Florida Law Review

Volume 17 | Issue 2 Article 6

September 1964

Florida Mortgage Deficiency Judgments: Conclusiveness of Foreclosure Sale Price in Determining Sale Price Deficiency

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FLORIDA MORTGAGE DEFICIENCY JUDGMENTS: CONCLUSIVENESS OF FORECLOSURE SALE PRICE IN DETERMINING SALE PRICE DEFICIENCY

THE PROBLEM

Because a mortgage is security for a note, there is often a disparity between the amount due on the note and the value of the mortgaged property. Consequently, when the lienholder forecloses his mortgage because of some type of default by the mortgagor and the property is sold by court decree, there is often a difference between the amount realized on the sale and the amount stated in the foreclosure decree. In the event the sale of the property produces less than the amount of the decree, the mortgagee will probably desire to recover the difference from the person or persons liable on the note.[1] In order to recover this difference, the creditor-mortgagee must get a deficiency decree from the foreclosure court or bring a separate action at law.[2] Since the mortgagee-creditor who files suit for a deficiency is attempting to get a judgment entitling him to reach nonsecured personal assets of the mortgagor, a personal judgment is necessary, requiring jurisdiction over the mortgagor's person.[3]

Many mortgages are foreclosed by a statutory process,[4] which allows constructive service by publication,[5] and the mortgagor frequently fails to make an appearance to defend the action against him. When an appearance is not made, the mortgagee must often postpone his suit to obtain a deficiency judgment until he can secure jurisdiction over the mortgagor's person. Where the mortgagor fails to appear during the foreclosure proceedings and the mortgagee later sues at law on the note, the defendant-mortgagor may attempt to defend on the ground that the property was sold for an inadequate price and that its fair market value was in excess of the amount due on the note.[6] The mortgagor may also attempt to use this defense when he appears and objects to the motion by the mortgagee for the foreclosure court to award him a deficiency decree after the judicial sale

1. This situation occurs more frequently in times of depression. It is less likely to occur in the modern conventional mortgage transaction since the corporate lender will seldom lend in excess of 75% of the appraised value of the property. See Miami Herald, Oct. 4, 1964, §G, p. 1, col. 4.

2. FLA. STAT. §702.06 (1963).

3. 37 AM. JUR. *Mortgages* §861 (1941); 22 FLA. JUR. *Mortgages* §416 (1958); 1 GLENN, MORTGAGES §77.2 (1943); 1 WILTSIE, MORTGAGE FORECLOSURE §439 (5th ed. 1939).

4. FLA. STAT. §702.02 (1963).

5. FLA. STAT. §§48.01-.18 (1963).

6. See, *e.g.*, Matz v. O'Connell, 155 So. 2d 705 (2d D.C.A. Fla. 1963).

of the property.[7] As is usually the case, there are two opposing policy considerations involved in the resulting conflict. The mortgagee, who has loaned money to the mortgagor, wants to recover as much of his investment as possible. On the other hand, the mortgagor is opposed to any personal judgment and particularly does not want his personal liability established by a deficiency resulting from a property sale at which he was not present. The mortgagor in these cases usually relies on a "due process" argument for a defense.[8] The argument advanced by the mortgagor is that the court's determination that the sale price is conclusive predetermines the result of the deficiency suit. Since a personal judgment against him is unconstitutional unless the court has jurisdiction over his person, the court cannot establish the amount of his personal liability in a subsequent deficiency suit by giving recognition to the sale price established in the earlier proceedings.

THE PRESENT AUTHORITY

The Florida Statute

At first blush it would appear that the Florida Legislature has solved the problem of the conclusiveness of the foreclosure sale price by enaction of section 702.02 of the Florida Statutes. Subsection (5) states:[9]

> The value of the property sold by the clerk shall be *conclusively* presumed to be the amount bid therefor and for which the property was sold at the sale, unless the objection thereto shall be filed in the cause within ten days after the filing of the clerk's certificate of sale. If any objections to said value be filed within such ten day period, such objections shall be considered by the court; provided, however, that the filing of objections to the value of the mortgaged property shall not in any manner affect or cloud the title of the purchaser at the sale of the mortgaged property. If no such objections be filed, the value as fixed herein shall have the same force and effect as if the court had decreed the value of said property was the amount bid and for which the property was sold at the foreclosure sale.

This statute is part of the general statutory scheme for the foreclosure of mortgages, which is contained in chapter 702 of the Florida

7. See, *e.g.*, Kurkjian v. Fish Carburetor Corp., 145 So. 2d 523 (1st D.C.A. Fla. 1961).

8. See Stewart v. Eaton, 287 Mich. 466, 476, 283 N.W. 651, 655 (1939).

9. FLA. STAT. §702.02 (5) (1963). (Emphasis added.)

Statutes, and was added by the 1953 revision of that chapter. Although the statute appears to be clear and unambigious on its face, two Florida district courts of appeal have held that a mortgagor was not precluded from showing that the sale price was inadequate when he was sued for a deficiency more than ten days after the filing of the clerk's certificate of sale.[10]

The purpose of this note is to analyze these cases, the Florida case law prior to the decisions and the relevant court decisions of other jurisdictions. In doing so, the respective interests of the mortgagor and the mortgagee will be considered along with some possible alternatives to the present statutory scheme in Florida.

The Florida Case Law After the Statute

The 1961 case of *Kurkjian v. Fish Carburetor Corp.*[11] was the first Florida case, after the enaction of section 702.02 (5), to consider the question of the conclusiveness of the sale price that was raised in a suit seeking a deficiency judgment or decree. In *Kurkjian,* the mortgagee obtained a foreclosure decree by a decree *pro confesso* and after sale of the real property by the clerk, moved the court to award him a deficiency decree. The chancellor directed that a notice of hearing be sent to the mortgagor, although notice was not required.[12] The defendant-mortgagor appeared and objected to the entry of the decree because he considered the sale price to be grossly inadequate.[13] The chancellor sustained the defendant's contention and denied the motion for a deficiency decree. The First District Court of Appeal reversed,[14] stating that while it was true that the award of the deficiency was within the chancellor's discretion and he could consider evidence bearing on the fair market value of the property, the defendant had shown no equitable reasons for not granting the decree.

While holding for the plaintiff, the appellate court stated that the basic equitable jurisdiction of the chancellor was such that he might properly inquire into the circumstances of the sale. The court also stated that the purpose of the statute was only to support the title of the purchaser at the sale and was not to bar the defendant-mortgagor from introducing evidence showing that the fair market value of the property was more than the sale price. This decision

10. Matz v. O'Connell, *supra* note 6; Kurkjian v. Fish Carburetor Corp., *supra* note 7.

11. 145 So. 2d 523 (1st D.C.A. Fla. 1961).

12. If the deficiency is prayed for in the complaint, as was done here, no notice is required. Cole v. Heidt, 117 Fla. 756, 158 So. 435 (1935).

13. The foreclosure decree was for $15,099.81 and the sale price was $10,000. Kurkjian v. Fish Carburetor Corp., *supra* note 11, at 525.

14. Kurkjian v. Fish Carburetor Corp., *supra* note 11.

seems contrary to the controlling statute, which reads "the value of the property . . . shall be conclusively presumed to be the amount . . . for which the property was sold at the sale, unless objection . . . shall be filed . . . within ten days . . . ."[15] Since the defendant was named a party to the action and was served with notice, he could have been present at the sale and could have filed the objections to the sale if he had cared to. The court stated that the purpose of the statute was only to support the title of the purchaser, but the "provided" clause of the second sentence says that even if objections are filed within the ten days, it "shall not in any manner affect or cloud the title of the purchaser. . . ."[16] This provided clause would seem to refute the court's suggestion that it was intended only to protect the purchaser at the sale since his title cannot be affected even if objections are filed within the ten-day period. When construed in the light of the case law before its enactment, section 702.02 (5) seems to protect both the mortgagor and the mortgagee. Before the enactment, the mortgagor was allowed to contest the sale price at any time,[17] but now the statute protects the mortgagee by making the sale price conclusive unless the mortgagor contests within ten days. The ten-day period is to soften the otherwise harsh effect of barring the mortgagor from contesting the sale.

The *Kurkjian* situation appears to be exactly the type in which the statute was intended to operate. Although the court did not mention it, the fact that the mortgagee was the purchaser at the sale may have influenced its decision to allow admission of evidence relative to the market value of the property.[18] The court's decision has placed the interpretation of the statute in question, and this instability will undoubtedly influence other courts.[19]

Matz v. O'Connell[20] was the second case interpreting section 702.02 (5) and it arose in a slightly different context than that present in *Kurkjian*. *Matz* also interjects two more decisive factors into the problem of the conclusiveness of the sale price. In *Matz* the suit was

15. FLA. STAT. §702.02 (5) (1963).

16. *Ibid.*

17. See Maule Indus. v. Seminole Rock & Sand Co., 91 So. 2d 307 (Fla. 1957); 22 FLA. JUR. *Mortgages* §367 (1958).

18. See Gelfert v. National City Bank, 313 U.S. 221 (1941) where the Court upheld as constitutional a New York statute, N.Y. CIV. PRAC. ACT §1083, which calculated a deficiency based on the fair market value of the property and not the sale price though the statute was applied retroactively to a mortgagee who purchased at the sale. The court stated in a footnote that no opinion of the constitutionality of the statute was intimated in a situation where the mortgagee was not the purchaser. Gelfert v. National City Bank, *supra* at 231 n.4.

19. See Builder's Fin. Co. v. Ridgewood Homesites, Inc., 157 So. 2d 551 (2d D.C.A. Fla. 1963).

20. 155 So. 2d 705 (2d D.C.A. Fla. 1963).

based on the note rather than on the mortgage and was brought in a court of law at a time subsequent to the foreclosure sale. The subsequent action at law had been filed because the mortgagors, who were residents of Pennsylvania, were not personally subject to the jurisdiction of the foreclosure court.[21] When the mortgagors returned to the state, thus allowing the law court to gain jurisdiction over their persons, the mortgagee filed suit on the note. The defendant-mortgagors attempted to introduce evidence that the fair market value of the property was in excess of the amount of the decree; but the trial court rejected this evidence and awarded the plaintiff-mortgagee a deficiency judgment. On appeal, the Second District Court of Appeal reversed,[22] holding that due process of law required that the defendants be allowed to introduce the evidence since they were not personally bound by anything occurring during the foreclosure proceedings. In so holding, the court stated that the statute[23] was only intended to protect or confirm the title of the purchaser at the sale and to hold otherwise in a situation where the mortgagor was not personally subject to the jurisdiction of the foreclosure court would make the statute unconstitutional as a violation of due process of law.[24]

The *Matz* court recognized the distinctions between its fact situation, which involved the due process question, and that in *Kurkjian*, but the court concurred with the *Kurkjian* interpretation of the statute. The two distinguishing features between the cases are that in *Matz* a third party purchased the property at the sale and in the foreclosure proceedings there was no jurisdiction over the mortgagor's person but only constructive service by publication, while in *Kurkjian* the mortgagee purchased the property and there was jurisdiction over the defendant's person in the foreclosure proceedings. A third distinction is the fact that the *Kurkjian* action was in equity and the *Matz* action at law. In a situation analagous to *Matz*, but where there was jurisdiction over the defendant's person in the foreclosure court, the Third District Court of Appeal in a per curiam decision,[25] held that in a suit at law for a deficiency judgment, the equitable considerations available in chancery could be pleaded and proved under rule 1.8 (g) of the Florida Rules of Civil Procedure.[26] Although

21. See authorities cited note 3 *supra*.

22. Matz v. O'Connell, *supra* note 20.

23. FLA. STAT. §702.02 (5) (1963).

24. Matz v. O'Connell, *supra* note 20, at 708; *cf.* Stewart v. Eaton, 287 Mich. 466, 283 N.W. 651 (1939).

25. Frank v. Levine, 159 So. 2d 665 (3d D.C.A. Fla. 1964).

26. "Joinder of Causes of Action; Consistency. A pleader may set up in the same action as many claims or causes of action or defenses in the same right as he has, and claims for relief may be stated in the alternative if separate items

there were no facts given, it would appear that the court had in mind a defense of inadequate sale price such as was made in *Matz* and *Kurkjian*.

The Florida Case Law Before the Statute

Each case involving the question of the conclusiveness of the foreclosure sale price involves such varied factors as the identity of the purchaser at the sale, the type of forum, and whether constructive or actual notice was served on the defendant, that it is difficult to find a case that is not distinguishable from the others. All of the cases prior to *Kurkjian* and *Matz* arose before the enactment of section 702.02 (5) and this fact was recognized by the *Matz* court.[27] When the courts were without the aid of the statute, they held that the price for which the property was sold at a public sale was the conclusive test of its value where the suit was at law on the note, jurisdiction over the mortgagor's person had been obtained in the prior foreclosure proceedings, and the property had been purchased by the mortgagee.[28] On similar facts, with the exception that the prayer for deficiency decree was made a part of the foreclosure action, it was also held that, as between the parties, the sale price was conclusive as to the value of the property sold.[29] In one case where the defendants were parties to the foreclosure action and were endorsers of the mortgage note, it was held that the sum for which the property was sold established its value.[30] But when the endorsers were not parties to the foreclosure action and were sued for a deficiency, it was held that the amount for which the property was sold could not be binding on them.[31] The only rule capable of being formed from this line of cases is that the

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make up the cause of action, or if two or more causes of action are joined. A party may also set forth two or more statements of a claim or defense alternatively, either in one count or defense, or in separate counts or defenses. When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency, and whether a defense be based on legal or on equitable grounds, or on both. All pleadings shall be construed so as to do substantial justice." FLA. R. CIV. P. 1.8 (g).

27. Matz v. O'Connell, *supra* note 20, at 707.

28. Penn Mut. Life Ins. Co. v. Moscovitz, 119 Fla. 708, 161 So. 80 (1935).

29. Jacksonville Loan & Ins. Co. v. National Realty & Improvement Co., 77 Fla. 825, 82 So. 292 (1919); Etter v. State Bank of Fla., 76 Fla. 203, 79 So. 724 (1918).

30. Tendler v. Gottlieb, 126 So. 2d 308 (3d D.C.A. Fla. 1961). Although this case was decided after the enactment of the statute, the court did not cite it, but instead cited Etter v. State Bank of Fla., *supra* note 29.

31. Younghusband v. Ft. Pierce Bank & Trust Co., 100 Fla. 1088, 130 So. 725 (1930).

sale price is conclusive except to an endorser who was not a party to the foreclosure suit. But no case similar to *Matz*, where the owner of the equity of redemption was sued at law but was not a party to the foreclosure action, appears to have been decided by the Florida courts previous to the enaction of the statute.[32]

Section 702.02 (5) appears in most instances to be a legislative codification of the case law as it existed prior to the statute. However, it would seem that the draftsmen failed to consider the problems created by the nonresident owner or the possible constitutional objections that could be raised in the situation where the mortgagor was not present at a prior judicial sale of his property, although it can be argued that the ten-day grace provision was intended to meet these difficulties. The scope of the problem can be seen by an examination of the authorities upon which the *Matz* court relied.

Foreign Case Authority

In arriving at the *Matz* decision, the court relied primarily on two cases. The first was the well-known case of *Pennoyer v. Neff*,[33] which was decided by the United States Supreme Court in 1878 and which is probably the leading case on the requirements for a personal judgment. The *Pennoyer* Court held that the only force and effect of an in rem judgment was to subject the attached property to satisfaction of the plaintiff's claim and no personal liability could be established without jurisdiction over the defendant's person. The *Pennoyer* case can be distinguished from that of *Matz* because the issue in *Pennoyer* was "only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein."[34] The situation in *Matz* differed in that the foreclosure action was valid without jurisdiction over the defendant's person and no attempt was made to establish personal liability until personal jurisdiction had been obtained in the subsequent law suit. In other words, the first action was not null and void in *Matz* as it was in *Pennoyer.* The mortgagee's contention in *Matz* was that the effect of the judicial statutory sale was to make the factual question of the value of the property res judicata. Giving conclusiveness to a factual issue that was determined in an otherwise valid proceeding is different from trying to obtain a personal judgment without jurisdiction over the defendant's person.

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32. *But see* Goodrich v. Thompson, 96 Fla. 327, 118 So. 60 (1928).
33. 95 U.S. 714 (1877).
34. *Id.* at 736.

The second case relied on by the court in the *Matz* case was *Stewart v. Eaton.*[35] It was cited as a case on point with the *Matz* situation. Although *Stewart* is probably the leading case on the conclusiveness of fair market value of property as determined by a prior foreclosure sale in making an award in a subsequent deficiency suit, it is easily distinguishable from *Matz.* In *Stewart* the mortgage was foreclosed in chancery, after obtaining jurisdiction by constructive service of notice on the mortgagors, and the Illinois property was purchased by the mortgagee at the public sale. The mortgagee then sued in the Michigan courts to recover a deficiency from the original mortgagors who were not the owners of the equity of redemption at the time of the foreclosure. The trial court denied the request for a deficiency judgment and adopted the defendant's contention that the property had been sold for an inadequate price and that an extension of time had been granted the owners without the defendant's consent. The Michigan Supreme Court affirmed the decision[36] and, while basing their decision on *Pennoyer v. Neff,* stated that the facts constituting the incontestable basis of personal liability could not be established by the Illinois judgment any more than the same judgment could have the effect of a personal judgment. *Stewart* is distinguishable from *Matz* on three grounds: first, there was no state statute indicating a legislative policy; second, the mortgagee purchased the property at the sale and would suffer no over-all loss on his business venture; and third, the foreclosure action and the deficiency suit were in different states. These same three grounds may have had no small influence on the *Stewart* court in arriving at its equitable decision. The reason that the mortgagee would not suffer an over-all loss is that since he had purchased property, which was worth more than he paid for it, he could make up the deficiency through a subsequent sale of the property. Nevertheless, the result reached in *Stewart* appears to be the weight of authority in other jurisdictions that have considered the question.[37]

ANALYSIS

Before proceeding to an analysis of the law in light of the cases, it is well to recall the two issues that may arise in these cases. The first problem, that of "due process," does not arise except when the owner, who is usually a nonresident, does not appear to defend the foreclosure action. When this happens and he is later sued for a deficiency, the question is whether his liability for a deficiency can be

35. 287 Mich. 466, 283 N.W. 651 (1939).
36. *Ibid.*
37. 37 AM. JUR. *Mortgages* §865 (1941); 120 A.L.R. 1354 (1939).

based on something done in the foreclosure action where he was not present or represented. In other words, was anything done in the earlier proceeding binding on him? The second problem is primarily one of policy and of balancing the respective rights of the mortgagee and mortgagor so as to treat them both fairly. This is somewhat broader in scope than the due process problem, but necessarily includes it.

The "Due Process" Question

The *Matz* court stated that the problem concerning the conclusiveness or effect of the sale price as established by the first proceeding was answered by determining "the force and effect of a judgment obtained in an in rem proceeding."[38] But this is not technically correct because a mortgage foreclosure proceeding is generally considered to be quasi-in rem.[39] However, the difference between the two is minor as applied to the present situation in that the decree or judgment in the in rem proceeding binds the whole world as to the property in question and the quasi-in rem proceeding binds only those persons named in the proceedings.[40] It is said that the conclusive effect of the in rem or quasi-in rem judgment or decree applies to the act to be performed pursuant to the court's ruling.[41] The act performed by the decree in the case of a foreclosure suit is the sale of the property. Should it therefore follow that since the result of a public sale is the determination of the sale price, it should be conclusive?

The basic question involved when the fairness of the price at a public sale is placed in issue is whether the actions taken at the sale were fair to the defendant and whether this fairness requires his presence in all cases. It would appear that the risk of the property being bid in at an unfair price at a judicial sale is a risk that the defendant assumes and considers when he buys and mortgages property.[42] Florida courts have recognized that the owner of property must assume the responsibility of informing himself of proceedings that affect his property.[43] If the mortgagor is charged with this responsibility, then the foreclosure proceedings, including the sale of the

38. Matz v. O'Connell, *supra* note 20, at 707.

39. Cohen v. Century Ventures, Inc., 163 So. 2d 799 (2d D.C.A. Fla. 1964); RESTATEMENT, JUDGMENTS §32, comment *a* (1942).

40. RESTATEMENT, JUDGMENTS §32, comment *a* (1942).

41. 30A AM. JUR. *Judgments* §136 (1958).

42. Stated differently, "the parties considered the eventuality of foreclosure" when they entered into the contract. Walton v. Washington County Hosp. Ass'n, 13 A.2d 627, 629 (Ct. App. Md. 1940).

43. "It is . . . the duty of the owner of real estate, who is a nonresident, to

property, should be conclusively presumed to have been conducted fairly and the owner should not be allowed to object.

Because there are so many variable factors that can complicate these cases, a proper analysis requires a step-by-step approach. The effect of interjecting each new variable will be considered next. Beginning with the most common situation, which includes a foreclosure suit filed under the statutory procedure praying for a deficiency judgment, jurisdiction over the mortgagor's person, and purchase by a third party, most courts would hold that the sale price is conclusive.[44] The reasons for this result are obvious. The defendant knows about the action because of service of process and he can be present at the sale, observe its conduct, and object to the sale within the ten-day period[45] if he desires to do so. In this situation there is no apparent reason not to hold that the sale price is conclusive unless one is willing to say that because judicial sales do not bring the price that a normal sale would,[46] the system works an unjustifiable hardship on the mortgagor. But is this not a risk that the mortgagor assumed with full knowledge when he mortgaged the property?[47]

Changing the situation slightly by having the purchaser at the sale be the mortgagee instead of a third party, an argument can be made that the mortgagor should be allowed to offset the fair market value of the property against the note instead of the price for which the mortgagee purchased the property.[48] Why should the mortgagee be allowed to profit at the expense of the mortgagor by realizing a profit at a later private sale of the property and also obtaining a deficiency judgment? This would, in some cases, provide the mortgagee with a double recovery.

By adding the variable of lack of jurisdiction over the mortgagor's person in the foreclosure proceedings to the situation where the mortgagee purchases the property, there is created still another element in favor of not conclusively binding the mortgagor by the sale price. However, if the situation is one where there is no jurisdiction over

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take measures that in some way he shall be represented when his property is called into requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. *Such publication is 'due process of law.'"* Goodrich v.Thompson, 96 Fla. 327, 334, 118 So. 60, 62 (1928) quoting the United States Supreme Court in Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559, 564 (1889). (Emphasis added.)

44. See case cited *supra* note 28; 37 AM. JUR. *Mortgages* §865 (1941).

45. FLA. STAT. §702.02 (5) (1963).

46. Gelfert v. National City Bank, 313 U.S. 221 (1941); 1 GLENN, MORTGAGES §93 (1943).

47. Walton v. Washington County Hosp. Ass'n, 13 A.2d 627 (Ct. App. Md. 1940).

48. Stewart v. Eaton, *supra* note 35.

the mortgagor's person, but with a third party purchasing at the sale, the problem becomes one of balancing the right of the mortgagor to question the effect of the sale on his personal liability against the right of the mortgagee to receive the balance of his investment. This problem is essentially one of fairness. Is it fair to impose a procedure for foreclosure on the mortgagee that denies him the right to recover his investment when the market price of the property has declined? On the other hand, is it fair to indirectly determine the amount of personal liability of the mortgagor by a proceeding at which he was not represented? The parties' interests involved appear to be approximately equal and the answer lies in a state's choice of policy in determining which party should bear the risk of a decline in value of the mortgaged property.

The Balance of Remedies in Florida

The Florida Legislature attempted to impose the risk of market decline on the mortgagor when it enacted section 702.02 (5) making the sale price conclusive, but allowing him ten days in which to object to the sale.[49] The legislature seems to have adopted the premise that constructive service of process afforded the defendants adequate notice in order to satisfy "due process" and indicated its choice of policy by giving finality to the sale after the passage of a specified period. As long as the sale was conducted according to law and there was no fraudulent conduct on the part of the mortgagee,[50] the mortgagor should be foreclosed from contesting the sale. The result is that the mortgagee will not lose his investment solely because of the operation of the system of judicial sales.[51]

Alternative Statutory Procedures

If the Florida Legislature should feel that too much of an injustice is being suffered by the mortgagor under the present statutory scheme, it can look to the changes made in recent years by the legislatures of several other states.[52] Connecticut has adopted a unique method to deal with foreclosure proceedings that terminate in a judicial sale. The Connecticut statute provides for a compulsory appraisal of the property at the time of sale and the "excess," if any,

49. FLA. STAT. §702.02 (5) (1963).

50. 3 WILTSIE, MORTGAGE FORECLOSURE §973 (5th ed. 1939).

51. The mortgagee would lose a portion of his investment only when the property is purchased by a third party and the mortgagor is allowed to credit the fair market value of the property instead of the sale price when sued for a deficiency.

52. 37 AM. JUR. *Mortgages* §864 (1941).

of the appraisal price over the sale price, is borne one-half by the mortgagee and one-half by the mortgagor.[53] In other words, where the mortgagee sues for a deficiency, one-half of the "excess" is deducted from what he would otherwise receive as a deficiency award. This method is extremely arbitrary in that it does not take into account who or what might be responsible for the decline in value and requires an additional expenditure of time and money to achieve a determination of the fair market value of the property.[54]

New York, on the other hand, uses a method very similar to that requested by the defendants in the *Matz* and *Kurkjian* cases. Upon motion by a mortgagee for a deficiency judgment, the court determines "upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises."[55] The court may then grant a deficiency judgment based on the difference between the amount of the foreclosure judgment and the sale price or fair market value, whichever is higher.[56] Connecticut uses this same method when the foreclosure is by strict foreclosure instead of by sale.[57] The New York method is more arbitrary than the Connecticut method because any loss resulting from a judicial sale is automatically placed on the mortgagee. This loss is measured by the difference between the reasonable market value and the amount realized at the foreclosure sale.

Although the statutes in Connecticut and New York help the mortgagor to get the most out of his property, they are not fair to the mortgagee in a case where a third party purchases at the sale, because he is left with no way to recoup his investment. And if it is conceded that the mortgagor assumes the risk of judicial sales, he is getting more protection than that to which he is entitled. If the Connecticut and New York statutes were applicable only where the mortgagee purchased the property at the sale then they would be fair and equitable to both parties.

CONCLUSION

It is apparent that the Florida judiciary has caused some confusion in determining the situations in which section 702.02 (5) of the Florida Statutes may be applied. The proper application of the statute is still in doubt because both the *Matz* and *Kurkjian* decisions interpreted the statute in such a manner as to protect only the pur-

53. CONN. GEN. STAT. §§49-25, -28 (1958).

54. Fair market value is an elusive concept at best. *Cf.* Gulf Fertilizer Co. v. Walden, 163 So. 2d 269 (Fla. 1964).

55. N.Y. REAL PROP. ACTIONS & PROC. LAW §1371.

56. *Ibid.*

57. CONN. GEN. STAT. §49-14 (1958).

chaser at the foreclosure sale and not to make the sale price conclusive in a subsequent proceeding to obtain a deficiency judgment against the mortgagor. The *Matz* court went further and said that if the conclusiveness of the sale price provisions of the statute were to be applied against a mortgagor who was not represented during the foreclosure proceedings, it would be unconstitutional as a deprivation of due process of law. But when the respective remedies of the mortgagee and mortgagor are considered, the constitutional limitation imposed by the *Matz* court loses its desirability and reason. A policy of protecting the mortgagor who is not present during the foreclosure proceedings should not be extended so as to deprive the mortgagee of his remedy. While dealing with the problem of compelling the mortgagee to credit the mortgagor with the fair market value of the property instead of the proceeds of sale, one court said: "The law surely is not capable of such injustice as to compel him [the mortgagee] to credit on his bond more than it allows him to receive."[58] In the *Matz* and *Kurkjian* decisions the mortgagee and his remedy were apparently forgotten in the courts' zeal to give the mortgagor justice.

Although much can be said for the argument used in *Matz* that the mortgagor who was served constructively is deprived of "due process," the identity of the purchaser rather than the presence of the mortgagor at the foreclosure sale would seem to be a more important consideration. The best solution to the problem of assuring the mortgagor that his property will be sold for a fair price would be for the legislature to limit the applicability of section 702.02 (5) of the Florida Statutes to cases in which the mortgagor is present at the sale and a third party rather than the mortgagee or his agent purchases the property. An injustice to the mortgagor occurs only when the mortgagee is allowed to get a double recovery by virtue of "buying" the land cheaply at the judicial sale and also obtaining a deficiency judgment. It is believed that this would be practical as well as fair to both parties. The mortgagor could still use the inadequate sale price defense in cases where the mortgagee purchased the property, and the mortgagee may be inclined to submit a fair bid if he knows that it may be questioned in a subsequent deficiency suit.

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58. Belmont v. Cornen, 48 Conn. 338 (1880).