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THE DEBTORS RELIEF AFTER SALE UNDER A DEED OF TRUST

I

In Missouri, a mortgagee of real property has several statutory remedies by which he may foreclose on the land which is security for the debt or obligation. Under Section 3447,¹ he may file a petition in the circuit court when the amount of his debt exceeds fifty dollars, setting forth in his petition the mortgage debt, requesting judgment for the debt, and that the mortgagor's equity of redemption be foreclosed, and the mortgaged premises sold. On the other hand, where the "mortgagee" is the beneficiary under a trust deed with power of sale, judicial proceedings are not necessary; however, where the mortgagee proceeds under the latter method and the sale is made by the trustee, some relief is given to the grantor by allowing him to redeem from such sale where the purchaser is the beneficiary of the trust.² It is a purpose of this article to analyze this latter procedure with the object of marking the limits of this statutory right to redeem, the duties of the grantor, and his successors, through a summary of the decisions which have interpreted this statutory relief. In addition, the article treats on the application of equitable principles where the statutory requirements are not followed in the sale of mortgaged premises.

It is important to note that the statutory right to redeem is not exclusive, and the passage of the statute does not prevent a court of equity from exercising its inherent power to allow a mortgagor to redeem where the equities are in his favor.³ The court in the *Schaeffer* case allowed the grantor under a deed of trust to redeem the property sold without compliance to the statute. Here, the grantor tendered interest after default but before advertisement of sale by the trustee. The grantor's tender was refused. After the sale, the grantor brought his action to redeem and was willing to pay any sum the court would decree due the purchaser at the sale. The court inferred that in a proper case laches may well bar the equitable relief even though

1. MO. REV. STAT. § 3447 (1939).

2. MO. REV. STAT. § 3450 (1939).

3. *Potter v. Schaeffer*, 209 Mo. 586, 108 S.W. 60 (1908); *Hoffman v. Bingham et al.*, 324 Mo. 516, 24 S.W.2d 125 (1930); *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S.W. 773 (1901).

the statutory period had not expired. The doctrine of laches was not applied as the defendant in taking possession was well aware of the grantor's rights by making a tender. Certainly, a correct result was reached in allowing equitable redemption, for the terms of the deed provided that the default in an interest payment would allow the trustee to exercise the power of sale. This is especially harsh when it was shown that the purchase price on the sale was far less than the grantor's equity in the property. As shown in the *Schaeffer* case, an equitable right to redeem will be allowed only where there is an irregularity in the sale by non-compliance with the statutory requirements surrounding such sale, or that something in the nature of fraud or "imposition" has been practiced on the grantor.

Mere purchase of the land at less than its true value is not, in and of itself, within the purview of what equity would deem fraudulent.⁴ It is to be noted, however, that in the *Roby* case, the cestui que trust under the deed of trust was not the purchaser at the sale. An additional fact supporting the equities of the purchaser was the giving up of possession by one of the grantor's heirs after the sale; thus, leading the purchaser to believe that the sale and the trust deed would not be contested. This fact, alone, should not control, but when it is considered that the suit was not started until twenty-three months after the sale, the purchaser's right should not be disturbed by allowing a redemption. While a purchaser cannot improve the premises to a point which would prevent redemption, the improvements made by this purchaser were proved to have been made in reliance upon the grantor's heirs' apparent abandonment of any desire to effect a future redemption.

An excellent example of the type of fraud or sharp practices in a sale which equity will set aside and from which the grantor will be allowed to redeem can be noted in *Alfred v. Pleasant*.⁵ In this case, the beneficiary of the deed of trust lulled the grantor by advising him that only the interest payments need be made on due date, and "not to be concerned about the principal." The grantor was an enfeebled old man who greatly relied on a son. During the son's absence, and without notice to the grantor, the

4. *Roby et al. v. Smith, et al.*, 261 Mo. 192, 168 S.W. 956 (1914); *Keith et al. v. Browning*, 139 Mo. 190, 40 S.W. 764 (1897).

5. 175 S.W. 891 (Mo. 1915).

sale was made, and the beneficiary purchased the premises. The son returned immediately after the sale and tendered payment of the indebtedness and the costs of the sale. The tender was refused. The court would not allow the beneficiary-purchaser's action of ejectment, contending that equity would protect the grantor from the deception which prevented him from exercising the opportunity of complying with the statutory right to redeem. It is interesting to note that the tender and willingness to pay was successfully used as a defense in an action of ejectment.

As previously inferred, a court of equity will require that a person bring his action within a certain period, or be barred by his laches. In the case of *Gray v. Howard*,⁶ an attempt was made to redeem seven years after the sale under the deed of trust, and the defendant, the cestui que trust, was purchaser. The plaintiffs, judgment creditors of the grantor and who had purchased the land from the sheriff who levied execution on their judgments, were denied the right to redeem. It would seem that the court took into consideration that the complaining party was not the original grantor, and that these creditors had waited seven years before attempting to secure any satisfaction on their judgments. In another situation, however, equity allowed redemption when proceedings were brought thirteen months after the irregular sale under the deed of trust, and where nothing was shown that the party intended to abandon the equity of redemption.⁷ In *Ferguson v. Soden*,⁸ a delay of eight years prevented the grantor from redeeming as there were no apparent defects in the deed of trust, or the trust deed given the purchaser. This case, however, is not proper authority as to when laches may bar the equitable proceeding, as there was no defect in the circumstances surrounding the sale, and as a result, no reason to consider whether equitable principles would apply. Redemption was refused within three years after the sale in *Klein v. Vogel*.⁹ There, the one seeking to redeem had purchased the grantor's equity of redemption prior to default. The defendant was a subsequent holder of the note which was secured by the lands to be redeemed. The trustee's sale was made after due notice to the petitioner, and the defendant purchased the property at the sale. The plain-

6. 14 Mo. 341 (1851).

7. *Hoffman v. Bingham et al.*, 324 Mo. 516, 24 S.W.2d 125 (1930).

8. III Mo. 208, 195 S.W. 727 (1892).

9. 90 Mo. 239, 1 S.W. 733 (1886).

tiff's position in equity was unfavorably affected, for it was shown that he refused, after filing suit, the defendant's offer to convey the premises if the plaintiff would pay the debt, interest, taxes, and costs of repairs made while the defendant was in possession. It may well be that if these additional facts were not involved in the case, the court would allow such a suit initiated three years after sale.

While it has been pointed out that a court of equity may allow redemption from an irregular sale, they will accept the terms of a separate agreement between the grantor and the holder of the debt, whereby the creditor agrees to purchase the property at the trustee's sale and hold it subject to the grantor's (or his grantee's) rights without requiring statutory compliance by the grantor. In *McNew v. Booth*,¹⁰ the grantor of a deed of trust was seeking to redeem three years after the sale. Prior to the sale, the holder of the obligation secured by the deed of trust agreed to purchase the property on the sale and to hold it a reasonable time for the grantor's benefit. There was no evidence of any fraud practiced on the grantor. Two years after the sale, the defendant refused a tender from the grantor of the proper sums. The court held that a "reasonable" time had elapsed and that the grantor's interests were completely barred. A clear case of the courts' respect of a separate agreement to hold for the grantor, after a purchase at the trustee's sale, can be seen in *Kennedy v. Siemers*.¹¹ Here, again, there was an agreement to purchase at the trustee's sale, take a trust deed in his own name and to convey the land back to the grantor if the grantor repaid advancements within two years from the date of sale. It was held that the grantor and those taking under him with knowledge of the contract were estopped to redeem from the sale which was invalid for failure of proper notice by the trustee—the contract fixed the rights of the parties. In *Sturgeon v. Mudd*,¹² the beneficiary agreed, after default, to forego forcing the sale of the property under the deed of trust, provided the grantor made certain payments. Instead, the sale was carried out, and the beneficiary purchased at the sale. This would appear to be a proper place for equity to allow the grantor to redeem. The oppo-

10. 42 Mo. 189 (1868).

11. 120 Mo. 73, 25 S.W. 512 (1894).

12. 190 Mo. 200, 88 S.W. 630 (1905).

site result was reached, however, apparently on the clean hands doctrine, when the grantor sought equitable relief. When the grantor had secured additional time from the holder of the debt, he, the grantor, was aware that there was a deed of trust prior to the defendant's deed outstanding against the property, and the existence of liens by virtue of judgments. Although knowing these facts, the grantor did not reveal them. The court came to the right result in finding that the defendant acted properly in his refusal to perform the extension agreement when learning that the property was encumbered by liens with priority over his deed of trust.

It may be said after a reviewal of these previously cited cases that for one seeking to redeem on equitable principles, irregularity in the trustee's sale must be shown, or that something in the nature of fraud has been practiced on the grantor. This latter condition may or may not be exposed by comparing the market value of the property and the selling price.

II

As explained in the foregoing section, the statutory right to redeem is not the grantor's sole remedy and the equitable relief remains. But inasmuch as equitable relief is discretionary would it not be better that the grantor seek to protect his equity in the property which is subject to a deed of trust by complying with the statute where he has the opportunity to do so? This would be true even though the provisions of the statute may change, and thus require a periodic review and advice as to the method which would be adopted to protect the debtor's equity. The principle of the statutory right to redeem has not changed—merely the time requirements and procedural steps which are to be observed.

The condition with which the one seeking to redeem must comply—and this includes the grantor's heirs, devisees, executors, administrators, grantees, or assigns—are as strictly enforced as the provisions which must be met in effectuating a valid sale. Section 3450¹³ requires:

. . . that such persons entitled to redeem shall give written notice at the sale or within ten (10) days before the sale to the person making or who is to make the sale of the purpose

13. MO. REV. STAT. § 3450 (1939).

to redeem if the sale and purchase are so made; and provided further, that said grantor . . . to make said redemption shall within said year pay the debt and interest and other obligations . . . together with all sums paid out by the holder thereof . . . for the interest and principal and either of any prior encumbrances, and for taxes and assessments and all legal charges and costs of the sale.

This section cannot be invoked unless the grantor also complies with Section 3451,¹⁴ which provides that no party has the right to redeem unless within twenty days from the date of sale proper security is given in the circuit court of the county in which the land is located. The security is in the nature of a bond which is to have proper surety and is to be sufficient to secure interest to accrue during the year on the mortgage debt, the legal costs and expenses of the sale, interest which accrued prior to sale on any encumbrance which the purchaser had to pay, interest on sums paid by the purchaser at sale, and for damages for waste during the year. A motion for approval shall accompany such bond. If the court is not in session when bond is filed for approval, temporary approval may be given by the clerk, subject to review, later, by the judge of the circuit court. Without this approval or presentment to the court or judge, within twenty days after filing, the bond is deemed disapproved. Where proper bond is given and approved by the circuit court, the trustee at the purchaser's request shall execute to him a certificate of sale. If redemption is not made within one year, then the purchaser is to receive a trust deed.

Having outlined the terms of the statute and the time periods in which the grantor, or those claiming under him, must act, a question arises as to whether "time is of the essence," or will the court excuse performance when the grantor proceeds to invoke the statutory right to redeem. In *Godfrey v. Stooke*,¹⁵ the grantor on the day of sale told the trustee and holder of the debt that he would redeem. Two days later, he filed leave to give security and for redemption. The bond which he gave was approved fifteen days later, and ten months after sale, the grantor offered to redeem the holder of the debt who purchased the premises and was then in possession. The statute required bond to be furnished at date of sale. The grantor was allowed to redeem within the

14. MO. REV. STAT. § 3451 (1939).

15. 116 Mo. 403, 25 S.W. 733 (1893).

twelve months period with the court concluding that the statutory requirement of furnishing bond on the day of sale was too arbitrary and unreasonable as the grantor may not know who is purchasing the property. Also, surety may be difficult to obtain, and even if obtained, the place of sale may be some distance from the clerk's office with the result that it may be impossible to have the bond approved. In this instance, the court felt that a reasonable time should be the guide and filing two days after sale met the test of reasonableness. The *Godfrey* case would seem to be no longer authority as the statute now requires the bond to be filed within twenty days after the date of sale. It is clear that the additional days of grace through legislative enactment have caused the extinguishment of the "reasonable time" rule in one small area of the law. In several instances, by sustaining a writ of prohibition, it has been held the provisions of the statute are mandatory.¹⁶ In *State ex rel. H.O.L.C.*, a writ of prohibition was sought to prevent continued action by a circuit judge before whom a motion to redeem was pending. The grantor had given notice of intent to redeem on the morning of the sale, and within the twenty day period filed a bond accompanied by a motion for its approval. This bond was rejected and the application to redeem denied. After expiration of the twenty day period, the petitioner was allowed to strike his former surety, and "refile" a bond which the court approved. The writ was sustained on the grounds that the circuit court had no jurisdiction because of the failure to comply strictly with the statute. In the *Leehorn* case, it was affirmatively stated that filing the bond within twenty days is a condition necessary for jurisdiction. Certainly, the result in the *Home Owners Loan Corporation* case was harsh, but not as severe as that which resulted in *Dawson v. Hetzler*.¹⁷ Here, the petitioner purchased the grantor's equity of redemption three days before the sale under the deed of trust. He failed to give notice to the trustee or the holder of the debt that he intended to redeem until several hours after the sale.

16. *State ex rel. Home Owners Loan Corp. v. Bird*, 232 Mo. App. 652, 110 S.W.2d 386 (1937); *State ex rel. Hanks v. Leeorn*, 227 Mo. App. 666, 55 S.W.2d 714 (1932), surety's act was ultra vires and proper bond not filed within twenty days from date of sale. Held: filing proper bond necessary before hearing motion to approve the bond.

17. 230 Mo. App. 737, 74 S.W.2d 488 (1934), mandatory—where wife joined in deed of trust, and after divorce seeks to establish marital rights in premises. *Moss v. Brant et al.*, 216 Mo. 641, 116 S.W. 503 (1909).

Then, and within the twenty day period, he filed his redemption bond. For failure to give notice "at, or prior to the sale" the petitioner was defeated; once again the mandatory character of the statutory requirements was brought into focus.

In addition, where one is petitioning to redeem, the bond must accompany the petition and both be filed within the twenty day period. This requirement is not met by petitioning for leave to file a bond.¹⁸ It has been held that a bill to redeem from a sale under a deed of trust not filed within twelve months after sale, and which fails to allege that the plaintiff gave or attempted to give the security required, is fatally defective.¹⁹ Note, however, if the petitioner includes sufficient allegations which may entitle him to equitable relief through redemption, the fatal character of the petition would be corrected.

A question has arisen as to the interest which the grantor acquires when he redeems the property, either under the statute or by equitable relief. It has been held that the grantor does not receive a new title but is merely restored to his old title free and clear of the lien which was foreclosed, subject to all other liens.²⁰ This is true even though a trustee's sale is wrongfully executed, for until the sale is set aside there is a legal transfer of title.²¹

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18. *Walmsey et al. v. Daugherty et al.*, 163 Mo. 298, 63 S.W. 693 (1901).

19. *Sturgeon v. Mudd*, 190 Mo. 200, 88 S.W. 630 (1905).

20. *Greene v. Spitzer et al.*, 343 Mo. 151, 123 S.W.2d 57 (1938).

21. *Loeb v. Dowling et al.*, 349 Mo. 674, 162 S.W.2d 875 (1942).

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