Missouri Law Review

Volume 47
Issue 2 *Spring 1982*

Article 12

Spring 1982

Redemption before Foreclosure under Power of Sale--Tipton v. Holt

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if the debtor redeems,[69] and redemption statutes may allow the bankruptcy trustee to redeem the debtor's property.[70] *Durrett* will not greatly increase uncertainty in these jurisdictions. Of course, if *Durrett* is limited to nonjudicial foreclosure sales, jurisdictions requiring judicial foreclosures also will be unaffected.

There are advantages to *Durrett*. It will facilitate the rehabilitation of debtors and will increase the chances that unsecured creditors will be paid. The effect on mortgages and deeds of trust, however, may be adverse. Lenders, mortgagees, and foreclosure sale purchasers must realize that if *Durrett* is followed, the bankruptcy courts have a one-year redemption period and that nonjudicial foreclosure sales, therefore, are less certain. On balance, the benefits to unsecured creditors and bankrupt debtors seem to outweigh both the inconvenience imposed on secured creditors and purchasers and *Durrett*'s possible effect on foreclosure sale prices. *Durrett* is a powerful tool with which the bankruptcy trustee can rehabilitate the debtor and pay his creditors.

FRANKLIN G. SNYDER

REDEMPTION BEFORE FORECLOSURE UNDER POWER OF SALE

Tipton v. Holt[1]

Orvis and Bonnie Tipton executed a promissory note in favor of Henry and Carolyn Chandler for the balance of the purchase price of a farm. The note contained an acceleration clause, which the Chandlers could exercise in the event of default. The Tiptons secured the note by a deed of trust with William Holt as trustee. On December 15, 1978, the Tiptons defaulted, and the Chandlers declared the entire debt, with interest, immediately due and

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they are usually cut off by any valid foreclosure sale. *See* 3 R. POWELL, LAW OF REAL PROPERTY ¶ 457, at 696.19 (rev. ed. 1979).

69. The existence of statutory redemption itself means that the purchaser "acquires a defeasible title, and this uncertainty may discourage outside bidding." G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 3, § 8.4, at 538.

70. *See* note 37 *supra*.

1. 610 S.W.2d 659 (Mo. App., W.D. 1981).

payable.[2] The Chandlers began foreclosure proceedings by individual notice[3] to the mortgagors[4] and public notice according to statute.[5] The sale date was set for March 12, 1979.

On March 5, the Tiptons gave written notice[6] to Holt and the Chandlers of their intention to redeem.[7] On March 9, Tiptons' attorney tendered to Holt a check for $36,320.93, representing payment to date of principal and interest, fee for the trustee, and cost of foreclosure publication. The Chandlers' attorney, however, demanded an additional $3,590, or ten percent of the principal and interest, under a provision of the note that stated, "If this note is collected by suit or foreclosure of any mortgage or trust deed securing the same, the maker, and endorsers hereof agree to pay reasonable

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2. A creditor may waive or lose his right to have the debt accelerated by failure to notify the debtor of his decision to exercise his option before the debtor makes a proper tender. Capital City Motors v. Thomas W. Garland, Inc., 363 S.W.2d 575, 578 (Mo. 1962).

3. A foreclosing party is required to give individual notice of the foreclosure sale to the mortgagor and certain other parties. MO. REV. STAT. § 443.325 (1978). For a discussion of the constitutional issues involved in such notice, see Nelson, *Constitutional Problems with Power of Sale Real Estate Foreclosure: A Judicial Dilemma,* 43 MO. L. REV. 25 (1978).

4. For convenience, the term "mortgagor" will refer to the obligor on a note and the grantor of a deed of trust. Likewise, the term "mortgagee" will refer to the obligee of a note and the beneficiary of a deed of trust.

5. MO. REV. STAT. § 443.310 (1978) requires notice of not less than 20 days. *Id.* § 443.320 sets out the manner of publishing the notice.

6. *Id.* § 443.410 requires written notice of intention to redeem in order to take advantage of the statutory right of redemption after foreclosure sale. When the mortgagor relies on an equitable right of tardy redemption, however, compliance with the statutory requirements is not necessary. Alfred v. Pleasant, 175 S.W. 891, 892 (Mo. 1915).

7. The equitable right of tardy redemption is often available to a defaulting debtor whose defaulted debt obligation is secured by a mortgage or deed of trust. This right may enable a defaulting debtor to redeem the burdened land by a late performance of the mortgage obligation, despite his agreement to forfeit the land on default. G. OSBORNE, MORTGAGES 624 (2d ed. 1970). The "right of redemption before sale" under a Missouri deed of trust appears to be a misnomer. The term dates back to when a mortgage created an immediate legal estate in the mortgagee, subject to a condition subsequent for transfer of title back to the mortgagor upon repayment of the debt. R. TURNER, THE EQUITY OF REDEMPTION 19 (1931). Under Missouri law, a deed of trust given on land to secure the payment of a debt creates no estate in land. The mortgagee has a lien and nothing more. R. L. Sweet Lumber Co. v. E. L. Lane, Inc., 513 S.W.2d 365, 368 (Mo. En Banc 1974). Since the mortgagee has nothing but the right to have the debt, if not otherwise paid, satisfied out of the land, the right of the mortgagor to discharge the security by payment of the debt appears to be but an incident of ownership. *See* Wissmath Packing Co. v. Mississippi River Power Co., 179 Iowa 1309, 1326, 162 N.W. 846, 851 (1917).

expenses of collection including attorney fee."[8] Accordingly, trustee Holt refused the tender.

Holt conducted the sale as publicized on March 12, 1979, and sold the land to Daniel Floyd for $42,000. The following day, the Tiptons sued to enjoin Holt from delivering a deed to Floyd and to direct the execution of a certificate of redemption[9] to the Tiptons. The trial court held the tender by the Tiptons to be insufficient to defeat the sale and ordered trustee Holt to deliver the deed to Floyd.[10]

The Missouri Court of Appeals for the Western District reversed this decision.[11] The court held that the amount to be required as payment for redemption before sale must be readily ascertainable in order to not impair the right of redemption conferred by Missouri Revised Statutes section 443.400.[12] Any amount that was not sanctioned by statute or fixed on the face of the note or deed of trust could not be required.[13] Although not necessary for disposal of the case, the court suggested that even though the note might require payment of a fixed charge following default, such charge may be void as unconscionable if it becomes due "merely upon default."[14]

A defaulting debtor is seldom able to exercise the equitable right of tardy redemption,[15] especially if the maturity of his debt is accelerated. Never-

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8. 610 S.W.2d at 661.
9. MO. REV. STAT. § 443.400 (1978).
10. 610 S.W.2d at 660.
11. *Id.* at 665.
12. (1978). This statute provides, "If such property be redeemed by payment to the officer before the sale, such officer shall make a certificate thereof . . . and such certificate shall be recorded . . . and shall have the same effect as satisfaction entered on the margin of the record."
13. 610 S.W.2d at 662.
14. *Id.* at 663 n.4.
15. To avoid confusion of issues, one should bear in mind the differences among the legal right to redeem, the statutory right of redemption, and the equitable right of tardy redemption. The legal right to redeem is the right of the mortgagor to have the mortgagee reconvey legal title to him following timely fulfillment of the condition of the mortgage. 55 AM. JUR. 2d *Mortgages* § 510 (1971). The equitable right of tardy redemption developed as a response by the courts of equity to the harshness of the legal consequences of a mortgage. Benton Land Co. v. Zeitler, 182 Mo. 251, 271, 81 S.W. 193, 199 (En Banc 1904). The Chancellor would allow a mortgagor to redeem his land by a late performance of the mortgage condition accompanied by damages to the mortgagee that would "cure" the default. Potter v. Schaffer, 209 Mo. 586, 597, 108 S.W. 60, 62 (1908). Foreclosure terminates the equitable right of tardy redemption; any right to redeem after a valid foreclosure sale must be authorized by statute. 55 AM. JUR. 2d *Mortgages* § 513 (1971). Some confusion may arise between the equitable right before foreclosure and the statutory right after foreclosure because, under certain circumstances, a mortgagor may redeem after a sale without resort to the statutes. Comment, *Mortgages-Redemption*

theless, when a mortgagor is willing and able to redeem, the amount of a proper tender is vital. A sufficient tender will invalidate a subsequent foreclosure sale.[16] Conversely, an otherwise valid sale that follows an insufficient tender is unassailable.[17] The *Tipton* court has formulated a rule for determining the proper amount for a payment to redeem after foreclosure proceedings have begun but before sale. Because of the facts of the case, the decision is probably consistent with established Missouri law.[18] Nonetheless, the reasoning and the adoption of the rule which produced that result ignore the principles behind the equitable right of tardy redemption. Under different facts, if a mortgagor calculated the amount required to redeem under the *Tipton* rule, the payment tendered might lack certain amounts traditionally required to cure default and could cause the mortgagor to lose his land.

The rule is based on the court's construction of Missouri Revised Statutes section 443.400[19] as conferring a peremptory right to redeem after default but before sale.[20] While this section originated more than 150 years ago,[21] it has never been construed.[22] This lack of construction by the courts, together with an analysis of the history of the current section, indicate that section 443.400 has been misplaced through successive statutory revisions, that it confers no right to redeem, and that it has no proper application in the context of trustees' sales.

Section 443.400 originated as part of a scheme of judicial foreclosure[23] before the legislature recognized nonjudicial foreclosure under power of sale

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After Foreclosure Sale in Missouri, 25 MO. L. REV. 261 (1960). This is only allowed where the sale, for some irregularity, may be set aside. *Id.* at 261-62.

16. Potter v. Schaffer, 209 Mo. 586, 597, 108 S.W. 60, 62 (1908).

17. McClung v. Missouri Trust Co., 137 Mo. 106, 116, 38 S.W. 578, 581 (1897).

18. The court could have reached the same result without adopting a new rule. The mortgagee refused the mortgagor's tender because it did not include an attorney's fee. 610 S.W.2d at 661. Because the note was construed not to require such a payment before sale, *id.* at 662, and because there is no general equitable duty to tender such fees in the absence of agreement, *see* note 64 *infra*, no further analysis was necessary. The court could have held that the trustee waived the additional fees that were claimed at trial because he had not demanded them in the tender. *See* Capital City Motors, Inc. v. Thomas W. Garland, Inc., 363 S.W.2d 575, 579 (Mo. 1962).

19. (1978).

20. 610 S.W.2d at 663.

21. *See* MO. REV. STAT. § 10, at 596 (1825).

22. The cases noted in V.A.M.S. § 443.400 (1952 & Cum. Supp. 1981) do not mention this section, but refer to the right in equity to redeem.

23. *See* MO. REV. STAT. § 10, at 596 (1825). Under the judicial foreclosure scheme, the trial court determined the amount of payment required to redeem before it directed the sheriff to conduct a sale. *Id.* § 5, at 594.

in mortgages or trust deeds.[24] The predecessor of section 443.400 appears to have been aimed at difficulties in clearing title due to the possibility, under judicial foreclosure, that a mortgagor would make his redemption payment to the sheriff or other officer conducting the sale. If the mortgagor paid the mortgagee, the mortgagee already was obliged to acknowledge the mortgagor's payment to him on the margin of the record to clear the title of the mortgage encumbrance.[25] The original statute authorized the sheriff or other executing officer, on receipt of redemption payment, to make a certificate that, when recorded, would have the same effect as the mortgagee's acknowledgment of satisfaction on the margin.[26]

That a statute which the legislature enacted to govern judicial foreclosures could be construed to govern nonjudicial foreclosures probably is attributable to two methods of statutory revision: abridgment and arrangement. In the 1835 revision,[27] this section was reduced from 154 words to 68 words. While the change reduced the verbosity of the statute, it also obfuscated its meaning. The construction and application of the section as originally written in 1825 was clear:

> [I]n all cases where the mortgagor, his heirs, executors, administrators, or assigns, shall redeem the mortgaged property, by paying to any sheriff or other officer having in his hands a writ of fieri facias *as aforesaid* for the sale thereof, before sale shall be made, such sheriff or other officer shall grant to him a certificate thereof. . . . [S]uch certificate . . . shall have the same effect as if satisfaction had been acknowledged and entered on the margin of the record.[28]

The changes of 1835 brought this section to its modern form.[29] As a result of such redaction, some of the key words depended on other sections for their meaning. Eventually, however, the sections on which these words depended were themselves revised, leaving the section, and in particular the terms "the officer," "redeem," and "payment," without antecedents to support them.

When the phrase "sheriff or other officer having in his hands a writ of

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24. *Id.* ch. 113, § 2 (1855) was the first statute to mention deeds of trust in Missouri.

25. *Id.* §§ 8-9, at 595 (1825).

26. *See id.* § 10, at 596 (1825). There was no need to apply this section to trustees. When trust deeds were recognized by statute, the trustee was obligated, on receipt of payment, to acknowledge satisfaction on the margin of the record. *Id.* ch. 113, § 21 (1855). When trustees were dropped from the list of those who could enter satisfaction on the margin, 1881 Mo. Laws 172, § 1, no change was made to indicate that "officer" should also include "trustee." MO. REV. STAT. § 7097, at 1656 (1889).

27. MO. REV. STAT. § 16, at 410 (1835).

28. *Id.* § 10, at 596 (1825) (emphasis added).

29. *See id.* § 16, at 410 (1835). A minor change in 1855 brought the section to its present wording. *See* note 37 and accompanying text *infra*.

fieri facias as aforesaid"[30] was shortened to "the officer,"[31] it referred to the sheriff to whom the writ of fieri facias was directed in a preceeding section.[32] The revision of 1866 removed the term "sheriff" from the section directing the writ,[33] leaving the ambiguous referent term "the officer" without an antecedent to give it meaning.[34]

A similar fate befell the clause "in all cases where the mortgagor . . . shall redeem the mortgaged property, by paying."[35] The 1835 revision reduced this to "if such mortgaged property be redeemed by payment."[36] A later revision brought it to "[i]f such property be redeemed by payment."[37]

The original section did not purport to grant a right to redeem. It merely prescribed a method to clear the mortgagor's title if he exercised a right of redemption that was granted expressly by a prior section.[38] The revision of 1835, however, dropped the language that recognized the mortgagor's right to redeem before sale and that stipulated the amount of payment required to redeem.[39] This revision did not leave mortgagors without the right,[40] but it did leave the reference to redemption and payment in section 443.400 with no statutory antecedent.

Perhaps the factor most responsible for misapplication of section 443.400

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30. MO. REV. STAT. § 10, at 596 (1825).

31. *Id.* § 16, at 410 (1835).

32. *Id.* § 9.

33. Instead of expressly directing the writ to the sheriff, the writ was "to be executed as in ordinary executions." *Id.* (current version at MO. REV. STAT. § 443.270 (1978)). The chapter concerning executions used and still uses the terms "officer" and "sheriff" indiscriminately. *Compare id.* ch. 160, §§ 1-79 (1866) *with id.* §§ 513.010-.530 (1978).

34. If "officer" does not include "trustee," a question arises concerning how title is to be cleared following payment to the trustee. Since 1881, trustees have not been authorized to enter satisfaction on the margin of the record without the mortgagee's authorization. *See* Hower v. Erwin, 221 Mo. 93, 100, 119 S.W. 951, 952 (1909). Nonetheless, the chronological sequence of enactment of the statutes suggests that MO. REV. STAT. § 443.400 (1978) was not meant to fill the gap left by this change. *See* note 26 *supra*. It is possible that the trustee can do nothing to clear title, unless authorized by the holder of the debt as provided by MO. REV. STAT. § 443.140 (1978).

35. MO. REV. STAT. § 10, at 596 (1825).

36. *Id.* § 16, at 410 (1835).

37. *Id.* ch. 113, § 24 (1855).

38. *Id.* § 6, at 595 (1825), provided in part, "[N]o sale of mortgaged premises shall be made, until at least nine months after the filing of the petition; within which period, the mortgagor . . . may, on payment of the debt, damages, and interest then due, with costs, redeem the mortgaged property."

39. *See id.* § 10, at 410 (1835).

40. A court of equity has jurisdiction, outside of statutory authority, to enforce the mortgagor's right to redeem. Arnett v. Williams, 226 Mo. 109, 118, 125 S.W. 1154, 1157 (1910).

to nonjudicial sales has been its placement among sections to which it was not written to relate. The statute originated as part of a scheme of judicial foreclosure.[41] The revisions of 1835 and 1845[42] made substantial additions and deletions, but the basic scheme remained intact. The revision of 1855 included a new section that recognized nonjudicial foreclosure under power of sale.[43] This new section was placed between the bulk of the sections concerning judicial foreclosure[44] and the predecessor[45] of section 443.400, making it appear that the section applied to nonjudicial foreclosure. Subsequent revisions, which added new sections regulating aspects of nonjudicial sales, such as notice[46] and place of sale,[47] further separated the section from the other judicial foreclosure statutes, obscuring the section's original purpose.

As a finishing touch, the revisors appended a misleading title to the statute. This section originally was enacted as part of an act concerning mortgages and had no legislative title of its own.[48] As was typical, however, the statute appeared with a marginal note to facilitate reference.[49] While the content of the marginal notes varied from revision to revision, for forty years the notes accurately described the content of the statute.[50] In 1879, the revision committee was authorized to prepare suitable titles to describe the subject matter of the several acts.[51] The committeemen titled this section "Redemption before sale," ignoring the emphasis of the text on "certificate to be given."[52] These titles, as opposed to legislative titles, are not law and should not be considered when construing the statute.[53] It is not unusual that the effort to make a useful title is ineffectual.[54]

The *Tipton* court applied section 443.400 to redemption before non-

41. *See* note 23 and accompanying text *supra*.

42. MO. REV. STAT. §§ 1-17, at 409-10 (1835); *id.* ch. 122, §§ 1-25 (1845).

43. *See id.* ch. 113, § 20 (1855). This section appears to codify the decision in Carson v. Blakey, 6 Mo. 273 (1840).

44. MO. REV. STAT. ch. 113, §§ 1-18 (1855).

45. *Id.* § 24.

46. 1885 Mo. Laws 209, § 2 (current version at MO. REV. STAT. § 443.320 (1978)).

47. 1885 Mo. Laws 209, § 1 (current version at MO. REV. STAT. § 443.410 (1978)).

48. *See* MO. REV. STAT. § 10, at 596 (1825).

49. *See id.*

50. For example, the note in the 1855 revision read, "Redemption, by payment to officer before sale, certificate to be given; to be recorded; effect thereof." MO. REV. STAT. ch. 113, § 24 (1855) (note in margin).

51. 1879 Mo. Laws 212-13, § 11.

52. MO. REV. STAT. ch. 52, § 3314 (1879). A fair reading of this statute indicates that its purpose is to direct the making of a certificate of redemption and not to grant a right of "redemption before sale." *See* notes 23-26 and accompanying text *supra*.

53. State v. Thomas, 301 Mo. 603, 615-16, 256 S.W. 1028, 1030 (1923).

54. *Id.* at 616, 256 S.W. at 1030.

judicial sale assuming, without discussion, that "the officer" included "trustee."[55] The court reasoned that since the phrase "[i]f such property be redeemed by payment" mentions redemption and payment, without more, the statute confers a "peremptory right of redemption . . . unencumbered by extraneous litigation."[56] Fearing that if the amount required were not self-evident the mortgagee might unjustifiably refuse the tender and force litigation, the court adopted the rule that a redemption tender need only include amounts that are ascertainable from the face of the note or deed of trust or required by statute.[57] The departure from prior law is illustrated by considering the amounts that the court did not require the mortgagor to tender: attorney's fees, trustee's fees, abstractor's fees, and interest on interest.[58]

The court held that under the terms of the note, an attorney's fee was not due.[59] In addition, the court declined to construe the note to impose a reasonable fee due on default.[60] Requirement of an amount "unspecified as to sum or percentile—as an incident of redemption *before sale*— . . . [would] impair the exercise of the equity of redemption § 443.400 confers upon a . . . mortgagor."[61] In a footnote, the court suggested that an attorney's fee, even of a specific amount, that became due merely on default might be void as a penalty.[62]

The attorney's fees excluded by the *Tipton* court probably would have been excluded under earlier law, but for less prohibitive reasons. Since by the very terms of the note the fee was not due until *after* the sale,[63] no amount

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55. 610 S.W.2d at 662.

56. *Id.* at 663 (construing MO. REV. STAT. § 443.400 (1978)).

57. 610 S.W. at 662. In support of its proposition that the amount of tender required is determined by the terms of the note and the deed of trust, the court cited Thielecke v. Davis, 260 S.W.2d 510 (Mo. 1953), and Brown v. Kennedy, 309 Mo. 335, 274 S.W. 357 (1925). These cases are distinguishable because they dealt with the issue of whether charges fixed by the note could be required in a redemption tender *in addition to* the traditional amounts required to redeem. *See* note 65 *infra*.

58. 610 S.W.2d at 663-64.

59. The fee would not become due until after "collection." The court found this to mean after the collection process was complete. *Id.* at 662.

60. *Id.* at 663.

61. *Id.* at 662. Attempts to hamper the equitable right to redeem were disallowed almost as soon as the right was established. The Chancellor disfavored any attempt to "clog" the right. R. TURNER, THE EQUITY OF REDEMPTION 29 (1931). Such disfavor, however, was reserved for the more serious impediments on the right, such as purposefully incurring unnecessary costs or agreements in the mortgage that would destroy the right. *Id.* at 29, 177. In Missouri, an agreement in the deed of trust waiving the right to redeem is void. Reilly v. Cullen, 159 Mo. 322, 331-32, 60 S.W. 126, 128 (1900).

62. 610 S.W.2d at 663 n.4.

63. *Id.* at 662.

representing such a fee would have been required.[64] If, however, the note had called for a reasonable fee after foreclosure proceedings had begun but before the foreclosure sale, the prior law probably would have required inclusion of the amount.[65] If a dispute developed concerning the proper amount that would be reasonable, the mortgagor or trustee could call for an accounting.[66]

The court did not require payment for the trustee's services prior to redemption because no such amount was contemplated by the deed of trust or required by statute.[67] In other words, it appears that under the *Tipton* rule no trustee's fee is due until the land is sold. While a trustee may not charge for services that he is not required to perform under the deed of trust,[68] trustees generally are entitled to reasonable compensation for services contemplated by the trust instrument, even if the terms of the trust fix no trustee's fee.[69] A trustee need not render services gratuitously.[70] The test for the permissibility of a fee is "whether the services and expenses for which he demands compensation and reimbursement were either directed by the terms of the deed of trust, or were necessary to a performance of the duties imposed upon him by that instrument."[71]

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64. If the terms of the deed of trust or note did not require an attorney's fee, there was no general equitable duty to pay such a fee in order to redeem. Philips v. Bailey, 82 Mo. 639, 648 (1884).

65. Clauses in the note which provide for charges that were not required in equity were held to be enforceable as "contracts fairly and honestly made." Amounts agreed to be due on default, therefore, were required in the redemption tender. Brown v. Kennedy, 309 Mo. 335, 341, 274 S.W. 357, 358 (1925).

66. When the amount required for redemption is in dispute, the mortgagor may sue for an accounting. Farrell v. Seelig, 27 S.W.2d 489, 491 (Mo. App., St. L. 1930). Similarly, when the integral trust instrument lacks direction, a trustee may require a bond of indemnity from the mortgagor or may bring the matter before a court for settlement. McClung v. Missouri Trust Co., 137 Mo. 106, 116, 38 S.W. 578, 581 (1897).

67. 610 S.W.2d at 664. MO. REV. STAT. § 443.360 (1978) sets a maximum amount of compensation for the person selling the land at an auction. It does not mention the fee that the mortgagor must pay the trustee before sale. Arguably, this statute was not meant to apply to trustees. It was enacted along with statutes setting fees for persons acting for the government, such as clerks, constables, and county officers. *See* 1874 Mo. Laws 62. Its legislative title stated that the section dealt with fees of persons selling land under official or judicial orders. *Id.* It was not until 1879 that the revisors placed the section with statutes concerning nonjudicial foreclosure and titled the section, "Compensation of Trustees under Trust Deeds." MO. REV. STAT. ch. 52, § 3318 (1879).

68. Tracy v. Gravois R.R., 13 Mo. App. 295, 299-301 (St. L. 1883), *aff'd*, 84 Mo. 210 (1884).

69. *In re* Estate of McKinney, 351 Mo. 718, 724, 173 S.W.2d 898, 902 (1943).

70. *Id.*

71. Tracy v. Gravois R.R., 13 Mo. App. 295, 298 (St. L. 1883), *aff'd*, 84 Mo.

The *Tipton* court did not require payment for an abstractor's services.[72] Under prior law, there was no specific requirement of tendering such an amount.[73] One of the basic requirements of redemption, however, was that a mortgagor cure his default by making the mortgagee whole, which included paying accrued costs.[74] In equity, the mortgagor could redeem "because if prior to sale the debtor . . . [paid] the interest and all accrued costs, the creditor . . . [had] been in nowise hurt."[75] Since a foreclosing party now must conduct a search of the record prior to foreclosure sale,[76] a redeeming mortgagor should be required to tender the amount charged for such services.

Whether payment of interest on interest from the date of default until tender should be required in a redemption tender before nonjudicial sale is unclear under prior law.[77] The amount to be tendered includes interest on the amount due from the time of default until the date of tender.[78] If the amount due includes interest on the principal, it would appear that the mortgagee could claim interest on the defaulted interest.[79]

The decision in *Tipton* purports to clarify the amount that will constitute a proper tender for redemption. For payment of an amount to be a prere-

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210 (1884). The *Tipton* court allowed, *sub silentio*, two charges that do not fit the new test: publication costs and the cost of a copy of the deed of trust. 610 S.W.2d at 664.

72. 610 S.W.2d at 664.

73. It is only recently that a search of the record has become a prerequisite to a foreclosure sale. Since 1973, a foreclosing party has been required to give individual notice to certain parties identifiable only by an inspection of the record. *See* MO. REV. STAT. § 443.325 (1978). While in certain cases this may only require a perusal of the record, it is not difficult to imagine a case requiring an abstract of title to determine the identity of "the person shown by the records . . . to be the owner of the property" in order to give the notice required by MO. REV. STAT. § 443.325.3 (1978). Whether mere perusal or a full title search is necessary, the mortgagor's redemption tender should include the actual costs of giving notice required by statute. *See* McClung v. Missouri Trust Co., 137 Mo. 106, 120, 38 S.W. 578, 582 (1897) (tender held insufficient when it did not include cost of giving statutory public notice).

74. Potter v. Schaffer, 209 Mo. 586, 597, 108 S.W. 60, 62 (1908).

75. *Id.*

76. *See* note 73 *supra*.

77. Overdue interest coupons on a bond, payable in St. Louis, have been held to bear interest after maturity. Huey v. Macon County, 35 F. 481, 482 (C.C.E.D. Mo. 1888). A search of prior Missouri cases reveals no case deciding the issue concerning interest payments on a Missouri deed of trust.

78. A tender of the debt and interest stops the running of interest. Knollenberg v. Nixon, 171 Mo. 445, 455, 72 S.W. 41, 44 (En Banc 1903).

79. This relies on the theory that the delinquent payment of interest constitutes a liquidated demand and that the creditor is entitled to interest on the money wrongfully withheld in the same way that he is entitled to interest on an overdue principal wrongfully withheld. 45 AM. JUR. 2d *Interest and Usury* § 83 (1969).

quisite to redemption, it must be required by statute or ascertainable from the note or deed of trust. If this requirement is applied strictly, the mortgagor need tender only the defaulted amount (or if accelerated, the accelerated amount) without regard to losses or costs that the mortgagee has incurred as a direct result of the default.[80] In treating the right of redemption before sale as a peremptory right conferred by statute and applying a rigid legal standard, the court departs from established equitable practice under which the mortgagor was required to repay costs incurred because of his default. The change should not be made absent clear legislative intent.[81]

Despite the method of calculation formulated by the court, a prudent mortgagor wishing to make a redemption tender that will, if refused, invalidate a subsequent sale should include in his tender all reasonable costs incurred by the trustee in pursuance of his duties under the trust instrument. The tender should include costs contemplated by the note or deed of trust and the actual cost of giving notice, including an abstractor's fee, postage, and publication costs. A small fee for the trustee's services would also be prudent. Whether an attorney's fee or interest on interest should be included is unclear. If the mortgagee does not demand them, a court may decide he has waived them. Although the mortgagee should not be able to hamper the mortgagor's right to redeem by incurring unreasonable costs, the mortgagor should be required to reimburse the mortgagee or trustee for costs actually and reasonably incurred due to the mortgagor's default. The cost of the clarity achieved under the *Tipton* rule is too high. The right to redeem before sale is founded in equity, and the first maxim of the Chancellor is that he who seeks equity must do equity.

JEFFREY A. BURNS

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80. The court has designed a situation that may make it impossible for a mortgagee to draft an instrument which will place the cost of the mortgagor's default on the mortgagor. If an expense is not expressly compensable by the note, deed of trust, or statute, it need not be paid. If the expense is expressly accounted for by requiring compensation of a reasonable or conditional amount, no payment is required because the amount is not ascertainable from the instrument. On the other hand, if an exact amount is contemplated by the instrument to be due merely on default, the requirement probably will be unconscionable as a penalty and thus not includable.

81. *Cf.* Arnett v. Williams, 226 Mo. 109, 118-19, 125 S.W. 1154, 1157 (1910) (if a legislature wishes to enact a statute that will affect an equitable right, "the legislation claimed to have that effect must get at its result by express enactment or by inexorable implication").