

1960

## Mortgages--Redemption after Foreclosure Sale in Missouri

Larry D. Dingus

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Larry D. Dingus, *Mortgages--Redemption after Foreclosure Sale in Missouri*, 25 Mo. L. REV. (1960)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol25/iss3/3>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## MORTGAGES—REDEMPTION AFTER FORECLOSURE SALE IN MISSOURI

LARRY D. DINGUS\*

### I. INTRODUCTION

In general, a foreclosure sale under a mortgage or deed of trust completely cuts off the mortgagor's or grantor's equity of tardy redemption, and the purchaser at such sale acquires absolute title to the mortgaged property. Typically, foreclosure in Missouri is accomplished by a nonjudicial sale. As to realty, the deed of trust with power of sale in the trustee is the preferable and most common security device, although the realty mortgage with power of sale in the mortgagee is used occasionally. The most common chattel security device is the chattel mortgage with power of sale in the mortgagee. This general effect of mortgage foreclosure, that the purchaser gets absolute title, applies equally, with minor exceptions, to each of the above mentioned security devices and methods of foreclosure.

Although the foreclosure sale theoretically extinguishes the equity of tardy redemption,<sup>1</sup> the mortgagor or persons claiming interests thereunder may be permitted to redeem after the sale by reason of special circumstances attending such sale. Missouri legislation provides for a limited statutory right to redeem at any time within one year from the date of sale in the case of a realty deed of trust where the holder of the note is purchaser at the trustee's foreclosure sale.<sup>2</sup> The statute further requires the redeeming party to give certain notice of his intention to redeem if the note holder becomes purchaser, and to post a bond within a certain time after the sale. Because of its limited application and strict requirements, the statutory right to redeem is seldom exercised in Missouri.

A more important exception to the conclusive effect of foreclosure is an equitable doctrine in Missouri allowing the mortgagor or persons claiming interests under him to invoke equitable jurisdiction, to set aside the sale and to redeem where there have been certain irregularities in the conduct of

---

\*Third year law student; B.S., University of Missouri, 1956.

1. §§ 443.280, .290, .410, RSMo 1949.

2. §§ 443.410-.440, RSMo 1949; 1950 WASH. U.L.Q. 423; 1950 WASH. U.L.Q.

the foreclosure sale. The doctrine is supported by a long line of Missouri cases, discussed below, which define the various grounds entitling the injured party under a mortgage or deed of trust to equitable relief. This Comment is primarily concerned with those irregularities in the conduct of the foreclosure sale which constitute sufficient grounds to set aside the sale. The cases indicate no important distinction between chattel mortgages and realty deeds of trust or realty mortgages; however, these situations have been classified separately for the purpose of explanation. The following material is not primarily concerned with cases interpreting Missouri legislation on the subject of mortgage foreclosure. Unless otherwise indicated, the reader may assume that there has been sufficient default under the security device to entitle the mortgagee to foreclose the mortgage or deed of trust. The terms mortgagor and grantor are used interchangeably; the same is true as to the terms mortgagee and beneficiary.

In most cases the person against whom redemption is sought has notice of the alleged irregularity, and consequently it is not necessary to determine whether the foreclosure sale is void or voidable. In the rare case where redemption is sought from a bona fide purchaser for value, who takes free from unknown equities, the distinction between a void and a voidable foreclosure sale becomes significant.

## II. INADEQUACY OF CONSIDERATION

Missouri decisions strictly adhere to the doctrine that mere inadequacy of price at a foreclosure sale under a mortgage or deed of trust will not affect the validity of the sale, nor afford grounds for setting it aside, in the absence of fraud, unfairness or irregularity.<sup>3</sup> This doctrine, however, should be distinguished from the principle allowing redemption from a tax foreclosure sale on the sole ground of inadequacy of sale price. Mere inadequacy of consideration, as the sole ground in attacking a mortgage foreclosure sale, thus far has not been recognized by our courts of equity; however, the application of this principle in actual cases is not simple or clear.

Confusion arises by reason of an expressed exception to this principle. Cases usually qualify the doctrine to the effect that inadequacy of consideration, in itself, is not a sufficient ground to set aside a foreclosure sale *unless the inadequacy is so gross as to shock the conscience or moral senses*

---

3. All cases cited in footnotes 4 through 14 *infra* adhere to this doctrine.

of the court, warranting an inference of fraud or imposition.<sup>4</sup> Normally, the latter qualification is inserted in the decision as a bare statement without clarification as to its application. Thus, the issue arises as to what sale price will be considered grossly inadequate, justifying an inference of fraud or imposition. Since the foreclosure sale is involuntary and often occurs during times of depression, the property will seldom sell for its reasonable market value. Consequently, Missouri cases indicate that the courts will go to an almost unlimited extent in sustaining a foreclosure sale, even though the sale price would appear on its face to be grossly inadequate.<sup>5</sup> Such sales have

4. *Roberts v. Murray*, 232 S.W.2d 540 (Mo. 1950) [foreclosure sale price was not so grossly inadequate as to raise an inference of fraud or imposition];

*Wooldridge v. Dittmeier*, 190 S.W.2d 926 (Mo. 1945) [foreclosure sale price was not grossly inadequate where property sold for less than one-half its reasonable value];

*Cockrell v. Taylor*, 347 Mo. 1, 145 S.W.2d 416 (1940) [foreclosure sale price at trustee's sale was not grossly inadequate where property brought about one-fifth of the reasonable value of the land];

*Dranek Realty Co. v. Nathan Frank, Inc.*, 346 Mo. 187, 139 S.W.2d 926 (1940) [foreclosure sale price was not so grossly inadequate as to shock the conscience of the court and become evidence of fraud];

*Judah v. Pitts*, 333 Mo. 301, 62 S.W.2d 715 (1933) [property worth \$750 sold for only \$500 (67%), but the sale price was not so grossly inadequate as to raise an inference of fraud];

*Schwarz v. Kellogg*, 243 S.W. 179 (Mo. 1922) [a bid at trustee's foreclosure sale for one-third to one-fourth of the full value of the property was not grossly inadequate];

*House v. Clarke*, 187 S.W. 57 (Mo. 1916) [sale price was not grossly inadequate where land at trustee's sale, allegedly worth \$5,000, brought \$1,800 (36%)];

*Daggett Hardware Co. v. Brownlee*, 186 Mo. 621, 85 S.W. 545 (1905) [foreclosure sale price of \$200 for property worth \$1750 (11.4%) is not grossly inadequate, but added irregularities justified setting the sale aside and redemption];

*McDonnell v. De Soto Sav. & Bldg. Ass'n*, 175 Mo. 250, 75 S.W. 438 (1903) [foreclosure sale price of \$13,100 for property allegedly worth \$55,000 (23.8%) was not grossly inadequate];

*Meyer v. Kuechler*, 10 Mo. App. 371 (St. L. Ct. App. 1881) [land worth \$2000 to \$2500 brought \$650 (32.5% to 26%) at trustee's sale, but such consideration was not grossly inadequate];

*Million v. McRee*, 9 Mo. App. 344 (St. L. Ct. App. 1880) [trustee's sale price of \$5000 for property worth \$15,000 to \$18,000 (33.3% to 27.8%) was not grossly inadequate].

5. *Trotter v. Carter*, 353 Mo. 708, 183 S.W.2d 898 (1944) [foreclosure sale price of one-third to one-fourth of the alleged property value is not sufficient ground to set aside the sale, unless combined with other irregularity];

*Masonic Home v. Windsor*, 338 Mo. 877, 92 S.W.2d 713 (1936) [inadequacy of consideration, in itself, is not sufficient ground to set aside a trustee's sale where property with a reasonable market value of \$8000 sold for \$1000 (12.5%)];

*Webb v. Salisbury*, 327 Mo. 1123, 39 S.W.2d 1045 (1931) [held that the facts did not show a foreclosure sale price to be so inadequate as to justify setting aside the sale];

*East Ark. Lumber Co. v. Rainer & Connell Cotton Co.*, 324 Mo. 706, 24

been upheld where the price paid for the property was only one-half, one-third, one-fourth, one-fifth, or even one-twentieth of its reasonable market value at the time of sale. Dictum in a few cases, however, indicates that the sales were set aside mainly on the ground of gross inadequacy where the property sold for much less than its reasonable worth, but in each of those cases there were added irregularities which justified setting aside the sale.<sup>6</sup>

---

S.W.2d 1001 (1930) [fact that property worth \$20,000 was sold for \$1300 at a foreclosure sale, subject to a first mortgage of \$8000 (about 10.8%), did not warrant setting aside the sale];

Oakey v. Bond, 286 S.W. 27 (Mo. 1926) [that land sold under a trust deed brought only one-third of its value is not such inadequacy of price as to justify setting aside the sale on that ground alone];

Phoenix Trust Co. v. Holt, 312 Mo. 563, 279 S.W. 714 (1926) [where land reasonably worth \$12,000 brought only \$7000 (58.3%) at trustee's sale, the sale will not be set aside on the sole ground of inadequacy of price];

Anderson v. Taylor, 227 S.W. 84 (1920) [holder of a first trust deed purchased land for an inadequate price at a trustee's sale which was regular in other respects; fact that this purchaser resold shortly thereafter at a greatly increased price does not invalidate the sale, though an attempt was made to cover the nature of the transaction by use of a straw];

Roby v. Smith, 261 Mo. 192, 168 S.W. 965 (1914) [fact that property sold at a trustee's sale for not more than one-fourth its value did not invalidate the sale];

Betzler v. James, 227 Mo. 375, 126 S.W. 1007 (1910) [fact that property worth \$6400 was sold for \$275 (4.3%) at a trustee's sale, which was regular in other respects, was not sufficient ground for setting aside the sale];

Prather v. Hairgrove, 214 Mo. 142, 112 S.W. 552 (1908) [where land estimated to be worth \$1,000 to \$1,500 was sold at trustee's sale for \$832 (83.2% to 55.5%), there was no evidence of inadequacy of price];

Markwell v. Markwell, 157 Mo. 326, 57 S.W. 1078 (1900) [mere fact that land brought about one-third of its value at a trustee's foreclosure sale is not such an inadequacy of price as to justify a court's setting aside the sale on that ground alone];

Keith v. Browning, 139 Mo. 190, 40 S.W. 764 (1897) [property admittedly worth \$1800 sold for \$500 (27.8%) at a trustee's sale; mere inadequacy of price, unaccompanied by fraud or unfair dealing, is not sufficient ground for setting aside the sale and permitting redemption];

Lipscomb v. New York Life Ins. Co., 138 Mo. 17, 39 S.W. 465 (1897) [property reasonably worth \$35,000 in normal times was sold for \$21,000 (60%) at trustee's sale during a depression; equity will not set aside the sale on that ground, because the court cannot be made the instrument of speculation as to future property value even for benefit of the unfortunate];

Maloney v. Webb, 112 Mo. 575, 20 S.W. 683 (1892) [a sale under a trust deed will not be set aside on the sole ground that the price paid was only half the value of the property];

Carter v. Abshire, 48 Mo. 300 (1871) [the rule that mere inadequacy of consideration is no ground for setting aside a sale applies to a sale of land under a trust deed in 1864 for \$1600, the purchaser selling it in 1866 for \$5000 (32%)].

6. Hoffman v. McCracken, 168 Mo. 337, 67 S.W. 878 (1902) [land worth \$4500 was sold for \$40 (.9%); the sale was set aside mainly on the ground of inadequacy of price, but there were other equitable grounds justifying the court's setting aside the sale];

Holdsworth v. Shannon, 113 Mo. 508, 21 S.W. 85 (1893) [inadequacy of price (\$121 for land worth \$400, 30.2%) was sufficient to justify setting aside a trustee's

As a practical matter, it is very doubtful that Missouri courts would set aside a foreclosure sale and permit redemption on the sole ground of inadequacy of consideration. There are no Missouri cases setting aside such sales on the sole ground of gross inadequacy of price, warranting an inference of fraud or imposition.

The second qualification to the main doctrine is the well-settled principle that inadequacy of price, although not sufficient alone, is sufficient ground to set aside a foreclosure sale when combined with any other circumstance showing unfairness, fraud or even stupid sale management resulting in sacrifice of the property.<sup>7</sup> These added circumstances, discussed more fully in following sections, may consist of chilled bidding,<sup>8</sup> unusual hour of sale,<sup>9</sup> collusion or conspiracy between the parties,<sup>10</sup> trustee's abuse

sale at suit of beneficiary; in addition, the sale was held at an unusual hour];

Vail v. Jacobs, 62 Mo. 130 (1876) [sale was set aside and grantor allowed to redeem where property worth \$5,000 to \$8,000 brought \$1,000 (20% to 12.5%) at a trustee's sale; there were additional grounds justifying redemption].

7. Roberts v. Murray, *supra* note 4 [inadequacy of price, absent fraud and unfair dealing, is not sufficient to set aside sale];

Wooldridge v. Dittmeier, *supra* note 4 [where the sale was lawfully made and rightfully conducted with full opportunity for competitive bidding, the sale will not be set aside on the ground of mere inadequacy of price];

Trotter v. Carter, *supra* note 5 [inadequacy of price when combined with any other circumstances showing unfairness, fraud or even stupid management resulting in sacrifice of the property will justify setting aside the sale];

Dranek Realty Co. v. Nathan Frank, Inc., *supra* note 4 [sale must be set aside altogether where there is fraud or unfair dealings in connection with inadequacy of price];

Masonic Home v. Windsor, *supra* note 5 [fraud or unfair dealings in connection with inadequacy of sale price will justify setting aside sale];

Reynolds v. Kroff, 144 Mo. 433, 46 S.W. 424 (1898) [where there was no fraud in conduct of sale and every effort was made to make the land bring its highest value, mere inadequacy of price will not avoid a trustee's sale];

Keith v. Browning, *supra* note 5 [inadequacy of price, unaccompanied by fraud or unfair dealings, is not sufficient ground for setting aside a sale under a mortgage or deed of trust];

Montgomery v. Miller, 131 Mo. 595, 33 S.W. 165 (1895) [inadequacy of sale price combined with other equitable grounds will justify equity setting aside the sale and permitting mortgagor to redeem];

Harlin v. Nation, 126 Mo. 97, 27 S.W. 330 (1894) [inadequacy of price may be combined with other grounds for setting aside sale and permitting redemption];

Landrum v. Union Bank, 63 Mo. 48 (1876) [in the absence of proof showing unfairness or fraud or collusion between the parties to a trustee's foreclosure sale, or that a higher price could have been obtained, the mere fact that the property was sold at a sacrificed value will not invalidate the sale].

8. Wooldridge v. Dittmeier, *supra* note 4; Cockrell v. Taylor, *supra* note 4; McDaniel v. Sprick, 297 Mo. 424, 249 S.W. 611 (1923); Betzler v. James, *supra* note 5; Hoffman v. McCracken, *supra* note 6.

9. West v. Axtell, 322 Mo. 401, 17 S.W.2d 328 (1929); Hanson v. Neal, 215 Mo. 256, 114 S.W. 1073 (1908); Montgomery v. Miller, *supra* note 7; Holdsworth v. Shannon, *supra* note 6; Stoffel v. Schroeder, 62 Mo. 147 (1876).

of discretion,<sup>11</sup> mistake and surprise,<sup>12</sup> lulling the mortgagor into a false sense of security,<sup>13</sup> improper sale in bulk or parcels<sup>14</sup> or some other fraud or misdealings. Whether or not equity will set aside the sale and permit redemption depends upon the facts in each particular case.

### III. UNUSUAL HOUR OF SALE

Ancillary to the preceding doctrine is the principle that inadequacy of consideration combined with an unusual hour of sale affords sufficient ground to have the sale set aside and permit redemption.<sup>15</sup> As discussed above, inadequacy of sale price will usually be an attendant circumstance at most forced foreclosure sales. What constitutes an unusual hour of sale will depend upon the facts in each particular case.

Missouri has detailed legislation requiring advertisement of the time

10. *Webb v. Salisbury*, *supra* note 5; *Chas. Green Real Estate Co. v. St. Louis Mut. House Bldg. Co.*, 196 Mo. 358, 93 S.W. 1111 (1906); *Hardwicke v. Hamilton*, 121 Mo. 465, 26 S.W. 342 (1894); *Landrum v. Union Bank*, *supra* note 7.

11. *Roberts v. Murray*, *supra* note 4; *West v. Axtell*, *supra* note 9; *Middleton v. Baker*, 262 Mo. 398, 171 S.W. 328 (1914); *Vail v. Jacobs*, *supra* note 6; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245 (St. L. Ct. App. 1878).

12. *Schwartz v. Kellogg*, *supra* note 4.

13. *Daggett Hardware Co. v. Brownlee*, *supra* note 4.

14. *Montgomery v. Miller*, *supra* note 7; *Hardwicke v. Hamilton*, *supra* note 10.

15. *West v. Axtell*, *supra* note 9 [sale for inadequate consideration at an "unusual hour," plus other equitable grounds, should be set aside on grounds of common fairness and justice];

*Lunsford v. Davis*, 300 Mo. 508, 254 S.W. 878 (1923) [where trustee, among other things, made sale at "unusual hour," and the property was bid in for \$100,000 short of its actual worth, the court properly set aside the sale];

*Hanson v. Neal*, *supra* note 9 [trustee's foreclosure sale will be set aside at suit of beneficiary, where sale was held at an "unusual hour" (11:15 a.m. when usual hour was 1:00 p.m. to 3:00 p.m.) after beneficiary had requested sale at later hour, and in addition the sale price was grossly inadequate];

*Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S.W. 773 (1901) [where foreclosure sale is disapproved for inadequacy of price or "unusualness of hour," it is customary to set aside the sale altogether, and not merely to permit redemption from the purchaser];

*Montgomery v. Miller*, *supra* note 7 [trustee's foreclosure sale was held at an "unusual hour" (11:00 a.m. when usual hour was between 1:00 p.m. and 2:00 p.m.), land was sold in bulk instead of parcels and sale price was inadequate; sale was set aside and redemption permitted];

*Holdsworth v. Shannon*, *supra* note 6 [sale at "unusual hour" of 11:00 a.m. when usual hour was 1:30 p.m., together with inadequate price, were sufficient grounds for setting aside trustee's sale at suit of beneficiary];

*Stoffel v. Schroeder*, 62 Mo. 147 (1876) [where there was an "unusual hour" of sale at 11:00 a.m. instead of 12:00 noon and an inadequacy of sale price, the trustee's sale should be set aside and redemption permitted].

when the foreclosure sale is to be held.<sup>16</sup> *Judah v. Pitts*<sup>17</sup> held that a notice designating the time of sale as "Monday, the 30th day of December, 1929,"<sup>18</sup> but not specifying the hour or between what hours of the day the sale was to be held, is substantial and sufficient compliance with the statutory requirements. The court stated that this would be true in the absence of evidence that the sale was held at an unusual hour or that any interested persons or prospective bidders were misled or prevented from attending the sale. Thus, there is no requirement in Missouri that the sale be advertised to be held at a specific hour or between certain hours.

The case of *Missouri Fire Clay Works v. Ellison*<sup>19</sup> held that where a deed of trust requires the time of sale to be stated in the advertisement and the advertisement calls for a sale between 9:00 a.m. and 6:00 p.m., but the trustee's deed does not recite that the sale was made between those hours, the failure to so recite does not per se avoid the trustee's deed. An absence of such recital in the trustee's deed will not imply that the sale was made outside the specified hours; however, the deed is voidable if the sale was not in fact made between the advertised hours.

In the absence of a provision in the security device requiring that the sale be advertised to be held at a certain hour or between certain hours, and in the absence of such advertisement, local custom governs the time when the foreclosure sale should be held.<sup>20</sup> Where such sales are customarily held sometime between the hours of 12:00 noon and 3:00 p.m. in front of the county courthouse door, a sale at either 11:00 a.m. or 4:00 p.m. would constitute an unusual hour and would be defective.

As a practical matter, the security device may provide that the sale should be advertised to be held between 9:00 a.m. and 5:00 p.m.; whereas, the customary or usual hour of sale may be between 12:00 noon and 3:00 p.m. The tenor of Missouri cases indicates that even though the sale is advertised to be held between 9:00 a.m. and 5:00 p.m., a sale held at 9:01 a.m. would be defective because it is not held at a usual or customary hour (*i.e.* between 12:00 noon and 3:00 p.m.).

The importance of holding the foreclosure sale at the customary hour is to insure that the largest possible number of interested bidders will at-

---

16. § 443.320, RSMo 1949.

17. 333 Mo. 301, 62 S.W.2d 715 (1933).

18. *Id.* at 309, 62 S.W. at 719.

19. 30 Mo. App. 67 (St. L. Ct. App. 1888).

20. Cases cited note 15 *supra*.



tend the auction in order to obtain the best possible sale price. The case of *Hanson v. Neal*<sup>21</sup> held that, in the absence of a request from the interested parties, holding the sale at an unusual hour is itself a badge of fraud. In *Montgomery v. Miller*<sup>22</sup> the property was sold at an unusual hour, in bulk instead of parcels, for an inadequate price, and the plaintiff's entire interest in the property sacrificed thereby. The court held that, while no one of these facts would of itself afford ground for setting aside the sale, yet, when all of them are found concurrently, the sale should be set aside and redemption permitted. All of the Missouri decisions appear to be in accord with this view. None of the above cited cases involve foreclosure sales set aside on the sole ground that the sale was held at an unusual hour. Apparently, the party attacking the sale, to invoke equitable jurisdiction and relief, must show substantial injury, such as inadequacy of consideration, in addition to the mere fact that the sale was held at an unusual hour.

#### IV. SALE IN BULK OR PARCELS

Frequently, mortgaged property is susceptible to being divided into parcels for the purpose of a foreclosure sale, rather than being sold as a single unit. This is particularly true in the case of realty which is situated as separate tracts of land or susceptible to subdivision into lots. The same principle of parceling, discussed in a following section, applies to chattels. Whether or not the mortgaged property should be sold in bulk or parcels usually depends upon which mode of sale will obtain the highest price. Also, foreclosure should include only so much of the mortgaged property as is necessary to satisfy the mortgage debt. The cases cited below deal exclusively with the trustee's nonjudicial sale, since the deed of trust is the primary realty security device used in this state.

Missouri courts uniformly hold that the mere fact that property conveyed by a deed of trust is sold under the deed in mass is not per se sufficient to induce a court of equity to set aside the sale; there must also be some attendant fraud, unfair dealing or abuse by the trustee of the confidence reposed in him or some resulting injury from a sale made in this mode.<sup>23</sup> Such a sale in bulk is voidable only, not void, and will not be

21. 215 Mo. 256, 114 S.W. 1073 (1908).

22. 131 Mo. 595, 33 S.W. 165 (1895).

23. *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S.W. 193 (1904) [sale in bulk was upheld where the trust deed did not require otherwise, and the attacking party sought neither redemption nor equitable relief, but simply interposed the mode of sale as a defense to the purchaser's suit in ejectment];

*Lazarus v. Caesar*, 157 Mo. 199, 57 S.W. 751 (1900) [sale in bulk was upheld

set aside in the absence of showing that the property would have sold for a larger sum had it been sold in parcels, or that other damages resulted from the mode of sale.<sup>24</sup>

Consistent therewith, equity will set aside a foreclosure sale and permit redemption where the property, readily capable of division, is sold in bulk resulting in substantial injury to the aggrieved party.<sup>25</sup> Certainly, if the mode of sale is to be sufficient ground to justify relief, the attendant injury must result from the fact that the sale is made in bulk rather than parcels, or vice versa. Sacrifice of the mortgaged property at such sale is the usual attendant injury rendering the foreclosure defective.<sup>26</sup> In *Montgomery v. Miller*<sup>27</sup> the court held that the foreclosure sale should be set aside and the mortgagor permitted redemption where the sale was held at an unusual hour, the price was inadequate, and the 160 acres were sold in bulk, although the sale of 40 acres would have satisfied the debt. The court added that while no one of these facts would itself afford ground for relief, yet combined, the sale should be set aside and the mortgagor permitted to redeem. The case of *Lazarus v. Caesar*<sup>28</sup> held that where a tract of land has been divided into parcels or lots for separate use and enjoyment, the presumption is that the property will sell for more when sold in parcels at a trustee's sale than when sold in one piece. This inference arises because such sale will usually better correspond to the probable wants of the purchasers and their ability to purchase; however, the court further

---

where the trustee used wise discretion in selling the land to the highest bidder on the mass which price exceeded the aggregate of the bids on parcels];

*Snyder v. Chicago, S.F. & C. Ry.*, 131 Mo. 568, 33 S.W. 67 (1895) [mere fact that the property conveyed by a trust deed is sold in gross is not per se sufficient ground to avoid the sale];

*Chase v. Williams*, 74 Mo. 429 (1881) [sale in bulk upheld where the plaintiff had requested sale in parcels, but other interested parties demanded it be sold in bulk; the trustee complied with the latter request after concluding that it was best to sell in bulk];

*German Bank v. Stumpf*, 73 Mo. 311 (1880) [sale in bulk, in the absence of substantial injury, is valid and will not be set aside].

24. *Miller v. Evans*, 35 Mo. 45 (1864) [this case was overruled by *McKnight v. Wimer*, 38 Mo. 132 (1866)]; however, the criticism involved a different point of law].

25. *Tatum v. Holliday*, 59 Mo. 422 (1875) [trustee's sale was set aside and the mortgagor permitted to redeem where the property was susceptible of division and was sacrificed at a lower price in bulk than it would have brought in parcels];

*Goode v. Comfort*, 39 Mo. 313 (1866) [court set aside trustee's sale and permitted redemption where city property was sacrificed in bulk and would have brought more if sold in lots].

26. *Ibid.*

27. *Supra* note 22.

28. 157 Mo. 199, 57 S.W. 751 (1900).

stated that this is by no means a conclusive presumption. Ancillary thereto, *Baker v. Halligan*<sup>29</sup> held that when enough has been realized from the sale of a portion of the property covered by a deed of trust to pay the debt, the trustee's power to sell is at an end, and any further sale is a nullity. The latter principle will apply only where the mortgaged property is actually sold in parcels, rather than in bulk. The court in *Arman v. Smith*<sup>30</sup> held that the sale should be set aside where the trustee abused his discretion in selling the land in bulk at a sacrificed price. Under the special circumstances of that case the court held that an offer to redeem by the mortgagor was not indispensable. The trustee, as agent both of the grantor and beneficiary, had enabled the beneficiary to purchase the property in mass for half what it would have brought as parcels. It should be noted that the above cases involve only foreclosure sales rendered defective because the property was wrongfully sold in mass rather than parcels; these decisions further indicate that the same principle would permit setting aside the sale and redemption if the property were wrongfully sold in parcels rather than bulk.<sup>31</sup>

The rule is firmly established in Missouri that a trustee in selling land is the agent for both the creditor and debtor and must adopt the mode of sale, bulk or parcels, which is most beneficial to the debtor.<sup>32</sup> A provision in the trust deed requiring the property to be sold in bulk in case of default is valid, and the trustee's sale thereunder will not be set aside on the ground that the debtor was compelled to consent to have the provision inserted in the deed because he was in dire financial need, and could get the money from no one but the creditor.<sup>33</sup> However, in the absence of such a provision, the trustee must exercise *reasonable discretion* in determining whether the land should be sold in bulk or parcels.<sup>34</sup> Abuse of such discretion by the

---

29. 75 Mo. 435 (1882). See also *State ex rel. v. Yancy*, 61 Mo. 397 (1875) [as to the sale of town land susceptible of subdivision into smaller parcels or lots, where the proof shows that a less number would have satisfied the debt, the sale will be set aside on motion of parties whose rights are affected].

30. 156 Mo. 286, 57 S.W. 105 (1900).

31. *Tatum v. Holliday*, *supra* note 25.

32. *Ibid.*

33. *Dunn v. McCoy*, 150 Mo. 548, 52 S.W. 21 (1899); *Tatum v. Holliday*, *supra* note 25.

34. *Benton Land Co. v. Zeitler*, *supra* note 23 [in the absence of a provision in the trust deed requiring the trustee's sale to be in bulk or parcels, the mere fact that the land was sold in bulk will not vitiate the sale];

*Markwell v. Markwell*, 157 Mo. 326, 57 S.W. 1078 (1900) [where the trust deed did not require the trustee to subdivide the property before the sale, or to accept bids for parcels of the whole tract, he was not required to do so, especially when it brought more as a whole than was offered for it in parcels];

*Harlin v. Nation*, 126 Mo. 97, 27 S.W. 330 (1894) [where the property con-

trustee, resulting in substantial injury to the debtor, will entitle the debtor to have the sale set aside and permit him to redeem.<sup>35</sup> In the exercise of such discretion, the trustee, insofar as possible, should act in compliance with the request of the interested parties as to the mode in which the sale is to be held. However, if the complaining party has become ineligible as a bidder at the sale<sup>36</sup> or if the complaining party is one of several interested persons with conflicting requests,<sup>37</sup> then the court will scrutinize the entire transaction to determine whether the trustee exercised his discretion properly.

The above cases indicate that the usual mode of sale is in bulk rather than parcels. In the absence of a provision in the trust deed requiring a particular mode of sale and in case of doubt as to which mode should be adopted, the trustee should offer the property for sale in both parcels and bulk, striking the property off to the highest bidder under the particular mode which is most beneficial to the interested parties.<sup>38</sup>

sisted of one lot and was not susceptible to parceling, it was immaterial that the trustee sold the land in one lot without considering a sale in parcels];

Carter v. Abshire, 48 Mo. 300 (1871) [sale was upheld where the trustee exercised sound discretion in selling the property in mass, because it brought much more than it would have if sold in parcels];

Gray v. Shaw, 14 Mo. 341 (1851) [if the trustee sells the mortgaged land in lots, in the exercise of reasonable discretion, it constitutes no objection to the validity of the sale];

Kline v. Vogel, 11 Mo. App. 211 (St. L. Ct. App. 1881) [whether various houses covered by a trust deed should have been sold separately or together was a matter of discretion in the trustees];

Million v. McRee, 9 Mo. App. 344 (St. L. Ct. App. 1880) [where it was not feasible for the trustee to parcel the mortgaged property and no one requested sale by parcels, the trustee did not abuse his discretion in selling the property in mass, even though the trust deed authorized sale in parcels].

35. Kelly v. Hurt, 61 Mo. 463 (1875) [sale set aside; it was not necessary for plaintiff to allege and prove any fraud on the part of the officer making the sale, or on the part of the purchaser; the officer's duty to make the sale in parcels rather than bulk and resulting injury to plaintiff are sufficient grounds for relief].

36. Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S.W. 1095 (1900) [where the only party demanding that the property should be sold separately had become ineligible as a bidder because he had purchased it at a former sale and refused to pay that purchase price, and the property had always been treated as a single unit, a sale in bulk was proper].

37. Givens v. McCray, 196 Mo. 306, 93 S.W. 374 (1906) [sale was not set aside where the plaintiff requesting the sale be made in bulk instead of parcels was one of several owners of the land; the trustee did not abuse discretion in determining that a sale in bulk would better protect the interests of all parties].

38. Lazarus v. Caesar, 157 Mo. 199, 57 S.W. 751 (1900) [sale was upheld and trustee commended for offering the property for sale in both bulk and parcels and then adopting the method which left nothing to conjecture];

Hardwicke v. Hamilton, *supra* note 10 [sale upheld where trustee sold the

### V. LULLING MORTGAGOR INTO SENSE OF SECURITY

Although the power of nonjudicial sale in a deed of trust or mortgage affords a speedy and inexpensive foreclosure of the mortgagor's equity of redemption, its operation is subject to abuse. When the mortgagor has defaulted under the terms of the security device, the mortgagee is immediately entitled to initiate a nonjudicial mortgagee's<sup>39</sup> or trustee's<sup>40</sup> foreclosure sale as provided in such security device; the minimum notice under Missouri law is only twenty days.<sup>41</sup> Usually, statutory notice<sup>42</sup> by publication of the intended realty foreclosure sale is sufficient, and actual or personal notice thereof to the mortgagor is not necessary.<sup>43</sup> However, as a practical matter, actual notice should be given to the mortgagor if his whereabouts are known.

A situation frequently arises where the *mortgagee lulls the mortgagor into a sense of security* by promising, before or after the mortgagor's default, that foreclosure will not be exercised until some future time or occurrence. Thereafter, the creditor, without personal notice to, or knowledge of, the mortgagor, forecloses by a nonjudicial sale. Unless the mortgagor is afforded equitable relief in the nature of having the sale set aside and redemption, he not only may lose title to the property, but also may become personally

land in lump because he received no bids when offered in separate parcels];

Sumrall v. Chaffin, 48 Mo. 402 (1871) [trustee's sale in gross was upheld where it was made after trustee called for bids on parcels and got no bids].

39. § 443.290, RSMo 1949 provides in part that:

All *mortgages* . . . with powers of sale in the mortgagee, and all sales made by such mortgagee or his personal representatives, in pursuance of the provisions of such mortgages, shall be valid and binding by the laws of this state . . . (Emphasis added.)

40. § 443.410, RSMo 1949 provides in part that:

*Deeds of trust* . . . may . . . be also foreclosed by a trustee's sale . . . in the same manner and in all respects as in case of mortgages with power of sale . . . (Emphasis added.)

41. §§ 443.310-320, RSMo 1949.

42. *Ibid.*

43. Homan v. Connett, 348 Mo. 244, 152 S.W.2d 1053 (1941) [where notice, as given in real estate mortgage foreclosure proceedings, complies with the provisions of § 443.320, RSMo 1949, "notice" is sufficient and personal notice to the mortgagor respecting the sale is not necessary];

DeJarnette v. DeGiverville, 56 Mo. 440 (1874) [the deed of trust to secure the payment of a note contained an agreement that on default of payment the trustee, on giving the requisite notice, should proceed to sell the property to satisfy the debt; failure of actual notice to the maker will not invalidate the sale, because the notice required was not intended to apprise the grantor of the sale of the land, but was intended to notify the community that the sale would take place in order that bidders might be present to purchase the property; this case was criticized in Jones v. Manly, 58 Mo. 559 (1875)].

liable for any deficiency on the debt remaining after the sale.<sup>44</sup> It should be noted, however, that the mortgagor will not be permitted to redeem the land from a bona fide purchaser for value unless such a foreclosure sale is found to be absolutely void.

Fortunately, Missouri courts have attempted to balance this statutory problem by affording the aggrieved mortgagor the right in equity to attack such a foreclosure sale. In *Casper v. Lee*<sup>45</sup> the court, citing other Missouri cases adhering to this doctrine,<sup>46</sup> said:

*'When the mortgagee lulls the owner of the equity of redemption into a sense of security and then forecloses the mortgage, without giving actual notice to the owner, courts of equity have uniformly set aside the foreclosure sales.'* That is a correct statement of the law.<sup>47</sup> (Emphasis added.)

It is equally well-settled by Missouri decisions that the promise of the mortgagee need not be supported by valuable consideration, making it legally enforceable.<sup>48</sup> The cases indicate that the aggrieved mortgagor is

44. § 443.240, RSMo 1949 provides that where judgment has been rendered for the plaintiff with personal service on the mortgagor, then the plaintiff may levy on the mortgagor's other goods, chattels, lands and tenements in the event of a deficiency after the mortgaged property is sold.

45. 362 Mo. 927, 245 S.W.2d 132 (1952) (en banc).

46. *Shumate v. Hoefner*, 347 Mo. 391, 147 S.W.2d 640 (1941) [court set aside the foreclosure sale where the mortgagee lulled the owner of the equity of redemption into a sense of security and then foreclosed the deed of trust, without giving actual notice to such owner];

*Laundy v. Girdner*, 238 S.W. 788 (1922) [equity extended relief in an action to cancel a deed executed on foreclosure where defendant lulled the plaintiff into a sense of security by his promise to collect the rents and apply them to the debt and impressed plaintiff that he would not proceed against the property without at least notifying him];

*Daggett Hardware Co. v. Brownlee*, 186 Mo. 621, 85 S.W. 545 (1905) [equity set a foreclosure sale aside where the mortgagor thought the sale was to be postponed, was absent from town when the sale was made to procure money and had no knowledge of the sale; within a few days after the sale, the mortgagor tendered to the purchaser the amount of his bid, and tendered into court the amount of the debt];

*Clarkson v. Creely*, 35 Mo. 95 (1864) [court set aside trustee's sale where holder of note lulled the mortgagor into a sense of security by agreeing to take no steps toward foreclosure pending his consideration and acceptance or rejection of the mortgagor's proposition to pay in a particular manner; the foreclosure was thereafter made without notice to or knowledge of the mortgagor].

47. 362 Mo. at 942, 245 S.W.2d at 140.

48. *Starr v. Mitchell*, 361 Mo. 908, 237 S.W.2d 123 (1951) [where the creditor's "conduct" was such as to lead debtors to believe that he was acting in the protection and furtherance of all their mutual interests, equity and good conscience required the creditor to act in good faith with due regard to the interests of the debtors];

*Cassady v. Wallace*, 102 Mo. 575, 15 S.W. 138 (1891) [a "mere promise" by

not basing his cause of action on a valid contract, but is seeking equitable relief against conduct which is in the nature of *fraud*.<sup>49</sup> Furthermore, although the "agreements" are usually oral, the case of *Turner v. Johnson*<sup>50</sup> held that such "agreements" are not within the Statute of Frauds. Thus, Missouri courts uniformly set aside foreclosure sales on the ground that the mortgagee lulled the mortgagor into a sense of security and then foreclosed the mortgage without notice to, or knowledge of, the mortgagor.<sup>51</sup>

## VI. CHILLED BIDDING AT FORECLOSURE SALE

Missouri courts hold that irregular conduct of the trustee or mortgagee which results in suppressed bidding at the foreclosure sale is sufficient ground to invoke equitable jurisdiction, have the sale set aside and permit the mortgagor to redeem.<sup>52</sup> This is commonly referred to as *chilled bidding*. The cases indicate that the irregular conduct may consist of either collusion in the nature of fraud between the trustee or mortgagee and purchaser,<sup>53</sup> or

the trustee to give plaintiff personal notice before foreclosure sale, the plaintiff being in the process of negotiating a loan for refinancing, is sufficient ground for redemption where the sale was made without such notice];

*Carter v. Abshire*, 48 Mo. 300 (1871) [an "unenforceable promise" for extension of time which lulled the plaintiff into a sense of security would be sufficient ground to set aside sale; however, the promise had been fulfilled in this case];

*Rutherford v. Williams*, 42 Mo. 18 (1867) [a "gratuitous promise" is sufficient ground to attack a foreclosure sale where the mortgagor has been lulled into a false sense of security].

49. *Alfred v. Pleasant*, 175 S.W. 891 (Mo. 1915) [there may be relief for "fraud" where the holder of the debt secured by a trust deed told the debtors that they need not pay until he notified them; the trust deed was hereafter foreclosed without notice to or knowledge of the debtors];

*Hewitt v. Price*, 204 Mo. 31, 102 S.W. 647 (1907) [where a foreclosure sale was found to have been tainted with "fraud" because of a lulling situation, the lower court should have set the sale aside].

50. 95 Mo. 431, 7 S.W. 570 (1888).

51. See also *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S.W. 1006 (1904); *Parketon v. Schlueter*, 145 Mo. 55, 46 S.W. 1134 (1898).

52. See notes 53 and 54, *infra*.

53. *Krug v. Bremer*, 316 Mo. 891, 292 S.W. 702 (1927) [sale should be set aside where the trustee became hostile to plaintiff and sold to one for whom he subsequently negotiated a loan to pay the price, after stating it was a cash sale, refusing to let plaintiff bid];

*McDaniel v. Sprick*, 297 Mo. 424, 249 S.W. 611 (1923) [one who conspires to suppress bidding at a trustee's sale does not acquire good title, even though he subsequently acquires title from a successful and innocent bidder; the mortgagor may successfully maintain a suit to redeem];

*Borth v. Proctor*, 219 S.W. 72 (Mo. 1920) [collusion between the trustee and mortgagee, or managing the sale in a way to preclude competitive bidding, is cause for setting aside a trustee's sale];

*Hurst Automatic Switch & Signal Co. v. Trust Co.*, 216 S.W. 954 (Mo. 1919) [a contract between the holder of the note and the purchaser at the trustee's sale

abuse of discretion by the trustee or mortgagee.<sup>54</sup> The latter usually includes some defect in the advertisement of the sale, such as announcing erroneously that the title to the mortgaged property is clouded, which has a tendency to suppress bidding at such sale. The sale, however, will not be set aside unless the evidence in fact shows suppressed bidding.<sup>55</sup>

The question arises as to whether chilled bidding at the foreclosure sale renders the sale void or voidable. Apparently, the distinction is not too important in the ordinary case where a bona fide purchaser is not involved. Most of the recent cases merely hold that the remedy at law is inadequate

to suppress bidding is an unlawful agreement authorizing the owner of the equity of redemption to have the sale set aside];

Miles v. Popp, 192 S.W. 424 (Mo. 1917) [conspiracy between the trustee and purchaser at trustee's sale to prevent competition entitles the holder of the note to have the sale set aside where the land sold for less than its value];

Hanson v. Neal, 215 Mo. 256, 114 S.W. 1073 (1908) [collusion between trustee and bidders at trustee's sale was sufficient ground to have the sale set aside where the property sold for a grossly inadequate price];

Hendricks v. Calloway, 211 Mo. 536, 111 S.W. 60 (1908) [combination to depress bidding at a foreclosure sale leaves the land subject to redemption by the nonparticipating owners of the equity of redemption as against a purchaser who is a party to the combination];

Dwyer v. Rohan, 99 Mo. App. 120, 73 S.W. 384 (St. L. Ct. App. 1903) [a conspiracy between trustee and beneficiary, which results in purchase by the beneficiary at a nominal sum, will preclude the beneficiary's recovering a deficiency judgment from the mortgagor; redemption and setting aside the sale were not in issue];

Taylor v. Von Schroeder, 107 Mo. 206, 16 S.W. 675 (1891) [mortgagor's creditors can complain, but not a person with only a derivative interest, where the beneficiary purchased at a friendly foreclosure sale pursuant to an oral agreement that the beneficiary would reconvey to the mortgagor if the latter prevented neighbors bidding the price over the amount of the debt].

54. Guels v. Stark, 264 S.W. 693 (Mo. 1924) [mortgagor's equity of redemption was not foreclosed when the mortgagee suppressed bidding at the foreclosure sale by reason of the manner of description of the mortgaged property in advertisement and his statements at the sale];

Hoffman v. McCracken, 168 Mo. 337, 67 S.W. 878 (1902) [erroneous advertisement that the mortgaged property was subject to a first mortgage, which in fact prevented bidding, was sufficient to authorize the setting aside of the foreclosure sale; there were added grounds for the decision].

55. Sidwell v. Kaster, 289 Mo. 174, 232 S.W. 1005 (1921) [evidence held insufficient to show a conspiracy between the purchaser and one to whom he subsequently sold to keep down the price or to show that the price was so inadequate as to warrant a court of equity in setting the foreclosure sale aside];

Keiser v. Gammon, 95 Mo. 217, 8 S.W. 377 (1888) [trustee's sale was not set aside where the evidence did not sustain a finding that there had been fraud in preventing bidding or that the sale should have been in parcels instead of mass];

Goode v. Comfort, 39 Mo. 313 (1866) [foreclosure sale will not be set aside on this ground absent proof that bidding was actually deterred];

Sternberg v. Valentine, 6 Mo. App. 176 (St. L. Ct. App. 1878) [sale was not set aside where evidence did not show that trustee suppressed bidding at the foreclosure sale].



and that "chilled bidding" is sufficient ground to justify the equitable remedy sought. However, the old case of *Miltenberger v. Morrison*<sup>56</sup> held that:

there is no doubt that a sale of this kind may be set aside and avoided, as between the parties, and a re-sale of the property ordered, in a proper case, on the ground of a secret arrangement and fraudulent combination among bidders and parties for the purpose of enabling the purchaser to obtain the property at a reduced price.

Such arrangements are held to render the sale fraudulent and void, as a fraud upon the rights of the vendor and as against public policy . . . .<sup>57</sup> (Emphasis added.)

In this case, however, there was clearly a fraudulent combination to deter bidding. *Quaere* if the court would have declared the sale void where the suppressed bidding was due to some inadvertent irregularity of the trustee's conducting the sale.

#### VII. TRUSTEE AS PURCHASER AT FORECLOSURE SALE

As discussed in preceding sections, Missouri recognizes the validity of a power of nonjudicial sale exercised by a trustee of a realty deed of trust, a trustee of a chattel deed of trust, a mortgagee of realty or a mortgagee of chattels,<sup>58</sup> where such power is contained in the security instrument. In reference to the power of sale, the trustee may be distinguished from the mortgagee in that the former is not normally a debtor, a creditor or an interested party to the mortgage transaction. The trustee of a deed of trust with power of sale is placed in a position where he should act with impartial fidelity in looking to the interests of both debtor and creditor.<sup>59</sup> The issue arises as to the legal effect of a trustee's foreclosure sale where the trustee violates this duty of impartial fidelity by purchasing the property, directly or indirectly, for himself.

Unquestionably, a trustee in a deed of trust may not, either directly or indirectly, without the consent of the person owning the beneficial interest, purchase the property at his own foreclosure sale. And if he does in

---

56. 39 Mo. 71 (1866).

57. *Id.* at 78.

58. §§ 443.290, 410, RSMo 1949. The power of sale of a trustee under a chattel deed of trust is not expressly provided for by statute; however, its existence has never been denied and may be implied from §§ 443.460-490, RSMo 1949.

59. *Wooldridge v. Dittmeier*, 190 S.W.2d 926 (Mo. 1945).

fact become the purchaser, he takes the chance that in some circumstances the transfer may be set aside even though made in good faith.<sup>60</sup> Where the trustee has in fact sold the land to himself, it is not required in order to avoid the sale that actual fraud be demonstrated.<sup>61</sup> Some Missouri courts emphasize the above doctrine by saying that "a trustee purchasing at his own sale, directly or indirectly, takes the property subject to redemption by the grantor in the deed of trust. The trust is not advanced."<sup>62</sup>

Whether a foreclosure sale will be set aside in a particular situation may depend upon whether a trustee's sale to himself is held to be void or voidable. Where the trustee buys the property at the foreclosure sale and later sells to a bona fide purchaser, the subsequent sale may cut off any equity of redemption unless the sale by the trustee to himself is absolutely void. Also, where the owner of the equity of redemption fails to do equity (*e.g.*, failing to make a tender as a condition precedent to seeking to have the sale set aside), the court might deny equitable relief unless such foreclosure sale is void. As indicated below, such a determination by Missouri courts will depend upon the particular facts in each case.

In *Northcutt v. Fine*,<sup>63</sup> citing other Missouri cases purported to support the same position,<sup>64</sup> the court stated: "Neither can a trustee, directly or indirectly, become the purchaser at his own foreclosure sale. Such a sale should be and is null and void." That statement has been taken out of the context of this particular case and cited to stand for the broad proposition that a purchase by the trustee at his own sale, in itself, renders the sale void.<sup>65</sup> A close examination of the facts of this case and the holdings of other Missouri decisions indicates that this general proposition is not the law in Missouri.

The *Northcutt* case involved an equitable action to set aside and to declare null and void a trustee's deed and foreclosure sale. The facts clearly indicate that the defendant-trustee defrauded the plaintiff-mortgagor

---

60. *Smith v. Haley*, 314 S.W.2d 909 (Mo. 1958).

61. *Pueblo Real Estate, Loan & Inv. Co. v. Johnson*, 342 Mo. 991, 119 S.W.2d 274 (1938); *Northcutt v. Fine*, 44 S.W.2d 125 (Mo. 1931); *Cummings v. Parker*, 250 Mo. 427, 157 S.W. 629 (1913); *Pollham v. Revelly*, 181 Mo. 622, 81 S.W. 182 (1904).

62. *E.g.*, *Jodd v. Lee*, 256 Mo. 536, 540, 165 S.W. 991, 992 (1914).

63. 44 S.W.2d 125, 128 (Mo. 1931).

64. *Duncan v. Home Co-op. Co.*, 221 Mo. 315, 120 S.W. 733 (1909); *Stark v. Love*, 128 Mo. App. 24, 106 S.W. 87 (St. L. Ct. App. 1907); *Thornton v. Irwin*, 43 Mo. 153 (1869).

65. See *Wise, Foreclosure by Power of Sale Inserted in a Mortgage or Deed of Trust*, 4 Mo. L. REV. 186, 189 (1939).

of his property by trickery and deceit. The court found that the defendant, the trustee, through the use of straw parties, was the original owner of the property, became the beneficiary under the deed of trust and was the purchaser at his own foreclosure sale. He also fraudulently and illegally collected a commission as real estate broker and appointed himself as trustee under the security device. Furthermore, he lulled the plaintiff into a false sense of security as to payment of the indebtedness and fraudulently foreclosed the deed of trust. Confined to the facts of this particular case, it would seem that the court was justified in holding that such a sale was *void* and should be set aside, revesting title in the plaintiff. None of the cases cited in this decision to uphold this position express any broad doctrine that a trustee's sale to himself, directly or indirectly, should be held void.<sup>66</sup>

The court's position in the *Northcutt* case has been greatly clarified by the later decision of *Gempp v. Teiber*.<sup>67</sup> That case involved an action at law for the balance due on a promissory note after there was credited on the note the net returns from a sale under a deed of trust securing the note. The plaintiff alleged that she was holder of the note, that the defendant mortgagor defaulted in the payment of principal thereon, that the property was sold by the trustee under the terms of the deed of trust and that a balance remained unpaid on the note for which the plaintiff should have judgment. The defendant, admitting the plaintiff's factual allegations to be true, alleged that the purchaser at the foreclosure sale was a straw man for the trustee, that the property was reasonably worth more than the value of the note, and that the plaintiff-beneficiary was also a straw for the trustee. After the pleadings had been filed, the plaintiff, admitting the truth of all facts well pleaded, filed a motion for judgment on the pleadings which was granted in the trial court. On appeal, one of the defendant's contentions was that where the trustee directly or indirectly becomes purchaser at his own foreclosure sale, the sale is *null* and *void*. The appellate court, noting that this was an action at law for the balance due on a promissory note, and not an action in equity to redeem, held that defendant's contention could not be sustained and affirmed the judgment of the trial court.

The decision in the *Gempp* case appears to be based on the grounds that it involved an action at law instead of an action in equity and that the foreclosure sale was *voidable*, not *void*. The court, referring to other cases

---

66. See cases cited in note 64 *supra*.

67. 173 S.W.2d 651 (1943).

in accord,<sup>68</sup> pointed out that where the mortgagee has the right to foreclose, the foreclosure sale passes legal title. An improper execution of the power of sale may be sufficient ground for a court of equity to set the sale aside; however, until it is set aside, it stands as a valid legal transfer of the title. At law the mortgagor ought to be barred from claiming damages resulting from the foreclosure sale as long as he permits it to stand as a legal conveyance of his title. His allowing it to stand and bringing an action at law thereon is in the nature of a collateral attack upon its validity. The court then forcefully stated: "Such a sale may be voidable in equity but it is not void in law. If he desires to challenge its validity (when it is voidable but not void), he should attack it directly and he can only do that by a suit in equity."<sup>69</sup>

Finally, the court distinguished the holding in this case from that of the *Northcutt* case, discussed above. The distinction set out was as follows:

In the case of *Northcutt v. Fine*, . . . the statement is made, 'Neither can a trustee, directly or indirectly, become the purchaser at his own foreclosure sale. Such a sale should be and is null and void.' But that was an action in equity to set aside a trustee's deed, and the statement had reference to such a case, and was only intended to be the holding that the trustee's deed would be held to be null and void in an equitable action by the obligor to redeem the property. And the case was cited as supporting the principle that 'such a purchase is not a nullity,' in the case of *Loeb v. Dowling*,<sup>70</sup> supra.<sup>71</sup> [Footnote 70 has been added by writer.]

The recent Missouri case of *Jackson v. Klein*<sup>72</sup> appears to be in accord with the principle that normally a foreclosure sale by a trustee to himself, directly or indirectly, will be declared, at law or in equity, merely voidable. Only under the special circumstances of a particular case and in an action in equity to set aside or redeem will such a sale be declared void. The *Jackson* case involved an equitable action to set aside a trustee's deed, a contemporaneously executed quitclaim deed and a subsequent warranty deed. The mortgagor executed a deed of trust on her real estate in 1948 to secure a \$600 promissory note. Evidence showed that the trustee there-

---

68. *Loeb v. Dowling*, 349 Mo. 674, 162 S.W.2d 875 (1942); *Peterson v. Kansas City Life Ins. Co.*, 339 Mo. 700, 98 S.W.2d 770 (1936).

69. 173 S.W.2d at 653.

70. *Supra* note 68.

71. *Supra* note 67, at 654.

72. 320 S.W.2d 553 (Mo. 1959).

after became holder of the note. Upon the mortgagor's default, the trustee, in 1950, foreclosed the deed of trust. The mortgagee originally named in the deed of trust purchased the property for \$494.86 as highest bidder at the trustee's sale. On the same day of the foreclosure sale the mortgagee-purchaser transferred the property to the trustee by a quitclaim deed. In effect, the trustee became an indirect purchaser at his own sale. Both the trustee's deed and the quitclaim deed were immediately recorded. In 1952, the Robinsons, through a real estate agent, purchased the property for \$2500 from the trustee, receiving a warranty deed therefor. The plaintiff made his claim as sole heir of the mortgagor. The trustee, mortgagee and Robinsons were made defendants in the equitable suit.

The trial court gave a judgment for the plaintiff. The court held that the trustee's deed was *voidable*, that the Robinsons had constructive notice of the contents of the trustee's deed and the quitclaim deed (irregularities giving the plaintiff the right to redeem), that they would have learned of such facts had they inquired and therefore that they were not bona fide purchasers without notice. The trustee's deed, the quitclaim deed, and the warranty deed were set aside. Ancillary thereto, the court made an award and adjustment between the parties of money damages. The Robinsons appealed this decision.

The Missouri Supreme Court reversed the lower court's decision as to the Robinsons and remanded the case. This decision rested upon the issue as to whether the defendant-Robinsons were bona fide purchasers without notice. On appeal the Robinsons had contended that the lower court erred in setting aside their transfer because the trustee's sale was voidable, not void, and that they were bona fide purchasers for value without notice of the plaintiff's right to redeem. In summation, the court stated that "as indicated, the Robinsons are bona fide purchasers without notice and for that reason the judgment as to them is reversed."<sup>73</sup> This holding, in itself, appears to sustain the argument that the sale was held to be voidable, not void. If the sale had been found to be void, the Robinsons would have acquired no interest under the transfer subsequent to that sale, even as bona fide purchasers without notice. The court expressly stated that a trustee may not, either directly or indirectly, purchase the property at his own foreclosure sale without the chance that in some circumstances the transfer may be set aside. The crucial language on the issue of voidability was set out as follows:

---

73. *Id.* at 559.

The relief granted, however, 'varies according to circumstances' . . . ; a purchase by the trustee is *voidable*, not void . . . , it may be affirmed or ratified by the acquiescence of the beneficial owner and the trustee may convey the property to a bona fide purchaser without notice. . . . This court has not set aside every purchase by a trustee for that reason alone and regardless of the attending circumstances.<sup>74</sup> (Emphasis added.)

It should be noted that both the *Gempp* case and the *Jackson* case involved situations where the trustee was or became holder of the promissory note. In the *Jackson* case the court pointed out that:

'In the absence of any fraud or misconduct, it is held or recognized by the great weight of authority that the validity of a deed of trust given as security for a debt, or the trustee's power of sale or foreclosure thereunder, is not affected by the fact that the trustee has an interest in the debt secured by the deed of trust, or is associated with one having such an interest.'<sup>75</sup>

Whether Missouri courts would distinguish a direct purchase by the trustee at his own sale from the above situations where he became an indirect purchaser through a straw party is not clearly indicated. However, both situations are usually referred to concurrently in the same sentence when the legal effect of such a sale is discussed; thus, it might be inferred that the situations would not be differentiated. There is ample authority, however, to support the position that in either event the sale is merely voidable.<sup>76</sup>

The trustee, after a fair sale to a stranger in compliance with the deed of trust, may deal with the property as any other stranger to the title, but equity will zealously scrutinize a repurchase by him.<sup>77</sup> Whether or not equity will sustain such a repurchase by the trustee or will set it aside will depend upon the particular facts in each case.

In conclusion, a trustee's exercise of a power of nonjudicial sale in compliance with the terms of a deed of trust will be sustained in Missouri so long as the power is exercised with sound judgment and impartial fidelity as to both debtor and creditor. A trustee's purchase, directly or indirectly, at

74. *Id.* at 556.

75. *Id.* at 557.

76. *Loeb v. Dowling*, *supra* note 68; *Giraldin v. Howard*, 103 Mo. 40, 15 S.W. 383 (1891); *Landrum v. Union Bank*, 63 Mo. 48 (1876).

77. *Mueller v. Becker*, 263 Mo. 165, 172 S.W. 322 (1914).

his own foreclosure sale is a violation of such fidelity which in some circumstances may be sufficient ground to have the sale set aside in equity. Normally, whether the suit is at law or in equity, such a sale will be declared voidable, not void. Where a stranger is purchaser, the fact that the trustee was or became holder of the promissory note does not affect the validity of a foreclosure sale which is otherwise valid. In general, after a foreclosure sale or after substitution of another trustee in compliance with the terms of the deed of trust, the trustee may deal with the property as any other stranger to the title; however, equity will scrutinize a subsequent purchase by him.

#### VIII. MORTGAGEE AS PURCHASER AT FORECLOSURE SALE

Whether or not the "mortgagee" can become purchaser, directly or indirectly, at a foreclosure sale depends upon whether the sale was conducted by a trustee with power of sale pursuant to the terms of a realty deed of trust or whether the sale was conducted by the mortgagee with power of sale pursuant to the terms of a conventional realty mortgage. In Missouri there is no statutory or other legal prohibition against the mortgagee-beneficiary becoming purchaser of the mortgaged property at an otherwise valid foreclosure sale in the former situation;<sup>78</sup> whereas, the latter situation constitutes an irregularity similar to the case where the trustee becomes purchaser at his own foreclosure sale.

The weight of authority in Missouri holds that the mortgagee with power of sale under a realty mortgage is a trustee as well as a creditor, and at his own sale he cannot become purchaser either directly or indirectly so as to cut off the equity of redemption. But such a sale is not void, as are sales by some other classes of trustees; it is good as to all the world and for all purposes, excepting only that the mortgagor still has the right to pay off the debt and redeem the land.<sup>79</sup> It is voidable. Such a sale is subject to the affirmation or avoidance by the mortgagor even though there is no actual

---

78. The validity of a trustee's foreclosure sale under a deed of trust where the mortgagee or beneficiary becomes purchaser appears to be so well settled in Missouri that the courts do not consider comment thereon necessary. There is, however, a limited statutory right to redeem under the realty deed of trust by reason of §§ 443.410-440, RSMo 1949.

79. *Girardin v. Howard*, *supra* note 76; *Holt Co. v. Harmon*, 59 Mo. 537 (1874); *Reddick v. Gressman*, 49 Mo. 389 (1872); *Allen v. Ranson*, 44 Mo. 263 (1869); *Thornton v. Irwin*, 43 Mo. 153 (1869); *Thornton v. Pigg*, 24 Mo. 249 (1857).

fraud or injury.<sup>80</sup> It has been held that the same disability to purchase at the foreclosure sale attaches to the agent of the mortgagee for collection of the debt.<sup>81</sup>

The Missouri decisions, however, recognize a limited exception to this broad principle prohibiting the mortgagee's buying at his own foreclosure sale. Where the interested parties to the sale of the mortgaged property assent, at a time before the sale is concluded, to the acquisition of title by the mortgagee, and after the sale concur in it, and there is no suspicion of fraudulent practice, the mortgagee may become the purchaser at his own sale.<sup>82</sup>

The courts often state that the rule prohibiting the mortgagee's purchasing at his own foreclosure sale is not intended to remedy the wrong, but to prevent its possibility, and applies where the mortgagee purchases through another as well as directly.<sup>83</sup>

#### IX. UNAUTHORIZED PLACE OF FORECLOSURE SALE

Missouri has a statute requiring that "all sales of real estate under a power of sale contained in any mortgage or deed of trust . . . shall be made in the county where the land to be sold is situated . . ."<sup>84</sup> In accordance therewith, the case of *Metropolitan Life Insurance Co. v. Coleman*<sup>85</sup> held that where a deed of trust covered noncontiguous parcels in two counties, a trustee's sale in one county of both parcels could not affect the title to the parcel in the other county; consequently, the mortgagor's equity of redemption in the land in the other county was not foreclosed, and he was permitted to redeem.

Although not required by statute, the parties by agreement usually stipulate in the realty mortgage or deed of trust that the place of foreclosure sale shall be "at the front door of the county courthouse . . . [in the county where the land is situated]."<sup>86</sup> Apparently, the main purpose of this added clause is to preclude ambiguity as to the place of sale and to insure

80. *Loeb v. Dowling*, 349 Mo. 674, 162 S.W.2d 875 (1942); *Pueblo Real Estate, Loan & Inv. Co. v. Johnson*, 342 Mo. 991, 119 S.W.2d 274 (1938).

81. *Gaines v. Allen*, *supra* note 79; *McNees v. Swaney*, 50 Mo. 388 (1872).

82. *Medsker v. Swaney*, 45 Mo. 273 (1873); *Moore v. Thompson*, 40 Mo. App. 195 (K.C. Ct. App. 1890).

83. *Byrne v. Carson*, 70 Mo. App. 126 (K.C. Ct. App. 1897).

84. § 443.310, RSMo 1949.

85. 99 S.W.2d 479 (Spr. Ct. App. 1936).

86. This clause is commonly found in the standard, printed forms of Missouri realty mortgages and deeds of trust. In St. Louis a form in common use called for a sale on the floor of the real estate exchange, but made express provision for an alternate place of sale.



specific notice thereof to all interested bidders. A problem arises when this provision is violated by the trustee's or mortgagee's conducting the foreclosure sale at a place other than is authorized in such a security instrument.

*Schanawerk v. Hobrecht*<sup>87</sup> is a leading Missouri case on this particular point. The deed of trust required that the foreclosure sale should be held "at the court house door in the county of Benton."<sup>88</sup> At the time of sale the courthouse had been torn down; the county court held sessions in a small building on the courthouse square and the circuit court held sessions in a church one block away. The trustee cried the sale at both buildings which was admittedly a violation of the contract provision in the deed of trust. Subsequent thereto, the plaintiff bought the property at another foreclosure sale and brought an action in ejectment against the mortgagor still in possession, claiming that he, not the purchaser at the first trustee's sale, had legal title. The Supreme Court of Missouri held that when a trustee makes a sale in a place not authorized by the deed of trust, the trust deed transfers legal title to the purchaser which is good as against a subsequent trustee's deed issued at another sale; that is so when the action is purely one at law and no equities are in issue. The court, *as dictum*, also stated that if the trustee, without a proper excuse, had made the sale in a place not authorized by the deed of trust and the first purchaser had brought an action of ejectment against the mortgagor, the mortgagor could have successfully defended with an offer to redeem on the ground that his equity of redemption had not been foreclosed. The court disapproved dicta in several other Missouri cases to the effect that such a sale was void at law as well as in equity.

The principle of the *Schanawerk* case appears to be that when a contract provision in a deed of trust as to place of sale is clearly violated by the trustee without a proper excuse, then the mortgagor's equity of redemption is not foreclosed and upon proper application he will be permitted to redeem. There is other Missouri authority in accord with this doctrine, especially when the trustee has also advertised the place of sale according to the terms of the security device.<sup>89</sup>

---

87. 117 Mo. 22, 22 S.W. 949 (1893).

88. *Id.* at 24, 22 S.W. at 949.

89. *Stewart v. Brown*, 112 Mo. 171, 20 S.W. 451 (1892). Where a deed of trust directs a sale "at the east courthouse door" and the courthouse is afterwards abandoned or destroyed, the sale may be made at the courthouse in use at the time of the sale. But where the circuit court is held in one building and the county and probate courts in a different building, and the trustee sells under a notice of sale

The word "courthouse," however, does not necessarily mean the building used as a courthouse when the parties executed the mortgage, but may include another building being used as the courthouse at the time of foreclosure. All of the following examples involve deeds of trust requiring that the place of foreclosure sale be at the courthouse door in the county where the land is situated. Where the courthouse is under repair or destroyed and the courts are holding sessions in a city building at the time of sale, a sale in front of the door of that building has been sustained.<sup>90</sup> Where the courthouse has moved to a different place since the execution of the deed of trust, the new location is the proper place to conduct the sale.<sup>91</sup> A sale held at the door of a new, but unfinished courthouse is valid where the county officers and court occupy various buildings and the sale is well attended with no evidence that any person is misled as to the place of sale.<sup>92</sup> In the absence of evidence to the contrary, testimony that the land has been sold by the trustee at the courthouse under the deed of trust is sufficient to warrant the jury's inferring that the sale was in conformity with the deed of trust.<sup>93</sup>

#### X. DEFECTIVE NOTICE OF FORECLOSURE SALE

Missouri has detailed legislation on the requirement of notice as to all sales of real estate under a power of sale contained in any mortgage or deed of trust.<sup>94</sup> No attempt is made herein to discuss the mortgagor's rights and remedies in the event of noncompliance with those statutory provisions. The parties to the security device can agree upon terms of notice more stringent than or in addition to the statutory requirements, and such terms are binding as a contract.<sup>95</sup> Space does not permit an enumeration of the various kinds of defective notices and the effect, in a court of equity, that each would be deemed to have upon a foreclosure sale.<sup>96</sup> However, in passing, the broad equitable doctrine appears to be well established in Missouri that

---

to be made "at the front door of the courthouse," the mortgagor may redeem from such sale on showing that both places were designated and known as the courthouse. It would seem however, that if the notice had designated one of such buildings the sale would have been valid. *Id.* at 172, 20 S.W. at 451.

90. *Riggs v. Owen*, 120 Mo. 176, 25 S.W. 356 (1894); *Maloney v. Webb*, 112 Mo. 575, 20 S.W. 683 (1892); *Hambright v. Brockman*, 59 Mo. 52 (1875).

91. *Napton v. Hurt*, 70 Mo. 497 (1879).

92. *David v. Hess*, 103 Mo. 31, 15 S.W. 324 (1891).

93. *German Bank v. Stumpf*, 73 Mo. 311 (1880).

94. § 443.310, 320, RSMo 1949.

95. *Martin v. Paxson*, 66 Mo. 260 (1877).

96. See Annotations, Vol. III, § 443.320, RSMo, State Ed. 1949, for briefs of many cases concerned with defective notice.

foreclosure of a mortgage on an insufficient advertisement of sale operates to transfer the legal title to the purchaser subject to the equity of redemption of the mortgagor.<sup>97</sup> On the other hand, the description of the land in the advertisement and trustee's deed may be so defective as to render a trustee's deed absolutely void, precluding the passage of legal title at the foreclosure sale.<sup>98</sup>

#### XI. SUBSTITUTE TRUSTEES AND TRUSTEE'S DELEGATION OF DUTIES

Usually, the deed of trust provides for a summary method of appointing a substitute trustee in the event of certain contingencies. The contingencies may be death of the trustee, absence of the trustee from the state, inability or refusal of the trustee to act, or other circumstances. The contract provision may provide that the substitute trustee shall be a named office holder, such as a sheriff, or it may provide that the substitute trustee shall be appointed by the mortgagee. Where the parties have so contracted, those provisions will have to be strictly adhered to. Under such circumstances it will not be necessary for the parties to resort to the statutory method of appointment of a substitute trustee, as discussed below.

Missouri legislation provides that if any trustee in any deed of trust to secure the payment of a debt or other liability becomes incompetent, disabled or otherwise refuses to act, any interested person may present an affidavit thereof to the circuit court of the county in which part or all of the property is situated.<sup>99</sup> If the court is satisfied that the facts stated in the affidavit are true, it shall make an order appointing the sheriff, or some other suitable person of the county, trustee to execute such deed of trust, in the

---

97. *Fancher v. Prock*, 337 Mo. 1119, 88 S.W.2d 179 (1935) [misleading description in notice of foreclosure of deed of trust, even though sufficient to convey legal title, may be ground for setting aside the sale, especially if the mortgagee is purchaser at an inadequate price];

*Snell v. Harrison*, 104 Mo. 158, 16 S.W. 152 (1891) [where the mortgagee omits to give proper notice of sale, whether directed by the power or not, the sale may be impeached in chancery];

*Price v. Blankenship*, 71 Mo. App. 548 (St. L. Ct. App. 1897) [foreclosure of a mortgage on an insufficient advertisement of sale operates to transfer the legal title to the purchaser, leaving the property in his hands subject to the equity of redemption on the part of the heirs of the mortgagor].

98. *Martin v. Kitchen*, 195 Mo. 477, 93 S.W. 780 (1906) [defective land description in deed of trust made the trustee's deed absolutely void, and the trustee passed no legal title at the trustee's sale];

*Lanier v. McIntosh*, 117 Mo. 508, 23 S.W. 787 (1893) [a foreclosure sale which does not pass legal title, owing to a misdescription of the land in the advertisement and deed, will not exhaust the power of sale in the mortgage].

99. § 443.330, RSMo 1949.

place of the original trustee; the appointed person is possessed of all the rights, powers and authority possessed by the original trustee, and this person shall do all acts the original trustee had power to do, "and with the same force and effect."<sup>100</sup>

Missouri courts uniformly hold that the trustee in a deed of trust to secure a debt occupies a position of great trust and confidence; he is agent of the owner of the property as well as owner of the secured debt; it is a personal trust; and he cannot delegate his powers calling for the exercise of judgment and discretion, except when the security device clearly gives him that authority.<sup>101</sup> It is well settled in this state that a sale of property under a power of sale in a deed of trust is not binding on the mortgagor unless the trustee was present at such sale or unless the deed empowered such trustee to delegate to another the power to sell; the mortgagor may redeem from a sale conducted by an agent of one of the mortgagees at which the original trustee was not present.<sup>102</sup> In the absence of a provision in the deed of trust authorizing a delegation of the power of sale to a substitute person, a foreclosure sale made by an agent of the trustee, the trustee not being present at the sale, is absolutely void.<sup>103</sup> Thus, the mortgagor could redeem even as against a bona fide purchaser for value.

## XII. FAILURE OF THE TRUSTEE TO POSTPONE OR ADJOURN THE FORECLOSURE SALE

The trustee has the right and duty to postpone or adjourn the foreclosure sale if necessary to prevent a sacrifice of the mortgaged property.<sup>104</sup> It has been held, however, that it is not a wrongful act to foreclose during a depression.<sup>105</sup>

*Meyer v. Jefferson Ins. Co.*<sup>106</sup> held that where the trustee in a deed of

100. § 443.340, RSMo 1949.

101. *Pollham v. Revelly*, 181 Mo. 622, 81 S.W. 182 (1904); *Cassady v. Wallace*, 102 Mo. 575, 15 S.W. 138 (1891); *Spurlick v. Sproule*, 72 Mo. 503 (1880); *Pickett v. Jones*, 63 Mo. 195 (1876); *Landrum v. Union Bank*, 63 Mo. 48 (1876); *Graham v. King*, 50 Mo. 22 (1872); *Markel v. Peck*, 144 Mo. App. 701, 129 S.W. 243 (Spr. Ct. App. 1910).

102. *Spurlick v. Sproule*, *supra* note 101.

103. *City of St. Louis v. Priest*, 103 Mo. 652, 15 S.W. 988 (1891); *Landrum v. Union Bank*, *supra* note 101; *Vail v. Jacobs*, 62 Mo. 130 (1876); *Howard v. Thornton*, 50 Mo. 291 (1872); *Graham v. King*, 50 Mo. 22 (1872); *Whittelsey v. Hughes*, 39 Mo. 13 (1866).

104. *West v. Axtell*, 322 Mo. 401, 17 S.W.2d 328 (1929); *Graham v. King*, *supra* note 103; *Million v. McRee*, 9 Mo. App. 344 (St. L. Ct. App. 1880).

105. *Peterson v. Kansas City Life Ins. Co.*, 339 Mo. 700, 98 S.W.2d 770 (1936).

106. 5 Mo. App. 245 (St. L. Ct. App. 1878).

trust, given to secure an indebtedness to a bank in which he was a stockholder and managing officer, had knowledge that the bank was ready and willing to pay five times the amount bid at the sale, he abused his discretion by striking the property off to the bank for the amount bid. Under such circumstances, where there are no other bidders, he should adjourn the sale and make a further effort to protect the debtor. Such a sale is fraudulent and should be set aside by a court of equity upon proper application.

In *Vail v. Jacobs*<sup>107</sup> the court took the position that where the property was sold at a trustee's sale for one-eighth to one-fifth of its value, the mortgagor will be permitted to redeem. The trustee had a clear duty to postpone the sale and await a more auspicious moment. Neither law nor parties intend that the trustee shall be a mere figurehead of the creditor and auctioneer. The trustee is placed in a position to act fairly by all interested, and when he fails his duty in this regard, the sale, upon timely application, will be set aside.

A similar position was taken in *Middleton v. Baker*.<sup>108</sup> Where a sale by the trustee was made for three or four per cent of the market value of the property and about eight per cent of the debt, the trustee was deemed obligated to resell the property, provided the bidders had not dispersed, or to re-advertise the property for sale at a future date. In addition to the above facts, the creditor was absent at the time of sale because he innocently mistook the hour at which the sale was to be held, but he appeared a few minutes after the sale and asked the trustee to set the sale aside.

When the purchaser to whom the property is struck off at a trustee's foreclosure sale fails to complete his purchase, the trustee must re-advertise the property for resale.<sup>109</sup> His obvious duty is to re-advertise and sell upon full notice, when the bidding would be open to competition and a fair price might be obtained.<sup>110</sup>

However, where there is no evidence that the mortgagor would have secured the money with which to meet the debt or interest, that postponement would have done him any good or that the property would have

---

107. 62 Mo. 130 (1876).

108. 262 Mo. 398, 171 S.W. 328 (1914).

109. *McClung v. Missouri Trust Co.*, 137 Mo. 106, 38 S.W. 578 (1897); *O'Fallon v. Kennerly*, 45 Mo. 124 (1869); *Dover v. Kennerly*, 38 Mo. 469 (1866).

110. *Judge v. Booge*, 47 Mo. 544 (1871).

brought a better price, the sale will not be set aside on the ground that the mortgagor's request for postponement was denied.<sup>111</sup>

### XIII. TRUSTEE'S ABUSE OF DISCRETION AND VIOLATION OF DUTIES—MISCELLANEOUS

A trustee in a deed of trust with power of sale to secure debts is agent of both the debtor and creditor and must act with strict impartiality and integrity.<sup>112</sup> The trustee is under a duty to act fairly and justly in selling the property to protect all parties.<sup>113</sup> He should adopt all reasonable modes of proceeding to render the sale beneficial to the mortgagor, and he cannot shelter himself under a literal compliance with the conditions of the power.<sup>114</sup> Equity has jurisdiction to control the acts of trustees under a deed to secure a debt, and where the powers conferred on the trustees are not strictly pursued, will set aside their sales.<sup>115</sup> In an action to set aside a foreclosure sale under a deed of trust, evidence showing that the trustee was hostile and wholly indifferent to any right of the mortgagor warrants setting aside the sale.<sup>116</sup> The mortgagor has the right to have the trustee's sale honestly conducted, so that the land will realize the best price possible to be applied to payment of the note.<sup>117</sup> In all cases where the trustee has been guilty of negligence, or fraud, resulting in a sale of the encumbered property below its value, such a sale, upon timely application to a court of equity, will be set aside.<sup>118</sup>

The case of *Potts v. Smith*<sup>119</sup> held that secret instructions by the note

111. *Dunn v. McCoy*, 150 Mo. 548, 52 S.W. 21 (1899);

*cf. Harlin v. Nation*, 126 Mo. 97, 104, 27 S.W. 330, 331 (1894) [the trustee should inform himself as to the value and situation of the property, so as to be able to determine whether it should be sold in a lump or in parcels, and so as to enable him to determine the question of "whether the sale should be adjourned or not"; but a trustee's failure to so inform himself is immaterial where the property consisted of one lot only and could not have been sold otherwise, and where adjournment of the sale and incurring \$25 for a new notice would have been an abuse of discretion].

112. *Goode v. Comfort*, 39 Mo. 313 (1866).

113. *Vannoy v. Duval Trust Co.*, 29 S.W.2d 692 (Mo. 1930); *Krug v. Bremer*, 316 Mo. 891, 292 S.W. 702 (1927); *Vail v. Jacobs*, *supra* note 107.

114. *Stoffel v. Schroeder*, 62 Mo. 147 (1876).

115. *Stine v. Wilkson*, 10 Mo. 75 (1846).

116. *Lunsford v. Davis*, 300 Mo. 508, 254 S.W. 878 (1923).

117. *Dwyer v. Rohan*, 99 Mo. App. 120, 73 S.W. 384 (St. L. Ct. App. 1903).

118. *West v. Axtell*, *supra* note 104; *Hewitt v. Price*, 204 Mo. 31, 102 S.W. 647 (1907); *Givens v. McCray*, 196 Mo. 306, 93 S.W. 374 (1906); *Whelan v. Reilly*, 61 Mo. 565 (1876); *Goode v. Comfort*, *supra* note 112; *Clarkson v. Creely*, 35 Mo. 95 (1864).

119. 178 S.W. 881 (Mo. 1915).

holders to a trustee as to the manner of sale do not justify setting aside a deed by the trustee to a bona fide purchaser for value.

Furthermore, it has been held that a deed of trust reciting that the trustee may sell and convey the property, though he has been, may now be, or may hereafter be attorney or agent of the mortgagee is valid and binding.<sup>120</sup>

#### XIV. REDEMPTION AFTER CHATTEL MORTGAGE FORECLOSURE SALE

The preceding sections deal exclusively with redemption after a non-judicial foreclosure sale under realty deeds of trust and realty mortgages. As was pointed out in the introduction, Missouri, as to chattels, commonly employs the chattel mortgage with power of sale in the mortgagee, rather than the chattel deed of trust with power of sale in a trustee. As to chattel mortgages, Missouri adheres to the title theory, not the lien or intermediate theory. As a practical matter, it is advisable for the parties to use the chattel deed of trust, rather than the chattel mortgage, where the mortgaged chattel has a large monetary value and the mortgagee will be a likely purchaser at a foreclosure sale (*e.g.*, a newspaper printing press). Where the deed of trust is employed, there is no legal prohibition against the mortgagee's purchasing the mortgaged chattel at a trustee's foreclosure sale. Where the mortgagee is permitted to purchase at such sale, he can bid in the property for the balance owed on the debt, possibly precluding the need for a deficiency judgment against the mortgagor.

The general principle that a foreclosure sale extinguishes the mortgagor's equity of tardy redemption also applies to the chattel mortgage and chattel deed of trust. Missouri, however, does not have a statutory right to redeem after a foreclosure sale under a chattel deed of trust or chattel mortgage. On the other hand, the equitable doctrine permitting the mortgagor, or persons claiming interests under him, to set aside a foreclosure sale and to redeem for irregularities in the conduct of the sale, resulting in substantial injury to the mortgagor, is recognized in Missouri as to foreclosure sales under chattel security devices.<sup>121</sup> Since the mortgaged chattel commonly has a smaller

---

120. *Lipscomb v. New York Life Ins. Co.*, 138 Mo. 17, 39 S.W. 465 (1897).

121. *Haeussler v. Missouri Glass Co.*, 52 Mo. 452 (1873);

*Jackson v. Cunningham*, 28 Mo. App. 354 (K.C. Ct. App. 1887) [after foreclosure under a chattel mortgage for nonpayment, and after the mortgagee has taken possession of the mortgaged property, a tender of the debt does not revest title in the mortgagor; he can only redeem by a suit in equity].

market value than mortgaged realty, and commonly has no chain of title, there is not much litigation, nor case authority, as to redemption from chattel foreclosure sales. Some of the equitable grounds permitting the mortgagor to redeem from a chattel mortgage foreclosure sale are discussed below.

The chattel mortgagee cannot rightfully become a purchaser at his own sale,<sup>122</sup> unless such is authorized or consented to by the parties in interest;<sup>123</sup> it matters not that the sale is bona fide and for a fair price. The rule is not intended to remedy the wrong, but is intended to prevent the possibility of a wrong being committed.<sup>124</sup> A purchase of chattels by the mortgagee at his own sale, without the consent of the parties in interest, constitutes fraud and authorizes setting aside the sale; it is not required that there should be actual fraud.<sup>125</sup> Analogous to the situation where the mortgagee of realty purchases at his own foreclosure sale, a like purchase by a chattel mortgagee would render the sale voidable, not void.<sup>126</sup> Thus, a subsequent bona fide purchaser for value is protected.

The mortgagee exercising the power of sale under a chattel mortgage often has the duty to sell the mortgaged chattel in parcels, rather than in

122. *Byrne v. Carson*, 70 Mo. App. 126 (K.C. Ct. App. 1897).

123. *Parker v. Roberts*, 116 Mo. 657, 22 S.W. 914 (1893) [a mortgagee of chattels may purchase under the power of sale, if he acts fairly];

*Jewell Pure Water Co. v. Kansas City Towel & Laundry Co.*, 74 Mo. App. 150 (K.C. Ct. App. 1898) [where the chattel mortgage contains a provision giving mortgagees the right to purchase property at a foreclosure sale, the exercise of this right by the mortgagees cannot be questioned];

*Clarkson v. Mullin*, 62 Mo. App. 622 (K.C. Ct. App. 1895) [an assignee of a chattel mortgage may become the purchaser of the property at a public foreclosure sale where such privilege is expressly conferred by the mortgage].

124. *Moore v. Thompson*, 40 Mo. App. 195 (K.C. Ct. App. 1890) [a mortgagee cannot legally become a purchaser at his own sale, unless such is authorized or consented to by the parties in interest; this is without regard to the bona fides of the sale or fairness of the price because the rule is intended not to remedy actual wrong, but to prevent possibility of it].

125. *P. R. Sinclair Coal Co. v. Missouri Hydraulic Mining Co.*, 207 S.W. 266 (Spr. Ct. App. 1919) [where consent to the mortgagee's purchasing at his own sale under a chattel mortgage is not given by the mortgage or otherwise, the equity of redemption is not extinguished by such sale and purchase];

*Byrne v. Carson*, *supra* note 122 [a purchase of chattels by the mortgagee at his own sale, without the consent of the parties in interest, constitutes a fraud in law; actual fraud is not necessary to authorize setting aside such sale];

*Moore v. Thompson*, *supra* note 124 [where the second mortgagee never consented or agreed that the first mortgagee might purchase the property at his own foreclosure sale, the second mortgagee had, after such sale, a right of redemption];

*Moore v. Ryan*, 31 Mo. App. 474 (K.C. Ct. App. 1888) [a purchase by a mortgagee of chattels at his own sale leaves the right of the mortgagor to redeem un-foreclosed].

126. Cases cited notes 79-83 *supra*.



bulk.<sup>127</sup> The mortgagee's violation of this duty renders the sale voidable, not void.<sup>128</sup> Where the chattel mortgage covers several lots of goods, and the mortgagee proceeds to foreclose and sell each lot separately, the moment he has realized enough to satisfy the debt and charges he should stop the sale; his title to the residue of the mortgaged property and power of sale is then extinguished.<sup>129</sup>

## XV. CONCLUSION

In general, a foreclosure sale under a mortgage or deed of trust completely cuts off the mortgagor's equity of tardy redemption, and the purchaser at such sale acquires absolute title to the mortgaged property. This principle applies with equal effect to both realty and chattel mortgages or deeds of trust. On the other hand, in Missouri, there are at least two exceptions to this broad concept which permit the mortgagor or persons claiming interests under him to redeem after the sale by reason of special circumstances attending such sale. The first involves a limited statutory right to redeem after a foreclosure sale under a realty deed of trust. As to chattel foreclosures, there is no statutory right to redeem. The second and more important exception involves an equitable doctrine allowing the mortgagor or persons claiming interests under him to invoke equitable jurisdiction, getting the sale set aside and redemption, where there have been certain irregularities in the conduct of the foreclosure sale which resulted in a substantial injury to the mortgagor's interest. The preceding material is concerned primarily with the various grounds justifying operation of this equitable doctrine.

Some of the equitable grounds justifying the mortgagor's redemption after a foreclosure sale are as follows: inadequacy of consideration combined with any other circumstance showing unfairness, fraud, or even stupid management resulting in sacrifice of the property; unusual hour of sale resulting in substantial injury to the mortgagor; wrongful sale in bulk or parcels resulting in substantial injury to the mortgagor; lulling the mortgagor

---

127. *Edmonston v. Jones*, 96 Mo. App. 83, 69 S.W. 741 (St. L. Ct. App. 1902) [it is often the duty of one exercising the power of sale under a chattel mortgage to sell in parcels, and not in bulk];

*Moore v. Thompson*, *supra* note 124 [a mortgagee of four mules had no right, as against a second mortgagee, to sell them in bulk, although the mortgagor consented].

128. *Keating v. Hannenkamp*, 100 Mo. 161, 13 S.W. 89 (1890) [a sale of furniture under a mortgage is not rendered "void" by the fact that it was sold in bulk or that more was sold than was necessary to satisfy the debt].

129. *Moore v. Ryan*, *supra* note 125.

into a false sense of security and then foreclosing without actual notice to the mortgagor; chilled bidding at the foreclosure sale; trustee purchasing at his own foreclosure sale; mortgagee purchasing at his own foreclosure sale; unauthorized place of foreclosure sale; defective notice of foreclosure sale; unauthorized substitution of trustee and delegation of the trustee's duties; wrongful failure of the trustee to postpone or adjourn the foreclosure sale; trustee's abuse of discretion and violation of duties. The above grounds for redemption apply to both realty and chattel foreclosures.

Conceding that the mortgagor or persons claiming interests under him may be entitled to have such a defective sale set aside, is the court providing the mortgagor an adequate remedy? The mortgagor can obtain such relief only through a judicial proceeding requiring additional time and expense. Also, the mortgagor may be required to do equity, by tendering payment of the mortgage debt prior to the court's granting such equitable relief. As a practical matter, it would seem that only a solvent mortgagor or one with other sources of credit would be able to pursue this equitable remedy.

Prima facie, the mortgagee has too great an advantage over the mortgagor as to mortgage foreclosures in Missouri. Missouri statutes authorize foreclosure of mortgages and deeds of trust by way of a nonjudicial sale. Furthermore, the requisite notice, upon default under a realty mortgage or realty deed of trust, is only twenty days by publication; no actual notice of the intended foreclosure sale is required. Thus, the liberal doctrines permitting redemption after foreclosure appear to have been developed as a counter balance thereto. But whether or not a court of equity will set aside the sale and permit redemption by reason of certain irregularities in the conduct of the foreclosure sale depends entirely upon a careful weighing of the facts in each particular case.