuing an execution sale so that the judgment debtor may find a buyer who will pay a specified amount over the last bid. N.C. Gen. Stat. §§ 1-339.64 to 1-339.68 (repl. vol. 1969); S.C. Code § 10-1770 (1962). California law provides for advance bids at private partition and probate sales. Code Civ. Proc. §§ 873.730, 873.740; Prob. Code § 785.
 36. Pennsylvania requires the judgment creditor to petition the court within six months of an execution sale to fix the fair market value of the property if the price obtained at the sale is insufficient to satisfy the judgment. Satisfaction is granted to the extent of the fair market value of the property. If a petition is not timely filed, the debtor is released from liability. Pa. Stat. Ann. tit. 12, §§ 2621.1-2621.10 (1967). Kansas also permits the court to credit the fair market value of property on the judgment. Kan. Stat. § 60-2415(b) (1976). California's antideficiency legislation applies only to foreclosures under mortgages and deeds of trust. Code Civ. Proc. §§ 580b, 580d, 726.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following provisions, to be included in the forthcoming Tentative Recommendation Relating to Enforcement of Judgments:³⁷

37. Section numbers in brackets in the proposed legislation are references to sections in the forthcoming comprehensive recommendation. Where appropriate, corresponding provisions of existing law are cited. Matter in the proposed legislation unrelated to the subject under consideration in this recommendation has been omitted.

[\u00a7 703.630.] Notice of sale

[703.630.] (a) Before property levied upon may be sold, the levying officer shall give notice of sale as provided in this section.

(b) The notice of sale shall be in writing, shall describe the property to be sold, and shall state the time and place of sale. Where an interest in real property is to be sold, the notice shall describe the real property by giving its street address or other common designation, if any. If a legal description of the real property is given, the validity of the notice is not affected by the fact that the street address or other common designation given is erroneous or omitted.

. . . .

(f) If an interest in real property is to be sold, not less than 20 days before the date of sale, notice of sale shall be given as provided in this subdivision. Notice of sale of an interest in real property, other than a leasehold estate with an unexpired term of less than two years at the time of levy, may not be given until after the expiration of 90 days from the date notice of levy was mailed to the judgment debtor. Notice of sale shall be posted (1) in one public place in the in which where the interest in the real property is to be sold, if it is to be sold in a city or, if not, then in one public place in the judicial district in which the interest in the real property is to be sold and (2) in some conspicuous place on the real property. A copy of the notice shall be published once a week for the same period in a newspaper of general circulation published in the city in which the real property or a part thereof is situated if any part thereof is situated in a city or, if not, then in a newspaper of general circulation published in the judicial district in which the real property or a part thereof is situated. If no newspaper of general circulation is published in the city or judicial district, a copy of the notice shall be published for such time in the county in which the real property or a part thereof is situated. Not less than 20 days before the date of sale, notice of the sale shall be mailed to any person who has requested notice pursuant to Section [702.270, to replace Section 692a] and to persons holding interests recorded in the office of the county recorder, and shall be delivered personally to the judgment debtor or mailed to the judgment debtor at the judgment debtor's business or residence address last known

to the judgment creditor or mailed to the judgment debtor's attorney. As used in this subdivision, the term "newspaper of general circulation," has the meaning provided in Article 1 (commencing with Section 6000) of Chapter 1 of Division 7 of Title 1 of the Government Code.

(g) In addition to the notice required by this section, the judgment creditor may advertise the sale in the classified or other advertising section of a newspaper of general circulation or other periodical publication.

Comment. Subdivisions (a) to (f) of Section [703.630] are similar in substance to the first three subdivisions of former Section 692. . . . The second sentence of subdivision (f) has the effect of delaying the sale of interests in real property (other than leasehold estates with unexpired terms of less than two years at the time of levy) for 90 days in addition to the period provided for notice of sale.

Subdivision (g) is new. It provides for the publication of advertisements concerning the sale of the property in other periodicals. Such notice would be particularly appropriate where certain types of property with a specialized market are to be sold, such as stamps, coins, and rare books. Reasonable expenses of advertising in this manner are a collectable cost under Section 1033.7. Subdivision (g) is permissive, not restrictive. The judgment debtor may also desire to advertise the sale.

The provisions of this section pertaining to sales of real property also apply to sales pursuant to foreclosure judgments. Section 726.

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[\$ 703.770.] Absolute sales

[703.770.] A sale of property pursuant to this article is absolute.

Comment. Section [703.770] supersedes the first sentence of subdivision (a) of former Section 700a which made absolute only sales of personal property and of leasehold estates with unexpired terms of less than two years. Section [703.770] reflects the repeal of the statutory right of redemption from execution and foreclosure sales. See former Sections 700a-707. Sales of interests in real property (except for leasehold estates of less than two years' unexpired term at the time of levy) are delayed 90 days. See Section [703.630(f)]. This is done in order to provide an opportunity for the judgment debtor to redeem the property from the judgment creditor's lien before sale or for the judgment debtor and judgment creditor to advertise the sale and give notice to potential buyers. See Civil Code § 2903 (equity of redemption); Code Civ. Proc. § [703.630(f)].

This provision making all sales absolute is not intended to eliminate the equitable right to redeem from defective execution and foreclosure sales. See *Odell v. Cox*, 151 Cal. 70, 90 P. 194 (1907) (grossly

inadequate price and excusable ignorance of levy and sale); *Smith v. Kessler*, 43 Cal. App.3d 26, 31-32, 117 Cal. Rptr 470, ___ (1974) (grossly inadequate price and manifest unfairness).

The elimination of the statutory right to redeem does not affect a right to redeem afforded by federal law. See, e.g., I.R.C. § 6337 (120-day redemption period after sale of real property to collect federal taxes).