

Memorandum 81-81

Subject: Study D-300 - Enforcement of Judgments (AB 707 and 798--
Redemption From Foreclosure Sales)

Attached to this memorandum as Exhibit 1 is a staff draft of a procedure retaining redemption where a sale is made pursuant to a decree of foreclosure of a trust deed or mortgage on real property and the judgment creditor is entitled to a deficiency judgment. This material implements the Commission's decision at the November 1981 meeting to retain a limited redemption procedure so as not to disturb the balance between debtors and creditors in this area. Redemption is to be retained because of its inhibitory effect on seeking deficiency judgments.

The draft statute set forth in Exhibit 1 differs in several important respects from the existing redemption scheme embodied in Code of Civil Procedure Sections 700a-707. For a brief discussion of the existing law in this area, see the Commission's printed pamphlet relating to AB 707 and 798 entitled Tentative Recommendation Proposing the Enforcement of Judgments Law 2112-15 (October 1980). As provided in draft Section 729.010(a), property would be sold subject to the right of redemption only in a case where the judgment creditor is seeking a deficiency judgment in a foreclosure action under Code of Civil Procedure Section 726. As under existing Section 725a, the redemption period would be three months, if the sale proceeds are sufficient to satisfy the secured indebtedness, one year if proceeds are sufficient. The three-month redemption period is needed because the 120-day delay of notice of sale under Section 701.545 in AB 707 would not apply to foreclosure sales where a deficiency is authorized. Redemption would only be available to the judgment debtor and the debtor's successors in interest; it would not be available to junior lienholders. The draft retains the inhibitory effect of redemption, however, because the purchaser at the sale (usually the judgment creditor) does not get clear title until the one-year redemption period has passed.

Additional changes are made in existing procedure as indicated in the Comments to the draft statute. The staff has not attempted to provide further detail in the statute because redemptions rarely take place and, as indicated above, the purpose of retaining this limited

right of redemption is to preserve the balance between certain creditors and their debtors.

Respectfully submitted,

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EXHIBIT 1

STAFF DRAFT

REDEMPTION PROCEDURE

[To be added to AB 798.]

045/104

§ 729.010. Property subject to redemption; manner of sale

729.010. (a) If the decree of foreclosure of a mortgage or deed of trust on real property pursuant to Section 726 determines that a deficiency judgment may be ordered against the defendant, the real property (other than a leasehold estate with an unexpired term of less than two years at the time of levy) shall be sold subject to the right of redemption.

(b) If the property is to be sold subject to the right of redemption, the sale is governed by Section 716.020, except that:

(1) The notice of sale of the property shall state that the property will be sold subject to the right of redemption and shall state the amount of the secured indebtedness with interest and costs.

(2) Notice of sale may be given upon entry of the judgment for sale of the property and the provision of Section 701.545 delaying notice of sale does not apply.

(3) Notice of sale may be given pursuant to persons having liens on the property upon entry of the judgment for sale of the property and the provision of subdivision (h) of Section 701.540 delaying such notice does not apply.

Comment. Sections 729.010-729.090 provide a limited procedure for redemption of real property from sale. Under Section 729.010, redemption is available only in a case where the judgment creditor is seeking a deficiency judgment. If the proceeds of sale are insufficient to satisfy the secured indebtedness the property may be redeemed until one year after the sale; if the secured indebtedness is satisfied by the sale, the redemption period is three months. See Section 729.030. This continues a former portion of Section 725a.

Subdivision (b) contains special provisions applicable where property is to be sold subject to the right of redemption.

§ 729.020. Persons entitled to redeem

729.020. Property sold subject to the right of redemption may be redeemed only by the judgment debtor or the judgment debtor's successor in interest. For the purpose of this article, the purchaser of the property at the foreclosure sale is not a successor in interest.

Comment. Section 729.020 supersedes former Section 701 and restricts the right of redemption to the judgment debtor and his or her successor in interest. Successors in interest may include an assignee after the foreclosure sale of the debtor's right of redemption as part of a transfer of the debtor's reversionary interest, a trustee in bankruptcy, or a junior lienholder who has acquired the judgment debtor's interest in the property through a prior foreclosure.

4715

§ 729.030. Redemption period

729.030. The redemption period during which property may be redeemed from a foreclosure sale under this chapter ends:

(a) Three months after the date of sale if the proceeds of the sale are sufficient to satisfy the secured indebtedness with interest and costs of action and of sale.

(b) One year after the date of sale if the proceeds of the sale are not sufficient to satisfy the secured indebtedness with interest and costs of action and of sale.

Comment. Section 729.030 continues the substance of a former portion of Section 725a.

045/083

§ 729.040. Certificate of sale

729.040. (a) Notwithstanding Section 701.660, when the purchaser of an interest in real property sold subject to the right of redemption pays the amount due, the levying officer conducting the sale shall execute and deliver a certificate of sale to the purchaser and record a duplicate of the certificate of sale in the office of the county recorder.

(b) The certificate of sale shall contain the information required by Section 701.670 and shall also contain the following:

(1) The price paid for each distinct lot or parcel of real property sold subject to the right of redemption.

(2) The total price paid.

(3) A statement that the property is subject to the right of redemption, indicating the applicable redemption period.

Comment. Section 729.040 continues the substance of a portion of subdivision (a) of former Section 700a. See also Sections 729.030 (redemption period), 729.080 (deed issued upon expiration of redemption period).

045/054

§ 729.050. Notice of right of redemption

729.050. If property is sold subject to the right of redemption, promptly after the sale the levying officer who conducted the sale shall serve notice of the right of redemption on the judgment debtor. Service shall be made personally or by mail. The notice of the right of redemption shall indicate the applicable redemption period.

Comment. Section 729.050 supersedes the first sentence of subdivision (b) of former Section 700a. See Section 729.030 (redemption period).

404/204

§ 729.060. Deposit of redemption price

729.060. (a) A person who seeks to redeem the property shall deposit the redemption price with the levying officer who conducted the sale before the expiration of the redemption period. If a successor in interest to the judgment debtor seeks to redeem the property, the successor in interest shall, at the time the redemption price is deposited, file with the levying officer either (1) a certified copy of a recorded conveyance or (2) a copy of an assignment or any other evidence of the interest verified by an affidavit of the successor in interest or of a subscribing witness thereto.

(b) The redemption price is the total of the following amounts, less any offset allowed under subdivision (c).

(1) The purchase price at the sale.

(2) The amount of any assessments or taxes and reasonable amounts for fire insurance, maintenance, upkeep, and repair of improvements on the property.

(3) Any amount paid by the purchaser on a prior obligation secured by the property to the extent that the payment was necessary for the protection of the purchaser's interest.

(4) Interest on the amounts described in paragraphs (1), (2), and (3) at the rate of interest on money judgments from the time such amount was paid until the date the deposit is made.

(c) Rents and profits from the property paid to the purchaser or the value of the use and occupation of the property to the purchaser may be offset against the amounts described in subdivision (b).

Comment. Subdivision (a) of Section 729.060 supersedes the first paragraph of former Section 702 and portions of former Section 705. Under Section 729.060, the redemption price is deposited with the levying officer whereas under former Sections 702-704 the judgment debtor or redemptioner could pay the redemption price directly to the purchaser or earlier redemptioner. Under paragraph (4) of subdivision (b), interest on the amounts comprising the redemption price is at the legal rate (see Section 685.010) whereas it was two-thirds of one percent per month in the case of redemption from the purchaser under former Section 702.

Subdivision (c) is derived from the second sentence of former Section 707 pertaining to rents and profits and codifies the rule in *House v. Lala*, 214 Cal. App.2d 238, 245-46, 29 Cal. Rptr. 450 (1963), pertaining to the value to the purchaser of the use of the premises. If these amounts are not offset, they may be recovered as provided in Section 729.090.

405/001

§ 729.070. Disagreement on redemption; summary proceeding

729.070. (a) If the purchaser and the person seeking to redeem the property disagree on the redemption price or as to whether the person is entitled to redeem the property, or if the purchaser refuses the tender of the redemption price pursuant to Section 729.080, the person seeking to redeem may file a petition with the court for an order determining the redemption price or whether the person is entitled to redeem the property. The petition shall be filed before the expiration of the redemption period. At the time the petition is filed, the petitioner shall deposit the undisputed amount of the redemption price with the levying officer, if deposit has not previously been made, and give written notice to the levying officer of the filing of the petition.

(b) The petition shall be in writing and shall include the following statements:

(1) The amounts demanded to which the person seeking to redeem objects and the reasons for the objection.

(2) Any amounts offset to which the purchaser objects and the justification for such offset.

(3) The status of the petitioner that qualifies the petitioner to redeem the property. A copy of the papers required by subdivision (a) of Section 729.060 shall be filed with the petition.

(c) The hearing on the petition shall be held not later than 20 days after the date the petition was filed unless continued by the court for good cause.

(d) Not less than 10 days before the hearing, the person seeking to redeem the property shall personally serve on the purchaser a copy of the petition together with a notice of the time and place of the hearing.

(e) At the hearing on the petition, the person seeking to redeem the property has the burden of proof.

(f) At the conclusion of the hearing, the court shall determine by order the amount required to redeem the property. The determination shall be made upon affidavit or evidence satisfactory to the court.

(g) If an amount in addition to that deposited with the levying officer is required to redeem the property, the person seeking to redeem shall, within 10 days after the issuance of the order, pay such additional amount to the levying officer.

Comment. Section 729.070 is derived from the second paragraph of former Section 702 but makes several modifications of the former procedure made necessary by the provision for offsetting certain amounts under Section 729.060 and the elimination of the option of paying the redemption price directly to the purchaser. See Section 729.060 and the Comment thereto. Under Section 729.070, the redemption price is deposited with the levying officer just as under Section 729.060, whereas under former Section 702 the deposit was made with the clerk in the case of a disagreement. Notice of the filing of the petition must be given to the levying officer to prevent issuance of a deed of sale under Section 729.080 at the expiration of the redemption period.

405/183

§ 729.080. Issuance of deed of sale or certificate of redemption;
tender of deposit

729.080. (a) If the redemption price is not deposited pursuant to Section 729.060 before the expiration of the redemption period, or if no additional deposit is made pursuant to subdivision (g) of Section 729.070 before the expiration of the time therein provided, the levying officer

who conducted the sale shall promptly execute and deliver to the purchaser a deed of sale that complies with the requirements of Section 701.670.

(b) If the person seeking to redeem the property deposits the redemption price pursuant to Section 729.060 or 729.070 during the redemption period, the levying officer shall tender the deposit to the purchaser. If the purchaser accepts the tender or if the redemption price determined by court order is tendered, the levying officer shall promptly execute and deliver a certificate of redemption to the person seeking to redeem and shall immediately thereafter record a duplicate of the certificate in the office of the recorder of the county where the property is located.

(c) Tender of the redemption price determined by court order or agreed upon by the purchaser and the person seeking to redeem the property is equivalent to payment. If the tender is refused, the levying officer shall deposit the amount tendered with the county treasurer of the county where the property is located, payable to the order of the purchaser. If the amount deposited is not claimed by the purchaser, or the legal representative of the purchaser, within five years after the deposit is made, by making application to the treasurer or other official designated by the county, it shall be paid into the general fund of the county.

(d) Except as provided in subdivision (e), upon redemption the effect of the sale is terminated and the person who redeemed the property is restored to the estate therein sold at the sale.

(e) Liens extinguished by the sale as provided in Section 701.630 do not reattach to the property after redemption and the property that was subject to the extinguished lien may not be applied to the satisfaction of the claim or judgment under which the lien was created.

Comment. Section 729.080 is new. If no redemption takes place within the redemption period applicable under Section 729.030 or as extended by Section 729.070(g), subdivision (b) requires the levying officer who conducted the sale to issue a deed to the purchaser. If the property is redeemed, subdivision (b) requires the levying officer to tender the deposit to the purchaser and issue a certificate of redemption if the tender is accepted or is in the amount of the redemption price as determined by the court under Section 729.070. Under former law, redemption could take place without going through the levying officer, although written notice of redemption was required to be given to the levying officer and recorded. See the third paragraph of former Section 703 and former Section 704. Formerly, if the judgment debtor redeemed, the person receiving payment issued and recorded a certificate of redemption.

See the sixth paragraph of former Section 703. The last redemptioner was formerly "entitled to a sheriff's deed." See the fourth paragraph of former Section 703.

The first sentence of subdivision (c) continues the former rule that tender was equivalent to payment which applied where the judgment was payable in a specified kind of money. See the last clause of the last sentence of former Section 704. However, under subdivision (c), tender is not equivalent to payment where the parties disagree on the redemption price and the price has not been determined by a court order. The remainder of subdivision (c) is new.

Subdivision (d) continues the substance of the last sentence of the fifth paragraph of former Section 703, with the exception noted.

Subdivision (e) changes the prior rule that liens subordinate to that under which the sale was held reattach upon redemption by the judgment debtor or a successor in interest. See *Call v. Thunderbird Mortgage Co.*, 58 Cal.2d 542, 548, 375 P.2d 169, 25 Cal. Rptr. 265 (1962). The prior rule that upon redemption by the judgment debtor the judgment lien under which the property was sold reattaches for the amount of the deficiency is also not continued. See *Moore v. Hall*, 250 Cal. App.2d 25, 29, 58 Cal. Rptr. 70 (1967). Only unsatisfied liens that are superior to the lien on which the property is sold survive the sale, whether or not there is a redemption. This encourages the judgment creditor and subordinate lienholders to protect their interests by looking to the property sold. See Sections 701.630 (extinction of liens upon sale), 726(c) (preservation of lien of record where lienholder not made a party to action). Subdivision (e) makes clear that once a lien is extinguished a lien may not be created on the same property to enforce the same claim or judgment. Hence, for example, a judgment creditor whose judgment lien is extinguished may not again record the judgment to create a lien on the same property, nor may the judgment creditor obtain an execution lien by levy of a writ of execution on the property.

405/190

§ 729.090. Rents and profits; entry of purchaser; waste

729.090. (a) From the time of the sale until a redemption, the purchaser is entitled to receive from the person in possession the rents and profits from the property or the value of the use and occupation of the property.

(b) Notwithstanding subdivision (a), the purchaser is liable to the person who redeems for any rents or profits that have been received by the purchaser pursuant to subdivision (a).

(c) The purchaser, from the time of sale until redemption, is entitled to enter the property during reasonable hours to repair and maintain the premises and is entitled to an order restraining waste on the property from the court. Such order may be granted with or without notice in the discretion of the court.

Comment. Section 729.090 is based on former Sections 706 and 707 and the second sentence of the first paragraph of former Section 702. If there is a tenant on the property under a lease which preceded the lien under which the property was sold, the purchaser at the sale acquires only the lessor's reversionary interest and right to rents, and the tenant may remain in possession during the term of the lease. However, the purchaser is entitled to receive the rents from the property or the reasonable value of the use of the property. Such amounts are a credit on the redemption price (see Section 729.060) or may be recovered after redemption as provided in subdivision (b). If the purchaser is in possession of the property during the time between the sale and the redemption, the person who redeems is entitled to receive the reasonable value of the occupation and use of the property. *House v. Lala*, 214 Cal. App.2d 238, 245-46, 29 Cal. Rptr. 450 (1963); *Christensen v. Forst*, 153 Cal. App.2d 465, 471-72, 314 P.2d 746 (1957). The provisions of former Section 707 extending the redemption period pending the determination of rents and profits are not continued. Former Section 707 provided a special procedure to resolve disputes concerning the existence and amount of a similar credit but provided for ultimate resort to an action for an accounting. Rents and profits that are not offset pursuant to Section 729.060(c) or determined pursuant to Section 729.070 may be recovered in an action.

Subdivision (c) is drawn from former Section 706 and the second sentence of former Section 702. The determination of what constitutes waste is no longer specified in the statute. This determination should be made by a court in light of the facts of the case. The person in possession may be liable for waste. Cf. Section 732 (liability of tenant for waste); *American Sav. & Loan Ass'n v. Leeds*, 68 Cal.2d 611, 614 n.2, 440 P.2d 933, ___ n.2, 68 Cal. Rptr. 453, ___ n.2 (1968).

EXHIBIT 2

STAFF DRAFT

AMENDMENTS TO ASSEMBLY BILL NO. 798

Amendment 1

On page 44, between lines 22 and 23, insert:

(e) If a deficiency judgment is waived or prohibited, the property shall be sold as provided in Section 716.020. If a deficiency judgment is not waived nor prohibited, the property shall be sold subject to redemption as provided in Sections 729.010 to 729.090, inclusive.