THE POPULIST JUDICIARY: MORTGAGES, USURY, TAXATION AND AGRARIAN REFORM

by

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"We want the accursed foreclosure system wiped out . . . . The people are at bay, let the blood-hounds of money who have dogged us thus far beware," shouted Mary Elizabeth Lease. Although undoubtedly caught up in the momentum of her own rhetoric, Populists knew exactly what she was talking about--mortgage indebtedness, usury and taxation. Farther to the West, in Washington, John R. Rogers expressed that same Populist sentiment when he wrote, "The money dealers by their management cause misery, failure, disease, crime and death with greater certainty and more culpability than the slaveholders of the past . . . ." Although Rogers, too, was overstating his case, no Populist would deny that thousands of farms were being lost every year. Kansas' Senator William A. Peffer, however, explained the economic situation best for Populists when he said, "The people's homes are slipping away from them. We're fast becoming a nation of renters."[1]

Although the members of the People's party were prepared to revise the mortgaging, lending, and taxing procedures, Populists also recognized the ultimate success of the agrarian reform movement would depend upon the response of the courts. Consequently, they hoped the election of Populist-endorsed candidates to the judiciary would make that branch of government more responsive to the general welfare. Before the agrarian revolt faded, Populists in Kansas, Nebraska, Idaho, Washington, and Minnesota elected nine men to their state supreme courts. Each Populist-endorsed justice would have the occasion to rule on mortgage regulation, usury, and taxation--issues of vital concern to the People's party. The response of the Populist-endorsed justices to these aspects of the economic system indicate whether the People's party was able to express its reform philosophy and achieve party goals through the judiciary.[2]

The first indication of how a Populist justice in Kansas stood on mortgage regulation came in 1895, after the Kansas legislature passed legislation which gave farm debtors some relief during mortgage foreclosure. The statute, passed in 1893, provided for a real estate redemption period of eighteen months after the foreclosure sale with the stipulation that if a court found the land had been abandoned by the debtor, the period of redemption was shortened to six months from the date of sale. During the first twelve of those eighteen months, the owner had exclusive rights to redemption instead of six

months as the old law provided; for the next six months creditors could redeem from each other. The terms of the redemption were reimbursement of the amount the creditor paid plus interest and the costs of the suit. After redemption the property was no longer subject to claims of creditors who had failed to press for settlement of their liens during the redemption period.[3]

Difficulties in enforcing the act arose when debtors asserted the law was retroactive in order to claim the benefits of a longer redemption period for mortgages entered into prior to passage of the law. A debtor tested this contention before the Kansas State Supreme Court after his property had been foreclosed and ordered sold under the terms of the old law. The court held the legislature had not intended the more lenient statute to apply to previously made mortgage contracts. Under the old law the purchaser was given actual possession of the property immediately after foreclosure and sale of the mortgaged premises. After that the debtor had no right, title, or possession of the property. The court reasoned the new law, in allowing the debtor to possess his property after sale for the length of the redemption period, actually established for the owner of the mortgaged property "an estate of several months more than obtained by him under the former law, with the full right of possession, and without paying rents, profits, or taxes." In the court's opinion, the new law "substantially impaired" the obligations of previous mortgage contracts, and if applied retroactively, would reduce the value of mortgages since the purchaser of the property at a mortgage sale could not collect rents or possess the property for eighteen months after the sale. If the act were applied to past contracts, it would be unconstitutional because no statute could be designed to interfere with existing contracts unless expressly declared by new legislation. The court directed the lower courts to "apply new legislation only to future cases, unless there [was] something . . . which show [ed it was] intended to have retroactive operations."[4]

Populist Justice Stephen H. Allen did not agree with the majority decision. He argued that because the law did not expressly prohibit its application to prior contracts, the legislature had intended it to be retroactive. Nor did he believe that parties to a contract had a vested interest in the law under which the contract was made. If that were the case, those parties would be superior to the legislature; the creditors, then, and not the legislature would be supreme in making and influencing laws. Allen further claimed that the redemption law did not take away any rights nor impair the obligations of contracts if applied retroactively. While the old law required that lands seized and ordered sold must first be appraised by three householders and then sold for at least two thirds of the appraisal, the new law relieved the debtor of the expense of an appraisal, allowed a speedy sale, and permitted the debtor to redeem the land any time within one year. Therefore, the law seemed to him "eminently just and commendable." Although Populists agreed with Allen's reasoning, debtors who assumed mortgage obligations prior to 1893 could still lose title to their property upon a judgment sale.[5]

Two years later, though, Kansas Populist received retroactive protection under the real estate redemption law when Populist-endorsed Chief Justice David Martin joined Allen in overturning the case of Watkins v. Glenn. As a result, the redemption law of 1893 was applied to both future and existing contracts--an action which greatly aided the debtor. For that effort, both the Republican party and Martin's friends condemned him. Neither were able to account for the "maggott of Populism which appeared to have entered his brain," and his political enemies charged that he saw better political prospects in the Populist party and was preparing to "flop" to that organization. Martin was certainly well in tune with Populist philosophy because he insisted that "the common people are clamoring for equity not law." Most people in Kansas, he said, had borrowed money when times were prosperous, but with high interest rates and an insufficient supply of money in circulation the debtors were on "the verge of being driven from their homes . . . and they demand [ed] relief regardless of ethical construction of law." He also maintained, "The judge who is bold enough to give mortgage bound people the benefit of the doubt in law's interpretation will be sustained by the masses." While this advocacy of judicial Populism won him the continued support of the People's party, the Topeka Journal noted the Republican party showed a "readiness to knife him on all sides if the chance should offer." William Allen White's Emporia Gazette reprinted an article from the Atchison Globe, Martin's hometown newspaper, indicating Republican hostility to his decision when the party charged the ruling was a "Populist decision pure and simple." Martin's decision was short-lived though because the United States Supreme Court overruled it the same year, holding that "any such modification of a contract by subsequent legislation against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution." Martin knew, the Globe reported, that the federal Supreme Court would reverse him and that "ninety out of every hundred lawyers were against him," but he upheld the law anyway.[6]

Several years later (1899) Kansas' Populist Chief Justice Frank Doster also voiced sentiments on behalf of debtors when he dissented with the court's ruling that a mortgage was considered a title to the land and not merely a security. In disagreeing Doster accused the court's majority of having "fallen into error" and argued that "a mortgage [was] merely a security and vest [ed] no estate whatever in land." Such reasoning was exactly what the Populists wanted to hear, but in 1899 few Kansans still rallied to the Populist banner.[7]

Litigation concerning real estate redemption also came before the Washington State Supreme Court when a morigage was foreclosed to secure a note for $1,500 bearing 6 percent interest per annum. The mortgage contract contained stipulations which provided that land could be sold on execution to the highest bidder without appraisal,

required that the debt be paid only in gold, and permitted the purchaser to possess the property during the one-year redemption period. These provisions were contrary to Washington law which in part prohibited foreclosed properties from being sold for less than 80 percent of their appraised value, permitted property sold for 80 percent of the appraised value to satisfy the full mortgage debt, and allowed the sale of only a portion of the property appraised at 80 percent if that amount would satisfy the debt in full. Nevertheless, the majority of the court found the mortgage contract provisions constitutional much to the displeasure of Populists in the state.[8]

Populist-endorsed Justice James B. Reavis disagreed with the decision, though, arguing that property had to be appraised before it could be foreclosed. He contended it was "universal knowledge" in Washington that property sold under execution was simply sacrificed by the owner because the "severe financial stringency and absolute dearth of money in general circulation [had] destroyed the value of real property . . . ." Populists knew that as such sales the only bidder was often the judgment creditor who bid as little as he chose. Consequently, the mortgagee could purchase property worth three times the value of what he bid for it, and a deficiency judgment was still left against the mortgagor for the balance of the debt. Reavis believed the legislature had passed legislation in 1897 to prevent those abusive practices against the debtor. Judge Reavis also viewed regulation of mortgage contracts as constitutional because "mortgages [had] been the subject of legislative control both in terms of contract and in the procedure enforcing the mortgage contract throughout history." However, he did not think that debts could be satisfied by any kind of lawful money; only the federal government could prescribe what was considered legal tender for the payment of private contracts. This was, of course, beneficial to creditors because mortgage contracts usually required that the loan be paid back in gold. With that exception, Reavis was clearly advocating the Populist cause for greater protection for debtors who had mortgaged their property.[9]

Several months later the Washington court upheld the rights of a redeemer to recover a portion of his property after foreclosure and sale. That ruling resulted from a farmer's suit to recover one of four tracts of land that he had lost in foreclosure proceedings. The mortgagee had purchased the farm property in four separate tracts but denied the farmer the right to redeem only one of them claiming that if one tract were separated from the others it would destroy the value of the remaining three tracts. The court, objecting to that reasoning, asserted that since the mortgagee had purchased the property in parcels the land could be redeemed separately. Again Populists could take heart that Reavis was supporting the interests of the debtors. Redemption of foreclosed property did not extend, however, to recovery of rents and profits which the purchaser earned

during the redemption period. The Court maintained that the right to rents and profits of real estate sold on execution was a matter of "legislative favor." Therefore, rents and profits were legally granted to the purchaser at the time of the property sale whether the bidder was a party to the contract of indebtedness or not.[10]

Debtors who faced mortgage foreclosure in Idaho also won court protection, although it was a procedural victory and not a basic reform decision. The case originated when the Vermont Loan and Trust Company brought action to foreclose a mortgage executed to a husband and wife; the husband could not be located so the suit was brought against his wife. The mortgaged premises were sold, and when the redemption period expired, a deed was issued to the mortgagee. When the wife refused to vacate the property, the county filed for a writ to compel her to leave, which the district court granted. Populist-endorsed Justice Ralph P. Quarles found this foreclosure procedure "astounding" for the company did not state the exact sum due on the loan, and since the property was considered community property (held by both husband and wife) the control of the property was in the hands of the husband so no action could be taken against his wife. Quarles termed the entire proceeding a "comedy of errors" and reversed the district court's ruling. Certainly that decision did not support the freedom of women to enter into contracts on an equal basis with their husbands, but it did protect at least some debtors from foreclosure.[11]

Two years later (1899), the Fidelity Savings Association, a Colorado corporation doing business in Idaho, brought action against a Pocatello boilermaker to foreclose and secure payment on a loan. In order to secure a $650 loan the worker mortgaged three lots and agreed to subscribe for twelve shares of Association stock which had a face value of $1,200. The principal was due in ten years at 6 percent interest, and a premium was levied on the shares of stock. The interest and premium were to be paid monthly until the note was paid in full. If any payment lapsed for sixty days, the entire principal was due at once if the Association demanded it.[12]

The boilermaker defaulted on his payments and the case eventually reached the Idaho Supreme Court; Justice Quarles again delivered the opinion and with a sense of outrage asserted it was "strange that men [would] resort to so many schemes to oppress and extort unconscionable gains from their fellow-men, who by reason of poverty or misfortune [were] compelled to borrow money." After reviewing the terms of the mortgage contract Quarles maintained it required "a great degree of intelligence, much sharpness, and keen shrewdness, to devise means and schemes to rob the unwary and unsuspecting debtor by extorting from him unsurious interest . . . yet such shrewdness [was] always accompanied by an absence of moral integrity or common honesty which [did] not appeal very strongly to the judge . . . whose duty is [was] to follow the law

in administering equity." Nonetheless, the court allowed the foreclosure to stand, but it was modified so that extraordinary attorney's fees were deducted from the suit and awarded to the defendant. Thus, while Quarles was sympathetic to the plight of the debtor, the technical aspects of the law took precedence over the need to protect the debtor from unreasonable contracts. Much in contrast to Martin in Kansas, Quarles favored law over equity in giving relief to debtors. Populists, of course, preferred equity.[13]

In Nebraska the mortgage problem became an early target for agrarian reformers. There, the law required the sheriff to appoint two appraisers to assess the value of land before it could be foreclosed and sold; and, in order for the sale to be legal, the property had to sell for at least two-thirds of the appraised value. However, during the first half of the 1890s due to the financial panic there was no market for the property. During those years if appraisers valued the land in terms of the expected future rise in land prices, a sale for two-thirds of the appraised value would often satisfy the debt owed. However, if they did not appraise the property in that manner and agreed that the land could be sold for the amount the mortgagee would bid, the debtor would be left with a large deficiency judgment. In response to the latter practice the 1897 Popocratic legislature tried to prevent deficiency judgments in foreclosure cases. Populists believed if the mortgagee purchased the land, his bid should satisfy the debt no matter what the amount of the bid or debt. Creditors, however, insisted that if only property could be taken to satisfy the mortgage, the entire credit system of Nebraska would be destroyed. Nonetheless, the legislature passed an act which prohibited the deficiency judgments.[14]

Several months after that legislation had been enacted a district court faced a foreclosure case based upon default. The property was sold by decree, but the sale price was insufficient to pay off the debt and the foreclosure costs. The plaintiff applied to the court for a deficiency judgment; he was refused so he brought his case before the state supreme court for review. The mortgagee contended that even though the act of 1897 prohibited deficiency judgments, the mortgage contract in question had been made prior to passage of the law and thus did not fall under that prohibition. Populist-endorsed John J. Sullivan, with Populist Justice Silas A. Holcomb concurring, agreed and asserted the act preventing the mortgagee from receiving a deficiency judgment was a violation of the Constitution because it impaired the obligations of previous contracts. Two years later, Sullivan and Holcomb maintained their position when they supported the court's opinion on a similar case holding that the law of 1897 which prohibited deficiency judgments had "no application to real estate mortgages executed before the passage of the act." Significantly, then, the two Populist-endorsed justices failed to support a basic demand of the

People's party.[15]

The Minnesota, Nebraska, and Idaho Supreme Courts also addressed the closely related problem of usury. The first such occasion came in Minnesota (1893) in response to a mortgage foreclosure. In order to receive a $20,000 loan an individual took a mortgage on his real estate, paid 7 percent interest each year on the loan, and provided the mortgagee with a bonus of $1,000 and additional services worth $500. When the plaintiff failed to make his payments, the mortgage was foreclosed. The mortgagor contested the contract as being usurious and brought the case before the high court. The court, including Justice Daniel Buck, believed the apparent usurious nature of the contract was illegal and ordered the interest on the note computed on the $18,500 actually loaned rather than on the $20,000 that the mortgagor had requested but had not received. As a result, Populists could take some satisfaction that usury would no longer go unchecked in Minnesota.[16]

In Nebraska at the turn of the century Justice Sullivan, with Holcomb concurring, also struck a blow against the usurious practices of loan agents. Their decision was a result of action brought to foreclose a real estate mortgage because of default of payments. Sullivan, in reviewing the details of the suit, noted that interest at the rate of 10 percent per annum was charged against the principal of the loan plus a 3 percent commission for the loan agent and an additional fee to cover the expense of making the loan. Sullivan ruled that if the money extracted for the mortgagor for bonuses or commissions were added to the highest legal rate of interest, the loan was usurious and could not be upheld. Had this ruling come a decade earlier, Nebraska Populists would have heralded the decision. In 1902, however, the People's party was little more than a memory.[17]

Justice Quarles in Idaho, also held that interest charges above 10 percent per annum were usurious and ruled that loan companies operating in the state had to be licensed. Although this practice brought the loan agencies under a measure of state regulation which was agreeable to the Populists, Quarles reasoned the statute requiring the licensing was not passed to protect the public or the borrower, nor to prevent loaning money at interest, but rather for the purpose of raising revenue. Thus, to loan money at interest without first procuring a license was to perpetrate a fraud against the public treasury. Such practice was prohibited.[18]

Another primary concern of the People's party was the need to increase taxation of railroad lands. The Populists believed farm lands were perennially overtaxed while railroad property was underassessed for taxation purposes but overvalued for establishing rates. Tax exemptions were nothing new; they were based on longstanding state and local precedents which stemmed from attempts of states, counties, and towns to lure industry and transportation facilities

into their localities. Unfortunately for local coffers, the railroads delayed taking patents on their grants in order to avoid even minimal taxation. As a result, the railroads did not bear their share of the tax burden and left the settlers to pay for the expenses incurred for public improvements and local government. At the same time, because of those improvements, railroad lands increased in value. Western settlers wanted the railroads to take titles to their lands so their grants could be assessed and taxed as soon as possible and residents of the frontier tried to place a heavy tax burden on the railroad passing through their area when the property could be taxed. The railroads studied those tax levies and assessment procedures and were quick to protect their properties by claiming the sanctity of property in the courts. Consequently, the taxation policies for railroad lands became as important in arousing the western farmer to demand reform as inequitable rate structures.[19]

The Minnesota Supreme Court was the first to deal with this matter when it was asked whether lands granted to the St. Paul and Duluth Railway Company were subject to taxation on the same basis as the other lands in the state. The lands in question had been acquired, in part, from the state in 1861 and 1865 to aid in the construction of the railway. The federal government also had granted some land to the railroad in 1864, and the following year the Minnesota legislature passed an act exempting railroad lands from taxation until that property was sold or leased. That act further provided that the railway company should pay the state treasury a percentage of its gross earnings in lieu of property taxation. Justices Daniel Buck and Thomas Canty concurred with the other members of the court in supporting the railroad ruling that "In the light of experience, it is probably very unfortunate that the legislature, in dealing with the various land grant railway companies, did not impose some reasonable limitation as to the time during which this immunity of granted lands from ordinary taxation should continue. But, if the state made injudicious contracts, the mistake is remediless now." This, of course, was not what Minnesota Populists wanted to hear.[20]

In Kansas the following year (1895) Justice Allen concurred with the opinion of the court which held that the Chicago, Burlington and Quincy Railroad Company was being unfairly assessed by Atchison city officials. The suit developed in July, 1893, when the state Board of Railway Commissioners assessed the railroad's property at its actual value. However, the city had assessed all other property at 25 percent of its true value and allowed the property to be taxed on that assessment. The railroad company paid the local tax on the basis of the 25 percent assessment and filed suit to enjoin the officials from collecting the remainder of the tax.[21]

The Kansas Supreme Court ruled the state constitution ordained the legislature to provide a "uniform and equal rate of

assessment and taxation." In order to provide for that uniformity, all property was assessed at its true value. The railway company, however, had been discriminated against because it had been required to pay four times the amount levied against the other property holders. The court acknowledged the tax inequity and granted the injunction against the collection of the unpaid tax. Although some Kansas Populists were vindicative against the railroads, Allen was not. Even though he was a member of the People's party, he did not use the occasion to criticize the railroads for past abuse or condone a greater tax levy for them than for the other property holders.[22]

The question must now be asked--To what extent did these justices act as Populists in regard to mortgages, usury and taxation? Clearly, the answer is they functioned primarily as judges and not as partisan representatives of the party that nominated and supported them for office. For the most part they were more concerned with property rights, the sanctity and inviolability of contracts, and legal procedures rather than with the partisan exercise of judicial power. They upheld limitations on the taxation of railroads because the law provided for those limitations. Usury was held unconstitutional, but the legal rate of interest was often 10 percent, which Populists still considered usurious. Populists wanted it reduced to 2 or 3 percent. Still, Justices Allen, Doster, and Martin of Kansas and Justice Reavis of Washington were sympathetic to the plight of the debtors and were willing to go on the record supporting the need for greater protection of property from foreclosure and loss. But that sympathy was not expressed in Populist rhetoric.

In retrospect, the conservative sentiment in these decisions was the continuation of the belief that law, as it developed in the early part of the nineteenth century, existed for the protection both of individual rights and property rights and that freedom of contract was a liberty which could not be violated without due process of law. The judiciary considered undesirable any extensive interference, on its part, with the economic order, and most of the Populist-endorsed justices on the state supreme courts adhered to that traditional philosophy. Consequently, the Populist-endorsed justices were more concerned with legal principles than with the rhetoric of the agrarian revolt. None of the judges used their respective benches as a form to champion Populist sentiments regarding mortgage foreclosure, usury and taxation. Political devisiveness never disrupted these courts. As a result, the benches, where Populist-endorsed judges sat as members, remained untainted by the intense partisanship characteristic of the agrarian revolt.

NOTES

[1]Elizabeth N. Barr, "The Populist Uprising," A Standard History of Kansas, II, ed. William E. Connelley (Chicago: Lewis Publishing Co., 1918), pp. 1150-51; John R. Rogers, Politics: An Argument in Favor of the Inalienable Rights of Man (Seattle: Allen Printing Co., 1893), p. 7; William A. Peffer, "The Passing of the People's Party," North American Review, 166 (January, 1898), 22.

[2]The nine Populist-endorsed justices were--Kansas: Stephen H. Allen (1893-1899); David Martin (1895-1897); Frank Doster (1897-1903); Nebraska: John J. Sullivan (1898-1904); Silas A. Holcomb (1900-1906); Idaho: Ralph P. Quarles (1897-1903); Washington: James B. Reavis (1897-1903); and, Minnesota: David Buck (1893-1899); and, Thomas Canty (1894-1899).

[3]Kansas, Session Laws of 1893, ch. 109; Kansas Farmer, March 15, 1893.

[4]Watkins v. Glenn et al., 55 Kas. 417 (1895); Between 1873 and 1894 J. B. Watkins located at Lawrence, Kansas, sold mortgages worth over $12,000,000. These mortgages were secured by western farms. See Allen G. Bogue, Money at Interest (Ithaca: Cornell University Press, 1955), p. 226.

[5]Ibid.

[6]Kansas Biographical Scrapbook, Vol. 6, p. 17, Kansas State Historical Society; Beverly v. Barnitz, 55 Kas. 466 (1895); Kansas City Journal, March 8, 1901; Topeka Journal, July 20, 1896; Beverly v Barnitz, 163 U.S., 118 (1895); Emporia Gazette, August 20, 1896.

[7]Evans v. Kahr, 60 Kas. 719 (1899).

[8]Dennis v. Moses, 18 Wash. 537 (1897-1898); Washington, Session Laws of 1897, pp. 70, 91, 98, 227.

[9]Ibid.

[10]State of Washington v. Carpenter, 19 Wash. 378 (1898); Wilson v. Would, 21 Wash. 398 (1899).

[11]Vermont Loan and Trust Co. v. McGregor, 5 Idaho 510 (1896-1898).

[12]Fidelity Savings Association v. Shea, 6 Idaho 405 (1898-1900).

[13]Ibid.

[14]Addison E. Sheldon, "The Deficiency Judgment: A Story of the Nebraska Nineties, The Farmers' Alliance and the Supreme Court," Nebraska History, 13 (October-December, 1932), 291-93; Nebraska, Session Laws of 1897, ch. 95.

[15]Burrows v. Vanderberg, 69 Neb. 43 (1903); Daniels et al. v. Mutual Benefit Life Insurance Co., 73 Neb. 257 (1905).

[16]Smith et al. v. Parsons et al., 55 Minn. 520 (1893).

[17]Hare v. Winterer et al., 64 Neb. 551 (1902).

[18]Stevens v. Home Savings and Loan Assn., 5 Idaho 741 (1896-1898); Vermont Loan and Trust Co. v. Hoffman, 5 Idaho 376 (1896-1898).

[19]Hallie Farmer, "The Railroads and Frontier Populism," Mississippi Valley Historical Review, 13 (December, 1926), 392; Leslie E. Decker, Railroads, Lands, and Politics (Providence: Brown University Press, 1964), pp. 10, 124, 233, 250, 293-94; Mary E. Lease, The Problems of Civilization Solved (Chicago: Laird and Lee Publishers, 1895), p. 282; Paul W. Gates, Fifty Million Acres: Conflicts over Kansas Land Policy, 1854-1890 (New York: Atherton Press, 1966), pp. 264, 266, 272; Addison E. Sheldon, Land Systems and Land Policies in Nebraska, Publications of the Nebraska State Historical Society (Lincoln, 1936), p. 98.

[20]State of Minnesota ex rel. Marr. v. Luther, 56 Minn. 157 1894).

[21]Chicago, Burlington and Quincy Railroad Co. v. The Board of Commissioners of Atchison County et al., 54 Kas. 781 (1895).

[22]Ibid.