FORECLOSURE BY POWER OF SALE IN DEEDS OF TRUST IN MISSOURI *

An oft-heard phrase, "sold at the east door of the courthouse," is descriptive of the final event in a security transaction which began with the execution of a deed of trust; an event that is part of the definition of the word foreclosure. It is the purpose of this writing to examine one method by which foreclosure is accomplish—the exercise of the power of sale contained in a deed of trust.

The method of forclosure with which we are most familiar is the petition in a court of equity for an order of foreclosure, for it was in connection with the development of this equitable process that much of the struggle between the law and equity courts was fought.[1]

The use of a power of sale as a means of foreclosure without the aid of an equity decree is of comparatively recent development, and one which is not universally accepted.[2] In Missouri, however, it is a frequently used device, governed by statute.[3] The statute describes the power as an "option," to be exercised by the "holder of the debt," through a "trustee's sale."[4] The power is not found exclusively in the trust deed form, however, for the statute says" . . . in the same manner and in all respects as in the case of mortgages with power of sale. . . ."[5] That the use of the trust deed form of the power is well established in Missouri is seen in the comment of a dissenting judge in an early action of ejectment in the case of *Carson v. Blakey*:[6]

> Deeds of trust have so commonly obtained in this country as to enable the creditor, who is desirous of avoiding the delays of procuring a foreclosure, to attain all the ends of security without a resort to court.[7]

That it is a method of foreclosure separate from the judicial sale, and of equal validity, is established by the decision in

* This paper was written as part of the requirements for the course in Mortgages.

1. WALSH, EQUITY 122-124 (1930).
2. I GLENN, MORTGAGES §98 (1943).
3. MO. REV. STAT. §3450 (1939).
4. *Ibid.*
5. *Ibid.*
6. 6 Mo. 273 (1840). (The judge dissented from a majority opinion which allowed the creditor to be named as trustee for the deed of trust).
7. *Id.* at 276.

Homan et al. v. Connett,[8] which held that mortgages which could be foreclosed by power of sale did not require a foreclosure by court proceeding. This could only follow from the fact that a trustee's sale operates as a complete foreclosure, as though all the parties were before the court.[9]

Although referred to in the statute as an option, it is incorrect to assume that is is an option which can be exercised independently of an agreement between the mortgagor (grantor of the trust deed) and the mortgagee (beneficiary of the trust deed). This statutory power of sale is a matter of contract between the mortgagor and mortgagee. In the case of *Adams v. Boyd,*[10] the court described it in this manner:

> The power to sell under a deed of trust is a matter of contract between the parties on the conditions expressed in the instrument, and does not exist independent of it.[11]

The *Adams* case further emphasizes the contractual quality of this power in its holding that the doctrine of caveat emptor applies to foreclosure sales under the power of sale contained in a deed of trust; that the purchaser takes with notice that all of the conditions in the deed of trust upon which the trustee's power to act depends, are complied with. Referring to the statute alone to determine the necessity of expressing the power in the trust deed, we find no mandatory clause, but such an expression is suggested by frequent reference to "power of sale given in any mortgage or deed of trust."[12] The power of sale in a deed of trust is, then, an optional, statutory method of forclosing the mortgagor's equity of redemption without the delay and formality of an equity decree.

II

Having chosen the deed of trust as the desired security instrument, and having expressed therein a power of sale in a chosen trustee,[13] agreed upon by mortgagor and mortgagee, the next

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8. 348 Mo. 244, 152 S.W.2d 1053 (1941).
9. Greene v. Spitzer, 343 Mo. 751, 123 S.W.2d 57 (1938).
10. 332 Mo. 484, 58 S.W.2d 704 (1933). (An action of ejectment in which the plaintiffs claimed under an administrator's deed. The court held in favor of the defendants who claimed under a sheriff's deed of later date).
11. *Id.* at 490, 58 S.W.2d at 707.
12. Mo. Rev. Stat. §§3481, 3450 and 3463 (1939).
13. This is a substantial difference between a mortgage and deed of trust. The power of sale is the desirable feature in the deed of trust instrument. I Glenn, Mortgages §20 (1943).

question is what procedure is involved in the exercise of this power?

The answer lies in the statutes.[14] The first question is where will the sale take place? The statute provides that is shall be made in the county where the land, the subject of the sale, is located,[15] For the mortgagee whose deed of trust covers two pieces of property in two different counties, such a provision presents a problem, which is answered in the case of *Metropolitan Life Insurance Co. v. Coleman.*[16] The court held a sale of both pieces of property at one time in one of the counties to be void as to the property not in the county in which the sale was held.[17] It is clear from this rule that the trustee would be obliged to hold two sales in two counties to meet the statutory requirement.

Of perhaps less substantial value,[18] and yet a practical problem which has given the courts considerable trouble, is the question of where in the county the sale is to be held. It is actually a matter of contract between the mortgagor and mortgagee, and such contract may specify any place agreed upon.[19] Such a simple proposition would not be worth a moment's notice were it not for the fact that frequently the problems arising from these contracts make the application of the rule difficult. As an illustration of this last statement, the case of *Stewart v. Brown*[20] stands in interesting contrast with that of *Davis v. Hess.*[21]

In the *Brown* case, which was an action to redeem, the deed called for a sale at the east door of the court house. One year prior to the sale, the court house was partially destroyed. At the date of the sale, the various courts and county officials were located in different buildings throughout the town. The trustee gave notice that he would sell the property at the "front door of the court house."[22] The sale was held at the north door of the building in which the circuit court met. The court found that

14. Mo. Rev. Stat. §§3463 and 3464 (1939).
15. *Id.* §3463.
16. 99 S.W.2d 479 (Mo. App. 1936). (An action for balance of debt due after foreclosure of one tract of land, and to have equity of redemption in second tract of land closed.)
17. Because the statute does not specify the exact location in the county in which the sale is to be held.
18. Stewart *et al.* v. Brown *et al.*, 16 S.W. 389 (Mo. 1891).
19. *Ibid.*
20. 103 M. 31, 15 S.W. 324 (1891).
21. Stewart *et al.* v. Brown *et al.*, 16 S.W. 389 (Mo. 1891).
22. 103 Mo. 31, 32, 15 S.W. 324, 325 (1891).

many, who otherwise would have, did not attend the sale, fearing its illegality. There was also a finding that the property was sold for one-half its value. Judge Black, speaking for the court, held that the terms of the contract governed the sale, and there could be no deviation therefrom in the face of the exact language used; that even if the court were to give more weight to the use of the words "court house" than to the designated door, the sale could not be sustained. In the court's opinion, the only building in the town which could qualify as a court house (in the sense used in such counties—that it is a building in which the county affairs are conducted) was the partially destroyed court house building.

In the *Davis* case the same judge heard a cause of action in ejectment, brought by the purchaser at the sale, against the mortgagor who was still in possession. The trust deed specified a sale at the "court house door." At the time the deed was executed, there was no county court house. The old one had been torn down. The courts and county officials were meeting in various buildings throughout the town. At the time of the sale, the new court house building was being erected, and only the outside was completed. The sale was held at the door of this empty building. This time Judge Black said the sale was made in compliance with the terms of the contract in the trust deed, considering the surrounding circumstances; that since the courts and county officials were scattered throughout the town, the only building which could be considered the court house was the one under construction. He went on to point out that there was no evidence that anyone was misled as to the place of sale, and there was good attendance.

The two cases were tried in the same year (1891) and are excellent examples of the microscopic examination to which the courts subject such sales. Despite the distinction between the cases as regards the language in the deeds of trust, and the fact that the court found that no one was misled in the *Davis* case, while many shunned the trustee's sale in the *Brown* case, the latter decision seems a harsh one. The court seems to have made a broad presumption that the price received for the land sold in the *Brown* case, which equalled only one-half its value, was a direct result of some of the townspeople staying away. There is nothing in the report of the case to show that any of these people were expressly interested in this land and would have paid more.

It also appears to be a harsh decision when one considers that in neither of the cases was the sale made at a building that met the court's own description of a county court house, i.e., a building in which the county affairs were being conducted. There were no county affairs being conducted in a building completed only on the outside in the *Davis* case, and only the circuit court was meeting in the place of sale in the *Brown* case. Yet the court accepted the uncompleted building, where no business was conducted as being within such definition in the *Davis* case, and did so on the ground that the attendance was good. This seems to make compliance with the terms of the deed of trust turn upon the conduct of persons who are not parties thereto. These cases should serve as a warning to draftsmen, however, to consider the possibility of such contingencies arising after the execution of the deed, and to strive to describe the place of sale, as well as alternative places, to eliminate such controversies.

The same section of the statute[23] also provides that not less than twenty days notice of the intended sale must be given, regardless of the provisions in the mortgage or deed of trust. This section is susceptible of an interpretation which would lead the uninformed to publish one advertisement of the sale within twenty days of the sale date. There is, however, greater clarity in the succeeding section[24] of the statute which provides in part:

> Notice of sale . . . shall be given by advertisement inserted for at least twenty times, and continued to the day of sale, in some daily newspaper. . . .[25]

The court in *Hoffman v. Bigham*,[26] confronted with such an interpretation, said that when the two sections were construed together, the statute clearly intended that publication on each of the twenty consecutive days next preceding the sale be a minimum requirement. In considering the use of the word "to," in the phrase, "to the day of sale," the court interpreted it to be a word of exclusion by common usage, which must mean "until or up to." Thus, advertisement on the day of the sale could not be treated as advertisement on the twentieth day, so that if there had been advertisement on only nineteen preceding days, the statute would not have been complied with.

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23. Mo. Rev. Stat. §3463 (1939).
24. Mo. Rev. Stat. §3464 (1939)
25. *Ibid.*
26. Hoffman v. Bigham, 324 Mo. 516, 24 S.W.2d 125 (1930).

Time, however, is not only part of this statute which has required judicial interpretation. Even the word "newspaper" has been the subject of litigation. In the case of *Judah v. Pitts*[27] the court accepted, as complying with the statute, a publication, printed daily except Sunday, devoted to court business, real estate and financial news, which included foreclosure sales. Had the foregoing been a publication in a county in which there were no cities of 40,000 population, the sale could have been advertised in four successive issues, with the last insertion not more than one week prior to the day of the sale.[28]

One cannot examine the courts' views on the procedure which constitutes compliance with these statutes without becoming somewhat doubtful that the exercise of this power is an act of foreclosure which is looked on by courts with favor. That such observation is not a wholly imaginative experience can best be illustrated by the language of the court in the case of *Stoffel et al. v. Schroeder et al.*:[29]

> It has always been the doctrine of this court as well as of courts elsewhere that the mode of sale referred to, being a harsh method of disposing of the equity of redemption, should be watched with jealous solicitude, and overthrown, if not conducted in all fairness and integrity. . .[30]

This is an expression of the philosophy which permeates the decisions of the courts whose opinions will be considered as further examination is made to include the foreclosure procedure in the exercise of the powers of that all-important party to the sale, the trustee.

III.

In the *Adams* case, *supra*, it was observed that the trustee's power is a contractual one. It is not, however, a power which the trustee exercises as holder of the legal title to the mortgaged property. On the contrary, as said in the case of *Lustenberger v. Sarkesian*,[31] the legal title does not vest in the trustee immediately upon the execution of the deed of trust. In Missouri, a mortgage is but a security for the payment of the debt owed, and

27. 333 Mo. 301, 62 S.W.2d 715 (1933).
28. Mo. Rev. Stat. §3464 (1939).
29. 62 Mo. 147 (1876).
30. *Id.* at 149.
31. 343 Mo. 51, 119 S.W.2d 921 (1938). (Suit to set aside a sale under a deed of trust, and to have the deed of trust declared a first lien on the indebtedness).

until the mortgagee enters for breach of condition or until final foreclosure, the mortgagor is the owner of the property.[32] Nor is the trustee's power to sell to be implied from any relationship with the mortgagee (such as an agency relationship with regard to collection of interest on the notes for which the trust deed is security).[33] So long as the trust deed states as a condition precedent, that the sale shall be ordered by the beneficiary, or holder of the note and trust deed, exercise of the power of sale by a trustee upon default without such permission or direction is invalid.[34] On the other hand, where no such condition precedent exists, the default alone is sufficient to authorize the trustee to proceed with the sale.[35] The case of *Petering v. Kuhs*[36] is an example of just such an exercise of the trustee's power. In that case the mortgagor was given extensions of time on the indebtedness, but the trustee had exercised the power of sale and stated in his deed that both principal and interest had been due on the notes at the time of foreclosure. The court established the position of the trustee as one of agency. To define the trustee-agent's powers, the court drew upon the decision in *Butler Building and Investment Co. v. Dinsworth*,[37] where the rule was announced, that the trustee is the agent for the grantor of the deed of trust and the holder, as to the third parties; that any statement, by such agent, of default, binds his two principals even though they have not requested foreclosure.

In addition to the case discussed above, which give a binding effect to the statements of default made by the trustee during the foreclosure procedure, there is also a statutory effect given to the trustee's recitals of default. Such recitals in the trustee's deed to the purchaser are accepted in all courts as prima facie evidence of the truth of such statements.[38] If rebutted, however, the trustee would be in a position of breach; and although the *Adams* case, *supra*, imposed the doctrine of caveat emptor upon all such sales, the court in *Hayes v. Delzell*,[39] said that that doctrine does

32. Reynolds v. Stepanek, 339 Mo. 804, 99 S.W.2d 65 (1936).
33. St. Louis Mutual Life Insurance Co. v. Walter, 329 Mo. 715, 46 S.W.2d 166 (1931). (Where the trustee exercised power of sale without knowledge of the mortgagee.)
34. Lustenberger v. Sarkesian, 343 Mo. 51, 169 S.W.2d 921 (1938).
35. Petering v. Kuhs, 350 Mo. 1197, 171 S.W.2d 635 (1943).
36. *Ibid.*
37. 146 Mo. 361, 48 S.W. 449 (1898).
38. Mo. Rev. Stat. §3481 (1939).
39. 21 Mo. App. 679 (1886).

not preclude the right to maintain an action for damages where the trustee's advertisement of sale is based upon fraud or deceit. In dictum, that same court said that the beneficiary of the trust deed would be liable if he had knowledge of the trustee's acts.[40]

The *Petering* case, *supra,* is also authority for the rule that where there is no default the foreclosure sale is void. In that decision, the court adds an important consideration in judging the act of the trustee, which is, that although there may be no default as to principal or interest because of an extension of the mortgage deed, there may yet be a default by reason of non-performance of one of the covenants in the deed of trust, such as the covenant to pay taxes.

Thus is seen the nature of the power of sale which may be exercised by the trustee of a deed of trust. As a means of describing this power more fully, it is well to contrast it with that of a mortgagee in a mortgage which expresses a power of sale. In *Pickett v. Jones,* [41] this power of mortgage is described as one which is appended to the estate conveyed; one that is coupled with an interest,[42] and is irrevocable; one that is assignable by a conveyance of all the interest in the debt and the estate securing the debt. In contrast with this, the same court says that a trustee's duties under a deed of trust are non-delegable; that to allow any assignment thereof would be equivalent to allowing a mortgagee to transfer his power of sale in a mortgage, without transferring the debt, because in a trust deed, the beneficiary is the holder of the debt, while the trustee holds the power of sale.

So in addition to being contractual in nature, the power includes a non-delegable duty. In the case law regarding this quality of the trustee's power, the language of the *Stoffel* case, *supra,* appears again urging close scrutiny of the trustee's actions. An example of this is found in the case of *Graham v. King,*[43] in which the court imposed the duty upon the trustee to exercise fair and just discretion; to supervise the sale personally, and be ready to adjourn the same if it appeared that the property was about to be sacrificed; and emphasized the fact

40. *Id.* at 682.
41. 63 Mo. 195 (1876).
42. But see I GLENN, MORTGAGES §§99, 614 (1943). (Where the author rejects this theory as unnecessary, saying that the power of sale is a part of the mortgagee's security.)
43. 50 Mo. 22 (1872).

that such a duty was a personal one which could not be assigned to third persons. One attempt to delegate these duties, where there was no express power to do so in the trust deed, is found in *Polliham v. Reveley.*[44] To clarify the position of the trustee in such circumstances, the court borrowed the following language from the case of *Goode v. Comfort:*

> Trustees are considered as the agents of both parties, debtor and creditor, and their actions in performing the duties of their trust should be conducted with the strictest impartiality and integrity . . . justice will exact of them the most scrupulous fidelity.[45]

This non-delegable quality is also detected in those cases dealing with a deed of trust in which provisions have been made for a particular successor to the named trustees. Such a provision is put into the trust deed for the obvious reasons that the trustee may die, be absent, or refuse to perform his duties. It is a common procedure to specify the sheriff of the county as the trustee's successor. Such a provision illustrates the point under discussion. In the case of *Lunsford v. Davis,*[46] the trust deed designated the sheriff as the trustee's successor. Prior to the foreclosure sale, the named trustee was removed, and a substitute appointed by the beneficiary. The court held that the appointment of a substitute was an improper delegation of the duties of the named successor, the sheriff. A more complicated situation existed in the case of *McNutt v. Mutual Benefit Life Insurance Co.*[47] There the trust deed named the trustee, and named the successor in case of death, etc. It further provided that in the event of any of the named contingenies happenings to the named trustee and successor, the "then" sheriff of the county was to act as trustee. The default occurred while the trustee and successor were out of state, but the beneficiary of the trust deed granted a five year extension, and there was no immediate sale of the property. Later, while the named trustee and successor were still absent, and a successor sheriff was in office, the sale was requested and made. The court held the sale invalid, saying that

44. 181 Mo. 622, 635, 81 S.W. 182, 185 (1904). (Where the deed provided that the named trustee could act in person or by attorney in fact. Held this was not a power which could be delegated even though the trust anticipated the possible need of an attorney to assist in carrying out the duties of a trustee).
45. 39 Mo. 313, 325 (1866).
46. 300 Mo. 508, 254 S.W. 878 (1923).
47. 181 Mo. 94, 79 S.W. 703 (1903).

a trust deed could be drawn so that any sheriff might properly make the sale; but where, as in this case, the deed stipulated the "then" sheriff, and the "then" sheriff was in office at the time of default, his successor's sale was unauthorized. Such a decision is a good illustration of how firmly the philosophy of the *Stoffel* case has become implanted in Missouri decision on this subject.

It is true that cases subsequent to the *McNutt* case, supra, applied a more salutary rule to this problem. They interpreted the "then" sheriff to mean the sheriff in office when the foreclosure is desired.[48] But in the case of *Swabey v. Boyers*,[49] which made just such an interpretation, the court went further to say that such a sheriff (the one in office when the foreclosure is desired) becomes vested with an irrevocable interest which he retains even after the death of the grantor. So again, however complicated or devious the path from the execution of the trust deed to the moment of the foreclosure sale, the courts will seek out the trustee named in the instrument, and scrutinize the sale for total compliance with the rules just discussed.

Nor does the courts' scrutiny end with the compliance with the above rules. Refering again to the statute,[50] attention is directed to the fact that the sale is one which is to be made by the trustee, which leads to the next step in our inquiry — the manner in which the sale is conducted. The *Petering* case, *supra*, is authority for the rule that the trustee need not actually cry the sale himself, but must give it his personal supervision so as to best protect the interest of the parties. Where, however, the trustee undertakes to cry the sale, he will be held accountable for the manner in which he exercises his power. Illustrative of this point is the case of *West v. Axtell*,[51] where the sheriff, as substituted trustee, cried the sale after announcing that there would be no more sales, and the crowd had dispersed. He was unaware that there was an additional sale scheduled. After learning this, he conducted the sale rather than postponing it until a time when all interested parties could be present. Of such conduct, the court said:

> When the trustee exercises the power of sale . . . it may be that he is not conscious of an intention to act unfairly, yet

48. Swobey v. Boyers, 274 Mo. 332, 203 S.W. 204 (1918).
49. *Ibid.*
50. Mo. Rev. Stat. §3450 (1939).
51. West v. Axtell, 322 Mo. 401, 17 S.W.2d 328 (1928).

> if his conduct was actually unfair, and operated to the injury of the complaining party to the transaction, such conduct, though unintentional, will not relieve the sale from its taint, nor the unfair act of its consequences.[52]

The same language with regard to the unintentional conduct of the trustee is found in the case of *Stone et al. v. Hammons.*[53] There the trustee announced at the sale that the land was being sold subject to a lease. The lease actually existed, but had been made subsequently to the execution of the deed of trust, so the deed would not be subject thereto. The announcement scared off the purchasers, and the holder of the lease was able to purchase a $4,000 piece of property for $2,800. The court considered the trustee's act to be a chilling of the bid, and a proper basis for setting the sale aside. It is important to notice that the court in this case did not base its decision on the low price at which the lessee was able to bid in the property; it was the chilling of the bid, however, unintentional, which tainted the sale. A court looks for more than a low purchase price as a basis for setting aside a sale. As said in *Judah v. Pitts,* inadequacy of price alone is not sufficient. "The inadequacy must shock the moral sense . . . ,"[54] and there must be some unfair dealing or fraud.

IV.

Up to this point the examination of the power of sale has been confined to the statutory requirements and the procedure necessary to comply therewith. Among the cases cited there have been numerous holdings to the effect that many such sales failed to comply with these requirements. Just what the result of such sales might be is found in the next cases to be considered.

Reference has already been made to the results of a foreclosure by exercise of the power of sale; that it operates as a complete foreclosure as though all the parties were before the court, as stated in the *Green* case, *supra.* If this is true, then the result of such sale must be a conveyance of valid title. That such is the result of the sale is shown in the case of *Wharton v. Farmers Bank,*[55] where the court said:

In Missouri foreclosure under power of sale contained in a

52. *Id.* at 415, 17 S.W.2d at 334.
53. 347 Mo. 129, 146 S.W.2d 606 (1941).
54. 333 Mo. 301, 313, 62 S.W.2d 715, 721 (1933).
55. 119 F.2d 487 (8th Cir. 1941).

deed of trust is as effectual to pass title as a foreclosure by action.[56]

In the *Graham* case, *supra,* where the sale was made by a party to whom the duties of the trustee were improperly delegated, and where there was no default, and the trustee was not present at the sale as in the *Petering* case, *supra,* the sales were said to be void. Where, however, the failure of the trustee can be construed as irregular, the rule of the case of *Adams v. Carpenter,*[57] will be followed. It is the rule that a sale which is at most irregular can only be taken advantage of by the mortgagor or those claiming under him, by an action to redeem, accompanied by an offer to pay the debt. This rule was reiterated by a later court in the case of *Wakefield v. Dinger,*[58] where a mortgagor was seeking to eject the mortgagee, who had taken peaceful possession under a foreclosure sale, on the ground that the sale was void for several irregularities which included sale at wrong door of court house, no default when sale made, and deed of trust not filed until after the suit was brought. In denying the mortgagor the right of ejectment, the court said the contention that the sale was void due to these irregularities was not supported by any decision in the State of Missouri, and was contrary to the rule of the *Adams* case.

Later decisions would indicate that although the *Wakefield* case applied the rule of the *Adams* case properly, it went too far in including a sale without default as an irregularity.[59] The rule is stated again under somewhat different circumstances in *Abrams v. Lakewood Park Cemetery Association.*[60] In that case it was urged that the foreclosure by sale of property dedicated to use as a cemetery was void unless the sale was ordered by a court of equity where the cemetery rights could best be protected. The court held that where there is a "legitimate attempt" to exercise the power of sale in a deed of trust, and the mortgagee has a clear right to foreclose, the sale is not void, but is at most voidable, subject to a dissaffirmance in an appropriate action of redemption by the mortgagor.

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56. *Id.* at 490.
57. 187 Mo. 613, 86 S.W. 445 (1905). (Action to set aside a deed of trust and have it declared a lien on the still-existing debt.)
58. 234 Mo. App. 407, 135 S.W.2d 17 (1939).
59. See Petering v. Kuhs, 350 Mo. 1197, 171 S.W.2d 635 (1943).
60. 355 Mo. 313, 196 S.W.2d 278 (1946).

There is a final consideration in the trustee's exercise of the power sale. Although there is no impropriety in the mortgagee's (beneficiary) bidding in the property at the foreclosure sale[61] (in fact it is contemplated in the statute governing the sale),[62] it is an established rule that such a purchase, either directly or indirectly, by the trustee, is a breach of his fiduciary duty; and his purchase is subject to redemption by the grantor (mortgagor).[63] In the case of *Jodd v. Lee*,[64] such a rule was enunciated; but in examining the facts, the court was satisfied that the purchaser had not bid in the property for the trustee at the time, and allowed that trustee's purchase of the property, some four years later, to stand as valid purchase.

Where there is a direct or indirect purchase for or by the trustee, the transaction is said to be void. For example, there is the statement of the court in the case of *Northcutt v. Fine*[65]:

> Neither can a trustee directly or indirectly become the purchaser at his own foreclosure sale. Such sale will be null and void.[66]

It is well to point out that the above quotation appeared in the opinion of a court that was hearing a petition in equity to set aside a trustee's deed in an action to redeem the mortgaged property. It is in such an action only that the invalidity of the trustee's sale can be attacked. The presumption of fraud which accompanies the trustee's direct or indirect purchase at the foreclosure is a basis for attacking the validity of the sale, but such an attack must be direct, and come in an action to redeem. It can never be a collateral attack; for example, it cannot be raised as a defense in an action of law for a recovery by the mortgagee of the balance due on the debt.[67]

When the foreclosure sale has reached the point where the mortgagor's right to redeem is being asserted in a court of equity, this examination of the transaction is completed. The right to redeem is statutory; it does not exist as a matter of course.[68] It is a right which must be asserted in careful com-

61. Bruner v. Stevenson, 73 S.W.2d 413 (Mo. App. 1934).
62. Mo. Rev. Stat. §3450 (1939).
63. Jodd v. Lee, 256 Mo. 536, 165 S.W. 991 (1913).
64. *Ibid.*
65. 44 S.W. 2d 125 (Mo. 1931).
66. *Id.* at 128.
67. Gempp v. Teiber, 172 S.W.2d 651 (Mo. App. 1943).
68. Judah v. Pitts, 333 Mo. 301, 62 S.W.2d 715 (1933).

pliance with the statute.[69] To pursue the factors of compliance, and the concomitant rights arising therefrom, leads beyond the scope of this writing. Its observations have been confined to the transactions at the east door of the court house, across which falls the ever-present shadow of the words of the *Stoffel* case:

> . . . a harsh method of disposing of the equity of redemption [which] should be watched with jealous solicitude. . . .[70]

ALLEN CHURCHILL†

69. MO. REV. STAT. §3450 (1939).
70. Stoffel v. Schroeder, 62 Mo. 147, 148 (1876).
† Third-year student, Washington University School of Law.