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Statutory Redemption Following Power of Sale Foreclosure in Missouri

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STATUTORY REDEMPTION FOLLOWING POWER OF SALE FORECLOSURE IN MISSOURI

I. Introduction ............................................. 309
II. A Brief History of the Mortgage and Redemption ............ 310
III. Historical Antecedents to the Current Missouri Statute .... 314
IV. Statutory Redemption in Missouri Today .................. 314
  A. Prerequisites to Redemption ............................ 314
  B. Statutory Redemption Only Available Following Power of 
     Sale Foreclosure ........................................ 315
  C. Mortgagee Must Purchase at the Foreclosure Sale ..... 315
  D. Who May Redeem? ....................................... 316
  E. Notice of Intent to Redeem ............................. 320
  F. Redemption Bond ....................................... 321
  G. Time Allowed for Redemption .......................... 324
  H. Amount Required to Redeem ............................. 325
  I. Effects of Redemption .................................... 326
V. Conclusion .................................................. 327

I. INTRODUCTION

The ever-increasing number of loans\(^1\) secured by real property emphasizes the importance of understanding the mortgage transaction,\(^2\) the mortgagee's remedies, and the mortgagor's rights. Although most mort-

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In 1971, 116,000 mortgages were foreclosed in the United States. 5 FED. HOME LOAN BANK BOARD J. 45 (1972). Many more potential foreclosures were settled by deeds to mortgagees in lieu of foreclosure or in some other manner. No data is available concerning arrangements other than foreclosure because the other practices often will not indicate on the face of the documents that default has occurred.

2. A mortgage of land involves a transfer by a debtor-mortgagor to a creditor-mortgagee of an interest in real estate to secure performance of an obligation or payment of a debt. See G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 1.1, at 1 (1979). This Comment will use the terms "mortgage,"
gagors expect to pay the debt when due, default does occur. Following default, the mortgagor often forecloses by sale. Knowing that the foreclosure sale will terminate his equitable right of redemption, a mortgagor who cannot exercise this right to pay the debt before foreclosure may wish to recover the property after foreclosure. At least two remedies may facilitate recovery. One is to attack the propriety of the sale and to have it set aside. The other is to exercise the statutory right of redemption. This Comment will explore the latter remedy in Missouri, examining its history and current availability. Although the statutory right of redemption has been available in Missouri for over 100 years, practitioners may be unaware of its many nuances. Because an understanding of the statutory right of redemption requires a limited knowledge of the history of the mortgage, this Comment begins with a brief, historical discussion of the mortgage.

II. A BRIEF HISTORY OF THE MORTGAGE AND REDEMPTION

When first developed as a security device, a mortgage represented a conveyance of the legal title to the mortgagee to secure payment of a debt or performance of a duty by the mortgagor. The mortgagor conveyed legal


3. See notes 10-13 and accompanying text infra.

4. For an excellent discussion of methods to attack the propriety of a foreclosure sale, see Dingus, Mortgages—Redemption After Foreclosure Sale in Missouri, 25 Mo. L. Rev. 261 (1960).


title, however, on a condition subsequent. If the mortgagor paid the debt or performed the duty when due, he automatically regained legal title.\(^7\) Payment of the debt or performance of the duty was due on the "law day," and default or tardiness in any aspect of the payment vested legal title in the mortgagee absolutely.\(^8\) This practice afforded scant protection to the mortgagor against forfeiture because of the rigid requirements of full and timely payment.\(^9\)

To reduce the likelihood of unfair results, courts of equity developed the equitable right of tardy redemption.\(^10\) Although the mortgagor no longer

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ed. 1971). Originally, the mortgagee took possession of the land until the mortgage was due. At that time, interest at any rate constituted usury and was unlawful. The mortgagor used possession and the right to collect rents and profits to obtain a return on the loan. Later, although the mortgagee retained the right to take possession, the mortgagor usually would remain on the land. If the mortgagee did obtain possession, he was obligated to apply income from the property to reduce the mortgage debt. G. Osborne, G. Nelson & D. Whitman, supra note 2, § 1.2, at 6.


The power to dispose of property is an incident of ownership. See Restatement of Property § 10 (1936). A mortgagee, therefore, could convey a legal title immediately after the law day if the debtor defaulted. 4 American Law of Property § 16.204, at 495 (A. Casner ed. 1952).

9. For example, if the mortgagor were ten minutes late in paying the amount, title would become absolute in the mortgagee. The mortgagee could not recover the property through subsequent performance of the obligation. Durfee & Doddridge, Redemption From Foreclosure Sale—The Uniform Mortgage Act, 23 Mich. L. Rev. 825 (1925). For an example of the harsh results possible under common law redemption, see White v. Macarelli, 267 Mass. 596, 166 N.E. 734 (1929).

10. The equity of tardy redemption should not be confused with the statutory right of redemption. The primary difference is that the equity of redemption has no statutory basis; it was created by the courts of chancery to soften the harsh legal consequences of default. Also, the equity of redemption arises prior to the sale and is extinguished by the sale. Statutory redemption, on the other hand, derives its existence from the appropriate statutes, Moss v. King, 212 Mo. 578, 584, 111 S.W. 589, 591 (1908), and it arises after the sale, MO. Rev. Stat. § 443.410 (1978). The differences between the two types of redemption are discussed more fully in Durfee & Doddridge, supra note 9, at 836-37. See also Powers v. Andrews, 84 Ala. 289, 4 So. 263 (1887); Eiceman v. Finch, 79 Ind. 511 (1881); Spurgin v. Adamson, 62 Iowa 661, 18 N.W. 293 (1883); Eiceman v. Finch, 79 Ind. 511 (1881) Higgs v. McDuffie, 81 Or. 256, 157 P. 794 (1916).

Missouri courts have never recognized the doctrine of strict foreclosure. O'Fallon v. Clopton, 89 Mo. 284, 290, 1 S.W. 302, 303 (1886); Davis v. Holmes, 55 Mo. 349, 352 (1874). Missouri courts also have rejected the common law mortgage theory, under which the mortgagee received legal title to the mortgaged land. Missouri adheres to the principle that a mortgage of real estate is a lien to secure a debt. It passes no estate to the mortgagee and creates no right to possession of
had a legal right to his land following default, equity extended the time within which he could pay the debt and regain the property. When equity first recognized this right, it was unclear how long the mortgagor could delay payment after the law day and still redeem.

To limit this seemingly limitless right to redeem, equity developed the strict foreclosure proceeding. By using this proceeding, the mortgagee could limit the time within which the mortgagor could redeem his property in equity. Pursuant to the institution of foreclosure proceedings, equity would order the mortgagor to pay the debt within a specified time. If he did not pay within that time, he lost the right to redeem the land in equity. Since default already had cost him the right to recover the land at law, nonpayment in equity meant that the mortgagor received full legal and equitable

the property. See, e.g., Jackson v. Johnson, 248 Mo. 680, 698, 154 S.W. 759, 765 (1913); Pease v. Pilot Knob Iron Co., 49 Mo. 124, 128 (1871); Kline v. McElroy, 296 S.W.2d 664, 665 (Mo. App., K.C. 1957); Klika v. Wenzlick Real Estate Co., 150 S.W.2d 18, 24 (Mo. App., St. L. 1941). See generally Comment, Real Estate Mortgage Theory in Missouri, 6 MO. L. REV. 200 (1941).

11. Equity courts created the "right of redemption," which has been defined as "a right to have title to property which has been given as security restored free and clear of the mortgage." 4 AMERICAN LAW OF PROPERTY § 16.169, at 404 (A. Casner ed. 1952).

12. In a mortgagee's suit for foreclosure of the mortgagor's equity of tardy redemption, the chancellor usually would fix a first decree or a "short day" within which the mortgagor had to redeem or be finally foreclosed. The actual time that would elapse was anything but short since the ordinary slowness and cost of any proceeding in chancery ensured that many months would elapse before equity entered a decree. 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 335 (3d ed. 1938). This decree then ordered an accounting, which consumed more time. R. COOTE, MORTGAGES § 1060 (9th ed. 1927). When the accounting was complete, the mortgagor received, as a matter of course, six more months to redeem. Id. § 1061. Further extensions were available on some showing of cause. See generally Ismoord v. Claypool, 1 Rep. Ch. 262 (1866-67) (extension granted without conditions); Eyre v. Hanson, 2 Bear. 478 (1840) (extension on condition of payment of amount due plus costs); Edwards v. Cunliffe, 1 Madd. 287 (1816) (mortgagor obtained four extensions; fourth one granted even though court said third extension was last).

When the redemption period expired, the mortgagee was entitled to a second, or final, decree up to the entry of which the mortgagor still might redeem. Glenn, A Study on Strict Foreclosure, 29 VA. L. REV. 519, 520 (1943). Even after the second foreclosure decree, equity might reopen the proceedings and give the mortgagor another opportunity to pay the debt. See generally Burgh v. Langton, 5 Br. P.C. 213, 15 Vin. Abr. 476, (1774) (decree absolute opened after 16 years). So great was the protection of mortgagors that a decree might be reopened to divest title from the mortgagee's purchaser. See Campbell v. Holyland, 7 Ch. D. 166 (1876). Because of this practice, it was noted that "[O]ne is not very safe in purchasing a foreclosed estate . . . ." F. MAITLAND, EQUITY 273 (1916).
title to the land. Strict foreclosure, however, did relieve the mortgagor from further liability on the mortgage debt. 13

Although strict foreclosure is still available in some states, 14 most mortgages now are foreclosed by sale. 15 The authorization for the sale can come from two sources: a court, pursuant to a judicial foreclosure, 16 or a deed of trust, under a power of sale foreclosure. 17 Under either method, irregularities in the foreclosure sale can void it. 18 Since the statutes do not enable a court to set aside an irregular sale, however, the mortgagor must set aside the sale in equity. 19 If equity voids the sale, it is as if there had been no foreclosure; the equitable right of tardy redemption is still available. 20

If the sale were conducted properly under a deed of trust’s power of sale, the mortgagor may be able to redeem his property through statutory redemption. In Missouri, statutory redemption is a distinct form of redemption, supplemental to the other forms. 21 It represents an effort by the legislative branch of government to protect the “helpless borrower against the supposed greed of the money lender.” 22 Basically, statutory redemption enables a defaulting mortgagor to redeem the mortgaged property from the

13. G. Osborne, supra note 7, at 20.
14. Id. at 650-51.
15. Id. at 21.
16. A typical action in equity . . . [for judicial foreclosure] involves a long series of steps: a preliminary title search to determine all parties in interest; filing of the foreclosure bill of complaint and lis pendens notice; service of process; a hearing, usually by a master in chancery who then reports to the court; the decree or judgment; notice of sale; actual sale and issuance of certificate of sale; report of the sale; proceedings for determination of the right to any surplus; possible redemptions from foreclosure sale; and the entry of a decree for a deficiency.

Id. at 663.


18. The irregularities would include inadequacy of consideration, unusual hour of sale, and purchase by the trustee at the foreclosure sale. See generally Dingus, supra note 4.
19. See id. at 261-62.
20. Greene v. Spitzer, 343 Mo. 751, 123 S.W.2d 57 (1938).
21. See, e.g., Fitzpatrick v. Federer, 315 S.W.2d 826, 829 (Mo. 1958); Oakey v. Bond, 286 S.W. 27, 28 (Mo. 1926); Arnett v. Williams, 226 Mo. 109, 118, 125 S.W. 1154, 1157 (1910); Potter v. Schaffer, 209 Mo. 586, 597, 108 S.W. 60, 62 (1908).
mortgagee-purchaser within one year after a power of sale foreclosure. To redeem, the mortgagor must pay a prescribed amount of money within one year of the foreclosure sale.

III. HISTORICAL ANTECEDENTS TO THE CURRENT MISSOURI STATUTE

The Missouri legislature created the statutory right of redemption in 1877. The statute provided that the grantor, his executor, administrator, or assigns could redeem land sold under a power of sale within one year from the date of the sale by paying the amount of the debt plus interest and costs. To redeem the property, the proper party had to provide security "for the payment of the interest to accrue after the sale, and for all damages and waste that may be occasioned or permitted by the party whose property is sold." 25

The 1877 statute remained in effect until 1917, when the legislature amended the statute significantly. The 1917 statute is still in force today. The current law allows redemption by the grantor, his heirs, devisees, executor, administrator, grantees, or assigns. The primary differences between the 1877 statute and the current one are the addition of notice requirements and the alteration of the security requirement. Under the 1917 amendments, the redemptioner must notify the trustee of his intent to redeem. The security requirement was changed to require the redemptioner to post bond with the circuit court in the circuit where the land is located and to require the court to approve the security.

IV. STATUTORY REDEMPTION IN MISSOURI TODAY

A. Prerequisites to Redemption

In Missouri, the right of statutory redemption is available in limited circumstances. At least seven requirements must be met before the right arises: (1) the sale must have been conducted under the power of sale in a deed of trust, (2) the purchaser at the foreclosure sale must be the mortgagee or someone on his behalf, (3) the redemptioner must be a proper party under

23. 1877 Mo. Laws 351.
24. Id.
25. Id.
28. Id. § 443.410.
29. Id. See also note 79 infra.
31. Id. § 443.430.
32. Id. § 443.410. See also White v. Smith, 174 Mo. 186, 199, 73 S.W. 610, 612 (1910); Evans v. United States Fidelity & Guar. Co., 195 Mo. App. 438, 439, 192 S.W. 112, 114 (K.C. 1917). For a listing of the steps involved in a foreclosure by judicial sale, see note 16 supra.
the statute,\textsuperscript{34} (4) before the sale, the redemptioner must notify the trustee of his intent to redeem.\textsuperscript{35} (5) the redemptioner must post security for certain expenses with the circuit court where the land is located,\textsuperscript{36} (6) he must redeem within the proper time,\textsuperscript{37} and (7) he must tender the proper amount to the mortgagee.\textsuperscript{38} Each of these requirements is discussed below.

B. \textit{Statutory Redemption Only Available Following Power of Sale Foreclosure}

Legislative history does not reveal why statutory redemption is unavailable following foreclosure by judicial sale in Missouri. Legislatures in most states have adopted statutes that allow redemption in either type of foreclosure.\textsuperscript{39} In fact, California does not allow statutory redemption under a power of sale.\textsuperscript{40} One commentator has hypothesized that statutory redemption exists only after a power of sale foreclosure because, in a judicial foreclosure, the court can protect the mortgagor. If a mortgagor gives a power of sale to the mortgagee and authorizes the mortgagee to purchase at the sale, it is the "mortgagor's own folly";\textsuperscript{41} he does not deserve protection.

C. \textit{Mortgagee Must Purchase at the Foreclosure Sale}

The second requirement that must be met before a mortgagor may use statutory redemption is that the holder of the debt must purchase the land at the power of sale foreclosure.\textsuperscript{42} If the purchaser is anyone other than the mortgagee,\textsuperscript{43} the mortgagor has no statutory right of redemption.\textsuperscript{44} A com-

\begin{itemize}
  \item[34.] \textit{Id.} § 443.410.
  \item[35.] \textit{Id.}
  \item[36.] \textit{Id.} § 443.420.
  \item[37.] \textit{Id.} § 443.410 (one year).
  \item[38.] \textit{Id.}
  \item[39.] G. OSBORNE, G. NELSON & D. WHITMAN, supra note 2, § 8.4, at 537.
  \item[41.] Durfee & Doddridge, supra note 9, at 842 n.51.
  \item[42.] MO. REV. STAT. § 443.410 (1978). See also Fitzpatrick v. Federer, 315 S.W.2d 826 (Mo. 1958); Euclid Terrace Corp. v. Golterman Enterprises, Inc., 327 S.W.2d 542 (Mo. App., St. L. 1959).
  \item[43.] If the trustee purchases the property at the foreclosure sale, the sale may be held to be \textit{voidable} since the purchase is a violation of the trustee's fiduciary duty of impartial fidelity. See Jackson v. Klein, 320 S.W.2d 553, 556 (Mo. 1959); Gempp v. Teiber, 173 S.W.2d 651, 653-54 (Mo. App., St. L. 1943). It has been argued that the sale is \textit{void} if the purchaser is the trustee. See Comment, \textit{Foreclosure By Power of Sale Inserted In a Mortgage or Deed of Trust}, 4 MO. L. REV. 186, 189 (1939). Nevertheless, the later cases do not support this proposition. Dingus, supra note 4, at 276-82. If the trustee purchases at the foreclosure sale, the sale may not extinguish the equitable right of redemption. Jod d v. Lee, 256 Mo. 536, 540, 165 S.W. 991, 992 (1914); Sunny Brook Zinc & Lead Co. v. Metzler, 231 F. 304, 310 (S.D.N.Y. 1916), aff'd mem., 238 F. 1007 (2d Cir. 1917).
  \item[44.] Dawson v. Hetzler, 230 Mo. App. 737, 739, 74 S.W.2d 488, 490 (St. L. 1934).
\end{itemize}
mon problem with this requirement arises when a "strawman" purchases on behalf of the mortgagee. For example, in *Loeb v. Dowling*, a strawman purchased the property for the mortgagee, but neither recorded the deed until twenty-seven days after the sale. The mortgagor alleged that the purpose of the delay was to deprive him of his statutory right of redemption. Since the record might have revealed the relationship of the strawman to the mortgagee, the mortgagor argued that concealment of this relation by failure to record denied him the statutory right of redemption. Nonetheless, the mortgagee's gambit was successful because the court ruled that the mortgagor had not posted a bond within twenty days following the sale as required by statute. Therefore, the mortgagor had forfeited his statutory right of redemption. The *Loeb* holding presents an important lesson for mortgagors. The mortgagor who wishes to exercise the statutory right of redemption should not lose hope when a purchaser other than the mortgagee buys at the sale. Instead, he should determine if the purchaser bought the land on behalf of the mortgagee because, if so, he still may be able to redeem.

D. Who May Redeem?

Under the Missouri statute, the mortgagor, "his heirs, devisees, executors, administrators, grantees or assigns" have the exclusive right to redeem. Lienholders junior to the foreclosed mortgage may not redeem. By precluding junior lienholders from redeeming, Missouri has avoided some particularly vexing problems concerning the rights between the mortgagor and junior lienholders and among junior lienholders. Illustrative of the

45. A "strawman" is one who holds naked legal title to property for the benefit of another. *See* Houtz v. Hellman, 228 Mo. 655, 661, 128 S.W. 1001, 1003 (1910).
46. 349 Mo. 674, 162 S.W.2d 875 (1942).
47. *Id.* at 678, 162 S.W.2d at 878.
49. 349 Mo. at 680, 162 S.W.2d at 878. After denying the mortgagor's statutory right of redemption, the court noted that he still could seek to set aside the foreclosure sale in equity and thereby revive his equitable right of redemption. *Id.*
50. The mortgagor has the burden of showing that a purchaser bought the property on behalf of the mortgagee. *See* Keith v. Browning, 139 Mo. 190, 196, 40 S.W. 764, 765 (1897).
51. MO. REV. STAT. § 443.410 (1978). Some jurisdictions allow other persons to redeem. For example, in Michigan, a lessee who is made a defendant in the foreclosure action and whose lease has an unexpired term of three years may redeem. MICH. COMP. LAWS ANN. § 600.6062 (Cum. Supp. 1981-1982). A stranger to the mortgagor's title may not exercise the statutory right of redemption. Feller v. Lee, 225 Mo. 319, 331; 124 S.W. 1129, 1132 (1910).
52. MO. REV. STAT. § 443.410 (1978). To protect his interest, the junior lienholder must be able to buy at the foreclosure sale.
53. The redemption systems used by other states that allow junior lienholders to redeem are interesting and complex. The "order" system provides for a period during which only the mortgagor or his successors in interest may redeem, followed
problems that can arise is the situation in Oregon. Oregon statutes permit the mortgagor and junior lienholders to redeem, but do not indicate who has priority if all choose to redeem. More than one person could claim he is entitled to the land. Neither the legislature nor the courts have resolved this conflict.

Although only certain parties initially may possess the statutory right of redemption, the mortgagor may assign his right to a third party. This assignment can take two forms: conveyance of title to the land and transfer of the right itself. Missouri courts have not decided if the mortgagor retains the right to redeem after conveying the property or the right of statutory redemption to a third party before foreclosure. This issue is complicated because the statute indicates that persons other than the grantor may by a period during which creditors may redeem, followed by a period during which the mortgagor or successors again have the sole right to redeem. See, e.g., IOWA CODE § 628.3 (1981). Another system used by some states is the “priority system.” The senior lienor has a specified number of days to redeem after the right accrues, followed by the same amount of time for redemption for the next senior lienor, until all of the lienors have had an opportunity to redeem. See, e.g., MINN. STAT. ANN. § 580.24 (West Cum. Supp. 1981). The third system is known as “scramble redemption.” A certain time is allowed for redemption by the mortgagor, his successor in interest, or by a junior lienor. Those entitled to redeem may do so from the purchaser or from each other in any order. The scramble system protects creditors in the order of their priority by requiring the mortgagor and the lienors junior to a prior redemptioner to pay the amount of any senior liens held by the prior redemptioner in addition to any other amounts due. When the mortgagor or his successor in interest redeems, no further redemption is possible. The effect of the foreclosure sale is terminated. The mortgagor, or his successor in interest, is returned to the property. The unsatisfied junior liens reattach to the property. See, e.g., CAL. CIV. PROC. CODE §§ 703, 725a (West 1980).


55. OR. REV. STAT. § 23.560(1) (1979) allows a judgment debtor to redeem and receive the deed for one year after the foreclosure sale. Id. § 23.530(2) allows a lien creditor to redeem if 60 days pass without a subsequent redemption. The creditor is entitled to the deed to the property, however. Id. § 23.600.

56. If the wording of these statutes is followed literally, the lien creditor as well as the mortgagor could claim a right to the deed, if the lien creditor redeems after the mortgagor and there are no subsequent redemptions for 60 days.

57. Comment, supra note 54, at 896-98.

58. Lapsley v. Howard, 119 Mo. 489, 495, 24 S.W. 1020, 1021 (1894). Some states labeled the statutory right of redemption as a property right and have allowed its transfer by statute. See, e.g., IOWA CODE § 628.25 (1981).

59. In this case, the new holder of the title of the land becomes the mortgagor. Lapsley v. Howard, 119 Mo. 489, 495, 24 S.W. 1020, 1021 (1894).

redeem. In California, the courts have construed a statute similar to Missouri's statute to allow the mortgagor to redeem after he has conveyed his interest in the property. In addition, the mortgagor may redeem, whether he conveyed before or after the foreclosure sale.

Allowing the mortgagor to retain a statutory right of redemption following conveyance of the mortgaged land has been criticized. Any redemption by the original mortgagor necessarily inures to the benefit of the current holder of the property since he would be the owner of legal title to the property. Allowing the mortgagor to redeem, therefore, is superfluous and problematic; only the current owner of the legal title should have the statutory right of redemption.

Possibly because of Missouri Revised Statutes section 443.410, which allows the "grantor in such mortgage deed of trust or his . . . grantees or assigns" to redeem, a second potential problem that Missouri courts have not resolved is whether a mortgagor's grantee in a postforeclosure sale conveyance of the mortgaged land possesses the statutory right of redemption. At least one Missouri court has suggested that a mortgagor's preforeclosure sale grantee acquires the statutory right of redemption. In Lapsey v. Howard, the court noted that "one who acquires title subject to a deed of trust [i.e., before the foreclosure sale] has the same right to redeem thereunder that his grantor had." Because of the advantages to the mortgagee and the mortgagor, it would seem logical to extend the statutory right of redemption to

61. MO. REV. STAT. § 443.410 (1978). In Missouri, the conveyance would have to be before the foreclosure sale as a practical matter because the statute reads, "[G]rantor in such mortgage deed of trust or his . . . grantees or assigns [may redeem]." Id.
62. CAL. CIV. PROC. CODE § 701 (West 1980).
63. Yoakem v. Bower, 51 Cal. 539, 540 (1876). In Missouri, if the original mortgagor conveys a life estate and retains a remainder under a deed, he may redeem. Stevenson v. Edwards, 98 Mo. 622, 626, 12 S.W. 255, 256 (1889).
65. Call v. Thunderbird Mortgage Co., 58 Cal. 2d 542, 550, 375 P.2d 169, 173, 25 Cal. Rptr. 265, 269 (1962); Lawler v. Gleason, 130 Cal. App. 2d 390, 399, 279 P.2d 70, 76 (1955) (overruled in Thunderbird Mortgage on another point). In Oregon, the judgment debtor's grantee who receives the property after the institution of the foreclosure suit but prior to the execution sale may redeem. OR. REV. STAT. § 23.560(1) (1979). The judgment debtor also can redeem. Id. § 23.600. Thus, under those statutes, debtors with deficiency judgments docketed against them may redeem and receive a deed. The debtor's grantee may also argue that he is entitled to the deed. Comment, supra note 54, at 893-95.
67. 119 Mo. 489, 24 S.W. 1020 (1894).
68. Id. at 495, 24 S.W. at 1021.
the mortgagor’s postforeclosure sale grantee. For example, if the mortgagor met all requirements for statutory redemption but could not pay the debt within one year, he might wish to sell the land to recoup some of his mortgage payments. If the mortgagor’s postforeclosure sale grantee could not redeem, the mortgagor would be conveying an interest of little value. Allowing the grantee to redeem, however, might enable the mortgagor to sell the land and recoup some of his mortgage payments. Allowing the grantee to redeem also would be advantageous for the mortgagee because he could receive payments from the grantee under the terms of the deed of trust; if the grantee remained solvent, the mortgagee might avoid a resale. The mortgagee also would avoid the inconvenience of managing the property. Several jurisdictions have allowed the mortgagor’s postforeclosure sale grantee to redeem.69

Problems also may arise in ascertaining who may redeem land owned by a husband and wife. For example, if property is titled solely in the name of one spouse who subsequently dies, the surviving spouse succeeds to the deceased spouse’s interest and can redeem if there is “substantial compliance” with the statutes.70 If both husband and wife executed the deed of trust but the land is titled in the name of only one spouse, the spouse claiming marital rights in the land also must substantially comply with the statutes.71 If one spouse mortgages property without the consent of the other and the mortgage is subsequently foreclosed, the property still can be redeemed in accordance with the statutes. If the time allowed for statutory redemption has elapsed and the spouse who mortgaged the property dies, the surviving spouse still may be able to regain the property. Missouri Revised Statutes section 474.15072 provides that any conveyance of real property by one spouse without the consent of the other is presumed to be in fraud of the marital rights of the surviving spouse. The surviving spouse then may recover the property from the donee “and persons taking from him without

69. E.g., Call v. Thunderbird Mortgage Co., 58 Cal. 2d 542, 550, 375 P.2d 169, 173, 25 Cal. Rptr. 265, 268 (1962). Of course a successor in interest who receives the deed after the statutory period of redemption has elapsed may not redeem since the grantor had no right to redeem.


71. In jurisdictions that still recognize the doctrines, the issue is whether they are interests to which a statutory right of redemption attaches. In Iowa, the statutes did not answer the question, but the courts ruled that when the owner of dower did not join in the mortgage, she had no statutory right to redeem. The theory was that the wife already had an absolute interest free of the encumbrance and, hence, no interest that foreclosure could prejudice. Huston v. Seely, 27 Iowa 183, 194 (1869).

adequate consideration."

The grantee may be able to prove that the conveyance was not in fraud of the surviving spouse's marital rights by showing that he gave adequate consideration, but the grantee has the burden to disprove fraud. Factors that the court considers in determining if the mortgage was in fraud of marital rights include the adequacy of consideration, the proximity of the conveyance to the grantor-spouse's death, and concealment of the mortgage by the mortgagor.

E. Notice of Intent to Redeem

Anyone wishing to redeem property under the statute must give written notice to "the person making or who is to make the sale" of his intent to redeem if the mortgagor purchases at the sale. The notice of an intention to redeem need not be given to the mortgagee; the statute only requires the mortgagor to inform the person who will make the sale. The person wishing to redeem must give this notice within ten days before the sale or at the sale itself. If the mortgagor does not give timely notice, he cannot exercise the statutory right of redemption. Dawson v. Hetzler exemplifies the pitfalls of untimely notice. Because the mortgagor did not give timely notice of his intent to redeem, the Dawson court refused to allow him to post a redemption bond, and it dismissed the proceeding. The court noted,

73. MO. REV. STAT. § 474.150 (1978).
74. Reinheimer v. Rhedans, 327 S.W.2d 823, 829 (Mo. 1959).
78. MO. REV. STAT. § 443.410 (1978). For a form that can be used to give notice of an intent to redeem, see Peterson & Eckhardt, Legal Forms, 7 MISSOURI PRACTICE SERIES § 1053 (1960).
79. MO. REV. STAT. § 443.410 (1978). In Sheridan v. Nation, 159 Mo. 27, 59 S.W. 972 (1900), a case decided under the 1877 statute, the court promulgated a more liberal rule. The court held that the mortgagor need not notify anyone as long as he posted the appropriate security. "The grantor's right to . . . redeem from a trustee's sale does not depend upon a notice of his intention to redeem . . ., but upon his filing . . . a satisfactory bond." Id. at 35, 59 S.W. at 974.
80. MO. REV. STAT. § 443.410 (1978). Missouri courts have required strict compliance with this requirement. See Fitzpatrick v. Federer, 315 S.W.2d 826, 829 (Mo. 1958); House v. Clarke, 187 S.W. 57, 60 (Mo. 1916); State ex rel. Gravois Home Sav. & Loan Ass'n v. Moss, 458 S.W.2d 593, 595 (Mo. App., St. L. 1970); Dawson v. Hetzler, 230 Mo. App. 737, 739, 74 S.W.2d 488, 489 (St. L. 1934). It has been postulated that if the mortgagor gives notice at that foreclosure sale, the person making the sale must receive the notice before the hammer falls. Peterson & Eckhardt, supra note 78, § 1053, at 238.
82. 230 Mo. App. 737, 74 S.W.2d 488 (St. L. 1934).
83. Id. at 739, 74 S.W.2d at 489.
"One can hardly read this statute without being impressed with its definite and mandatory terms respecting the notice required."

F. Redemption Bond

If the mortgagor gives proper and timely notice, his next step is to post a bond within twenty days following the sale. He must persuade the circuit court of the county where the land is located that the bond is adequate to secure the expenses as required by statute: interest on the mortgage debt for one year before and after foreclosure, costs of the sale, encumbrances, and taxes for the one year statutory redemption period.

In Krohenmann v. Schulz, the court applied Missouri Revised Statutes section 3064 and required the bond to cover taxes that accrued prior to the foreclosure as well as taxes that accrued during the year allowed for redemption. The court noted that taxes arise "by operation of law subsequent to the giving of the mortgage . . . and thus impair the security, unless they are paid." If the mortgagor were not required to include payment of both taxes, the mortgagee would be liable for any unpaid taxes if the mortgagor did not redeem the property. The bond, therefore, must be sufficient to secure payment of taxes.

Krohenmann also illustrates the statutory requirement that the bond cover all interest accrued prior to the foreclosure sale on any prior encumbrance. The court, in denying a motion for a rehearing, defined "prior encumbrance" as any encumbrance existing prior to the mortgage. As with unpaid taxes, the accrued interest on a prior encumbrance could impair the security.

Not only must a party who is entitled to redeem under the statutes ex-

84. Id.
85. MO. REV. STAT. § 443.420 (1978). For a form applicable to the filing of the redemption bond, see Peterson & Eckhardt, supra note 78, § 1055.
86. MO. REV. STAT. § 443.420 (1978).
87. 233 Mo. App. 852, 109 S.W.2d 889 (St. L. 1937).
88. (1929) (current version at MO. REV. STAT. § 443.420 (1978)).
89. 233 Mo. App. at 856, 109 S.W.2d at 890.
90. Id. at 857-58, 109 S.W.2d at 891. The court, in its holding, stated:
   It would seem, therefore, unreasonable that a mortgagor, in seeking to avail himself of his right to redeem, be allowed to prolong his possession, and extend the time of payment of his mortgage debt as well, for a period of one year, without giving security for the payment of taxes already accrued, as well as for the payment of taxes accruing during such year.
91. Id. at 857, 109 S.W.2d at 890.
92. Id.
93. Id.
94. Id.
execute the bond, but "at least one good surety" must guarantee the bond.\textsuperscript{95} The courts have applied the latter requirement strictly. In \textit{State ex rel. Hanks v. Seehorn},\textsuperscript{96} a corporation attempted to guarantee the bond. The company's charter, however, did not enable it to become a surety on a bond. Since the corporation lacked the power to become a surety, guaranteeing the bond was ultra vires and, therefore, void.\textsuperscript{97} Since the mortgagor could not redeem unless the bond had at least one good surety and the corporation lacked the power to become a surety, the mortgagor could not redeem.\textsuperscript{98}

The bond must comply with statutory requirements in form\textsuperscript{99} as well as substance. For example, in \textit{State ex rel. Mortgage Associates, Inc. v. Rickhoff},\textsuperscript{100} the court disallowed redemption because the bond contained two defects. First, it was not signed by the mortgagor,\textsuperscript{101} and second, it was a "security for costs" bond, which did not secure the items required in the statute.\textsuperscript{102} The \textit{Rickhoff} court ruled that because the mortgagor had not filed a proper bond, the court lacked jurisdiction to hear redemption proceedings.\textsuperscript{103}

The bond must be filed within twenty days following the foreclosure sale.\textsuperscript{104} Courts consistently have denied redemption when the mortgagor was tardy in presenting the bond.\textsuperscript{105}

Application for approval of the bond must accompany the bond.\textsuperscript{106} If the mortgagee is a resident of the county where the land is located, the redemptioner must notify the mortgagee at least one day before applying for redemption. If the mortgagee is not a resident of the county where the land is located or he cannot be found, the mortgagor must give the one day notice to the trustee.\textsuperscript{107} The circuit court then will either approve or reject

\begin{itemize}
\item \textsuperscript{95} MO. REV. STAT. § 443.420 (1978).
\item \textsuperscript{96} 227 Mo. App. 666, 55 S.W.2d 714 (K.C. 1932).
\item \textsuperscript{97} \textit{Id.} at 668-69, 55 S.W.2d at 715.
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{See} notes 85 & 86 and accompanying text \textit{supra}.
\item \textsuperscript{100} 537 S.W.2d 872 (Mo. App., St. L. 1976).
\item \textsuperscript{101} \textit{Id.} at 874.
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.} Similar results have been reached in other cases in which the form of the bond did not exactly comply with the statute. \textit{See}, \textit{e.g.}, \textit{State ex rel. Gravois Home Sav. & Loan Ass'n v. Moss}, 458 S.W.2d 593, 595 (Mo. App., St. L. 1970).
\item \textsuperscript{104} MO. REV. STAT. §§ 443.420-430 (1978).
\item \textsuperscript{105} \textit{E.g.}, \textit{State ex rel. Home Owners' Loan Corp. v. Bird}, 232 Mo. App. 652, 653, 110 S.W.2d 386, 387 (K.C. 1937); \textit{State ex rel. Hanks v. Seehorn}, 227 Mo. App. 666, 669, 55 S.W.2d 714, 715 (K.C. 1932). If there is a defect in the bond, the mortgagor cannot correct the error. \textit{See}, \textit{e.g.}, \textit{State ex rel. Mortgage Assocs., Inc. v. Rickhoff}, 537 S.W.2d 872, 874 (Mo. App., St. L. 1976). \textit{Cf}. \textit{Hoppe v. Boerger}, 116 S.W.2d 195, 197 (Mo. App., St. L. 1938) (mutual mistake, thus purchaser entitled to reformation of instrument). \textit{See also} \textit{State ex rel. Frank v. Administrator of Frank}, 51 Mo. 98, 100 (1872).
\item \textsuperscript{106} MO. REV. STAT. § 443.430 (1978).
\item \textsuperscript{107} \textit{State ex rel. Hopkins v. Stemmons}, 302 S.W.2d 51, 54 (Mo. App., Spr. 1957).
\end{itemize}
the application. Requiring the mortgagor to give notice of the motion for approval of the redemption bond protects the mortgagee by providing an opportunity for the purchaser to be heard prior to approval of the bond.108 Compliance with this notice requirement is mandatory, and an ex parte hearing approving the redemption bond is void.109

If the circuit court is not in session when the application is made, the court clerk will approve the bond temporarily, subject to later judicial action.110 The clerk must approve the application temporarily or the court must consider the application within twenty days, or it will be deemed rejected.111 At any time during the one year redemption period, the court may appoint a receiver to manage the property.112 The court also may require additional bond be given on application of the mortgagee after providing the bondsman with five days notice.113

Missouri Revised Statutes section 443.440114 sets out the procedure following approval of the application to redeem and subsequent inactivity of the mortgagor to do so. After approval of the bond, the trustee, at the mortgagee’s request, executes a certificate of sale115 that refers to the deed of trust, the sale, and the purchase, and delivers it to the mortgagee. If there is no redemption, the trustee will give the mortgagee, his heirs, or devisees good title by deed.116 The rights, interests, or estates of any of the parties may be conveyed as interests in land. Any prematurely executed trustee’s deed operates as a certificate of sale by the trustee.117

If the mortgagor cannot redeem within the one year period, the point at which the mortgagee receives full legal title to the property is unclear. He may receive it when the trustee passes the certificate of sale to him at the sale. Alternatively, he may receive it after the expiration of the redemption year. Although the cases support both views, the latter rule appears to be favored.118 Some commentators have argued persuasively that the purchaser

109.   State ex rel. Goodenough v. Turpin, 487 S.W.2d 876, 877 (Mo. App., St. L. 1972); White v. Huffman, 304 S.W.2d 909, 911 (Mo. App., St. L. 1957); State ex rel. Hopkins v. Stemmons, 302 S.W.2d 51, 54 (Mo. App., Spr. 1957).
111.   Id.
112.   Id.
113.   Id.
115.   For an applicable form, see Peterson & Eckhardt, supra note 78, § 1056.
118.   See Greene v. Spitzer, 343 Mo. 751, 760, 123 S.W.2d 57, 62 (1938) (dictum) (implies that grantor retains legal title throughout redemption year); Safety Sav. & Loan Ass’n v. Williams, 228 Mo. App. 595, 598, 71 S.W.2d 848, 850 (K.C. 1934) (purchaser-beneficiary acquires legal title prior to end of redemption year).
acquires legal title after the expiration of the redemption year, but then only after the trustee issues the trustee’s deed. 119 These commentators argue that since section 443.440 requires the mortgagee-purchaser to request a trustee’s deed at the end of the one year period, the certificate of sale, which the trustee issues at the sale, does not pass legal title. 120 In addition, the statute provides that the “rights, interests, and estates of any of the parties may be conveyed by deed as interests in land are conveyed.” 121 This passage implies that unlike the transfer of legal title, which normally is by deed, the transfer of the interest the mortgagee-purchaser receives at the sale involves interests not normally transferred by deed. Hence, the mortgagee-purchaser does not receive legal title at the sale. If the grantor does redeem, the mortgagee and his grantee must give “a sufficient recordable acknowledgement of redemption,” 122 but the statute does not require the mortgagee-purchaser to execute an instrument sufficient to reconvey legal title. If the grantor does not redeem, the trustee must execute a “good and sufficient deed of conveyance,” 123 which is the first instrument of the transaction to convey legal title. 124

G. Time Allowed for Redemption

The mortgagor has one year 125 after the foreclosure sale to redeem. 126

119. Peterson & Eckhardt, supra note 78, § 1052, at 236.
120. Id. at 236-37.
122. Id.
123. Id.
124. Peterson & Eckhardt, supra note 78, § 1052, at 236-37.
125. The length of redemption periods has been criticized because it deprives the lending institution of revenue by delaying the time of payment. Bridewell, supra note 22, at 558. This loss of immediate revenue will make it more difficult for others to obtain land financing since less mortgage money will be available. Id. A second argument for eliminating or shortening the time for redemption is that the longer the period, the less attractive the property is to potential buyers. Comment, supra note 22, at 40; Comment, supra note 54, at 903. The latter of these arguments does not apply to statutory redemption in Missouri because the remedy is only available when the mortgagee purchases at the foreclosure sale. MO. REV. STAT. § 443.410 (1978).
126. At least ten states recently have shortened the length of time for redemption. Note, Proposed Changes in Minnesota Law, 50 MINN. L. REV. 331, 331 n.2 (1965); Note, Right of Redemption of Real Property in Kansas, 10 WASHBURN L.J. 285, 295 (1970). The average time allowed for redemption is six months. Prather, Foreclosure of the Security Interest, U. ILL. L.F. 420, 453 (1957). This statistic was compiled before the ten states shortened their redemption periods. Seven of those ten states chose a six-month limit on the time available for statutory redemption. Note, 50 MINN. L. REV., supra, at 331 n.2. A second alternative is the imposition of separate and distinct redemption procedures for real property used for farming. See, e.g., WYO. STAT. § 1-18-103 (1977). The statute provides for a three-month redemption period for
The courts have construed this time constraint strictly.\textsuperscript{127} Although the courts recognize agreements by the parties to extend the time of redemption,\textsuperscript{128} these agreements take the proceedings out of the statute and into the doctrine of equitable redemption.\textsuperscript{129} Mortgagors also must use caution to avoid laches.\textsuperscript{130} In Euclid Terrace Corp. \textit{v.} Golterman Enterprises, Inc.,\textsuperscript{131} the mortgagor's redemption bond had not been approved one year after the sale, but the matter was pending on appeal. The mortgagor, however, did not pay the amount necessary for redemption within the one year period.\textsuperscript{132} Because of this nonpayment, the court held that the mortgagor had forfeited his statutory right of redemption.\textsuperscript{133}

H. \textit{Amount Required to Redeem}

In Missouri, a mortgagor who wishes to exercise the statutory right of redemption must pay the amount of the debt, with interest, and other specified items.\textsuperscript{134} The Missouri statute differs from most statutes, which require the mortgagor to pay the amount of the foreclosure sale price.\textsuperscript{135} The latter type encourages bidders at the foreclosure sale to bid at least the amount of the debt to protect themselves from redemption.\textsuperscript{136} By indicating that a

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\textsuperscript{127} Id. at 545.

\textsuperscript{128} Id. Some states have different time limits for exercising the statutory right of redemption for different classes of creditors. See note 53 supra.

\textsuperscript{129} MO. REV. STAT. § 443.410 (1978).

\textsuperscript{130} See Turner \textit{v.} Johnson, 95 Mo. 431, 446, 7 S.W. 570, 573 (1888); McNeer \textit{v.} Swaney, 50 Mo. 388, 390 (1872).

\textsuperscript{131} MO. REV. STAT. § 443.410 (1978) (by implication).

\textsuperscript{132} See Turner \textit{v.} Johnson, 95 Mo. 431, 448, 7 S.W. 570, 573 (1888). In Turner, the mortgagor and a second mortgagee agreed that the second mortgagee would purchase the land under the mortgage and allow the mortgagor a "reasonable time" to redeem. The mortgagor brought suit to redeem within three years and four months after the sale. The court ruled that laches did not apply. \textit{Id.}

\textsuperscript{133} 327 S.W.2d 542 (Mo. App., St. L. 1959).

\textsuperscript{134} Id.

\textsuperscript{135} G. Osborne, G. Nelson & D. Whitman, supra note 2, § 8.4, at 537; Durfee & Doddridge, supra note 9, at 836.

\textsuperscript{136} G. Osborne, G. Nelson & D. Whitman, supra note 2, § 8.4, at 538; Note, supra note 40, at 848.
redemptioner must pay the amount of the debt, the Missouri statutes imply that a mortgagor could not pay part of the debt and redeem a proportionate share of the land. Missouri courts, however, have not decided if a mortgagor could redeem, for example, one-half of a parcel by payment of one-half of the debt. One court, however, has allowed apportionment when two separate parcels of land secured the debt. In that case, the court ruled that the mortgagor could redeem any one piece of real estate independently of the other.

I. Effects of Redemption

When the court approves the application and redemption bond, the mortgagor remains in or regains possession of the property. If the mortgagor has committed waste, deductions from the redemption bond secure reimbursement to the mortgagee.

If the mortgagor redeems, the foreclosure sale is annulled, and the mortgagor is given full title to the land. A difficult question remains, however, concerning the effect of redemption on the junior liens that existed prior to foreclosure. The argument in favor of revival of junior liens is that they are only suspended by the redemption process. In support of this position, two commentators have argued, "Subsequent judgments which would have created liens had there been no sale will create inchoate liens; and then, when a redemption annuls the sale, these liens are revived. If there had been a foreclosure sale without redemption, the liens would be extinguished." If the purpose of redemption is to encourage adequate bidding at the sale, liens should not revive because charged lands would become less salable.

Also, revival of junior liens might discourage redemptions. A junior lienor who wanted to protect his lien could buy at the foreclosure sale. The same two commentators note that many redemptioners believe that the statute has "conferred upon . . . [them] the privilege of buying out the purchaser, not a mere privilege of paying money for the advancement of others."

In Greene v. Spitzer, the Missouri Supreme Court stated, by way of dic-

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140. Adkison v. Hannah, 475 S.W.2d 39, 41 (Mo. 1972) (removal of trees and rug from property; mortgagor counterclaimed alleging conspiracy to destroy his business). If the mortgagee sues for waste, the amount of damages is a jury question. Id. Also, to recover for waste, the mortgagee must sue in a civil action separate from the proceeding to approve the redemption bond. See Carter v. Guffey, 548 S.W.2d 233, 234-35 (Mo. App., K.C. 1977).
142. Durfee & Doddridge, supra note 9, at 850.
143. Id. at 851.
144. Id. at 852.
145. 243 Mo. 751, 123 S.W.2d 57 (1938).
tum, that when real property is subject to two deeds of trust and the first deed is foreclosed and sold at a trustee's sale, exercise of the statutory right of redemption revives the second deed of trust.\textsuperscript{146} The court reasoned that after statutory redemption, the grantor "does not get new title to the property, but his title is merely restored, freed from the ... lien [of the first deed of trust, which was foreclosed] but subject to all other liens."\textsuperscript{147} In Missouri, therefore, it would seem that statutory redemption does not extinguish debts secured by liens junior to the foreclosed lien.

V. CONCLUSION

The efficacy of statutory redemption should be measured by how well it furthers the policies behind the statutes. If a primary purpose for statutory redemption is preventing the mortgagor from losing the equity he has in the property, then the Missouri statutes do not fulfill their purpose. Because the statutory right of redemption is available for only a few types of foreclosure sales, few mortgagors can redeem foreclosed property. The inconvenience caused the mortgagee by the statutory right to redeem must be balanced against the hardship that the mortgagor might suffer without redemption. Apparently the Missouri General Assembly in 1877 and, again, in 1917 balanced these factors and struck a middle ground. After seventy-five years, the time may be ripe to broaden the availability of the statutory right of redemption in Missouri.

SCOTT R. DEVENNEY

\textsuperscript{146} Id. at 760, 123 S.W.2d at 62 (dictum).
\textsuperscript{147} Id. (dictum).