

The Deed of Trust: Arizona's Alternative to The Real Property Mortgage

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In recent years Arizona's real property mortgage laws have been the subject of considerable criticism from members of the state mortgage banking industry. Spokesmen for the industry contend that the mortgage foreclosure process in Arizona is unnecessarily time-consuming and expensive.¹ To foreclose a \$25,000 mortgage in an uncontested action, for example, requires approximately 8 months; a contested proceeding may last from 12 to 14 months.² Since the realty mortgage must be foreclosed by judicial action, court costs and attorney's fees add to the expense of the proceeding.³ Moreover, the purchaser at the foreclosure sale acquires title subject to a 6-month redemption right of the mortgagor.⁴

In response to these factors, the Arizona legislature, in May 1971, adopted the deed of trust as an alternative security device to the traditional mortgage.⁵ This comment will first explore the nature of the deed of trust, distinguishing this arrangement from the mortgage. The Arizona Deeds of Trust Act will then be analyzed and several unresolved issues raised by the statute will be discussed.

1. See Legislative Council Comm. on Deeds of Trust, 29th Ariz. Leg. (Minutes of meeting, May 16, 1969) (copy on file in the offices of *Arizona Law Review*).

2. Comm. on Mortgage Law & Practice, American Bar Association, *Cost and Time Factors in Foreclosure of Mortgages*, 3 REAL PROP., PROB. & TR. J. 413 (1968); Legislative Council Comm., *supra* note 1 (comments of Franklin J. Stowell, State Superintendent of Banks).

3. ARIZ. REV. STAT. ANN. § 33-721 (Supp. 1972). The minimum suggested fee for an uncontested mortgage foreclosure action in Arizona is approximately \$300. MARICOPA COUNTY BAR ASS'N, ADVISORY MINIMUM LEGAL FEE GUIDE (1970); PIMA COUNTY BAR ASS'N, FEE SCHEDULE (1970). A survey conducted in 1968 revealed an average cost of \$445 for a \$25,000 uncontested foreclosure in Arizona. Comm. on Mortgage Law & Practice, *supra* note 2.

4. ARIZ. REV. STAT. ANN. § 12-1282(B) (Supp. 1972-73). If the court determines that the property is abandoned and not used primarily for agriculture or grazing, the statutory redemption period is 30 days. *Id.* § 12-1282(A).

5. *Id.* §§ 33-801 to -821 (Supp. 1972). While the trust deed is not new in Arizona, historically it has been treated as a mortgage. See Ariz. Rev. Stat., Civil ¶ 3303 (1901); Ariz. Rev. Stat. ¶ 2358 (1887).

THE DEED OF TRUST

The deed of trust, like the real property mortgage, secures the performance of a promissory note or other contractual obligation of a debtor. The trustor (debtor) conveys his title to real property to a trustee who holds the title to guarantee payment to the beneficiary (creditor).⁶ While the trust deed and the mortgage have many features in common, there are distinct differences. If the debtor defaults on the secured note, a mortgagee may generally foreclose only by filing a civil action.⁷ The deed of trust does not require judicial action, since the trustee holds a power of sale enabling him to sell the property out of court.⁸ The beneficiary usually has the option of foreclosure by court action or the trustee's sale.⁹ The advantage of the trust deed to the creditor derives from his right to choose this second alternative, thus avoiding the delay and expense accompanying a judicial proceeding. In addition, while the mortgagor generally has a statutory right to redeem his property after sale,¹⁰ the trustor has no right of redemption once the property is sold at the trustee's sale.¹¹ Instead, the purchaser takes such title as the trustor had, including an immediate right to possession of the land.¹²

These two features, the creditor's right to elect a nonjudicial foreclosure and the debtor's inability to redeem his property after sale, are the primary characteristics which distinguish the trust deed from the mortgage. Because of these factors, the trust deed is usually preferred by lending institutions over the real property mortgage.¹³ Nonetheless,

6. 1 G. GLENN, *MORTGAGES* § 20 (1943). A transfer of title is not essential to the character of the trust deed, as several states hold that it creates only a lien. *E.g.*, *Brand v. First Fed. Sav. & Loan Ass'n*, 478 P.2d 829 (Alas. 1970); *Fleming v. Adams*, 392 S.W.2d 491 (Tex. Civ. App. 1965).

7. *See, e.g.*, *ARIZ. REV. STAT. ANN.* § 33-721 (Supp. 1972); *N.M. STAT. ANN.* § 61-7-7 (1960); *ORE. REV. STAT.* § 88.010 (1971).

8. G. OSBORNE, *MORTGAGES* § 339 (2d ed. 1970). Several states recognize a mortgage with a power of sale which does not require judicial foreclosure. *See, e.g.*, *ALA. CODE*, tit. 47, § 166 (1958); *MD. ANN. CODE*, art. 66, § 5(a) (1972); *N.H. REV. STAT. ANN.* § 479:25 (1968); *WIS. STAT. ANN.* § 297.01 (1958). While a mortgage with a power of sale once was recognized in Arizona, *ARIZ. REV. STAT.* § 2359 (1887), the statute was later amended to require court foreclosure for all mortgages. *ARIZ. REV. STAT. CIVIL* § 4113 (1913).

9. J. PUGH & W. HIPPAKA, *CALIFORNIA REAL ESTATE FINANCE* 150 (1966).

10. *See ARIZ. REV. STAT. ANN.* § 12-1282 (Supp. 1972-73).

11. *See, e.g.*, *ALASKA STAT.* § 34.20.090(a) (1971); *IDAHO CODE* § 45-1508 (Supp. 1972); *MONT. REV. CODES ANN.* § 52-410(3) (Supp. 1971); *NEB. REV. STAT.* § 76-1010(2) (1971).

12. 1 H. MILLER & M. STARR, *CURRENT LAW OF CALIFORNIA REAL ESTATE* 503 (1965) [hereinafter cited as 1 MILLER & STARR].

13. Proponents of the Act maintain that the deed of trust will encourage a greater influx of capital into Arizona. See Memorandum from C.H. Havens, President of the Arizona Mortgage Bankers Association, to Members of the Arizona House and Senate, January 15, 1969 (copy on file in the offices of *Arizona Law Review*). *See generally* Gose, *The Trust Deed Act in Washington*, 41 *WASH. L. REV.* 94 (1966); Rarick, *The Background for the Proposed Deed of Trust Legislation*, 40 *OKLA. B. ASS'N J.* 215 (1969). The present desirability of attracting new land development

the deed of trust has certain disadvantages for the lender. If the sale proceeds fail to extinguish the indebtedness, for example, the beneficiary's right to a deficiency judgment is limited. While some jurisdictions prohibit any deficiency judgment after the trustee's sale,¹⁴ others restrict the amount of the judgment to the difference between the sale price and the fair market value of the land.¹⁵ In contrast, the mortgagee may often recover the full difference between the sale price and the balance due on the contract.¹⁶ Further discussion of the relative advantages and disadvantages of the trust deed for both the creditor and debtor requires a thorough consideration of the provisions of the Arizona Act.

THE ARIZONA DEEDS OF TRUST ACT

Scope and Definitions

The Arizona Act defines a trust deed as a deed conveying legal title to real property to a trustee to secure the performance of a contract.¹⁷ This definition suggests that the trust deed, unlike the Arizona mortgage, will convey title rather than create a lien.¹⁸ Nonetheless, the trustee is generally held to have bare legal title—sufficient only to permit him to convey the property at the out of court sale.¹⁹ All other incidents of title remain in the trustor.²⁰ Thus, in legal effect, there would seem to be no substantial difference between the trustee's "title" and the mortgagee's "lien."²¹

While a trust deed may convey title to personal property,²² the

capital to Arizona has been questioned, however. See Bleck, *High Population Growth Rates in Tucson Change Projections of Housing Needs*, 22 ARIZ. REV. 30 (Mar. 1973); Bleck, *Is the Tucson Housing Boom Going to Burst?*, 21 ARIZ. REV. 7 (Oct. 1972).

14. See, e.g., ALASKA STAT. § 34.20.100 (1971); MONT. REV. CODES ANN. § 52-414 (Supp. 1971); ORE. REV. STAT. § 86.770 (1971); WASH. REV. CODE ANN. § 61.24.100 (Supp. 1972).

15. See, e.g., IDAHO CODE § 45-1512 (Supp. 1972); NEB. REV. STAT. § 76-1013 (1971); UTAH CODE ANN. § 57-1-32 (1963).

16. See, e.g., ARIZ. REV. STAT. ANN. § 33-727(A) (Supp. 1972). But see *id.* § 33-729, which prohibits any deficiency judgment after foreclosure of a purchase money mortgage securing property of 2½ acres or less which is limited to and utilized for single one or two family dwellings.

17. *Id.* § 33-801(4).

18. In Arizona, the mortgagee holds only a lien on the property, title remaining in the mortgagor until the foreclosure sale. *Lane Tit. & Trust Co. v. Brannan*, 103 Ariz. 272, 440 P.2d 105 (1968); *Mortgage Inv. Co. v. Taylor*, 49 Ariz. 558, 68 P.2d 340 (1937); *Steinfeld v. State*, 37 Ariz. 389, 294 P. 834 (1930).

19. See *Hamel v. Gootkin*, 202 Cal. App. 2d 27, 20 Cal. Rptr. 372 (1962).

20. *MacLeod v. Moran*, 153 Cal. 97, 99, 94 P. 604, 605 (1908); *Buck v. Superior Court*, 232 Cal. App. 2d 153, 158, 42 Cal. Rptr. 527, 530, cert. denied, 382 U.S. 834 (1965).

21. See 1 MILLER & STARR, *supra* note 12, at 372. The title-lien distinction may be significant with respect to certain statutory provisions which refer only to a mortgage or lien. See, e.g., ARIZ. REV. STAT. ANN. §§ 10-769, 14-565, -577, -592, -602, 33-1104(C) (1956).

22. See *Bulla v. Valley Nat'l Bank*, 82 Ariz. 84, 308 P.2d 932 (1957); *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 P. 87 (1916).

Act was not intended to include this form of security since only real property is mentioned.²³ If both real and personal property are secured by the same instrument, the statutory requirements applicable to security interests must be satisfied.²⁴ The creditor may foreclose on the personal property separately or with the real property in one action.²⁵ Fixtures are automatically included as security in the conveyance since they are deemed to be part of the realty.²⁶

There are two real property transactions to which the Act is inapplicable. Specifically excluded are deeds conveying real property of which a part or all is located outside the state.²⁷ In addition, when a trust deed is executed for a principal purpose other than or in addition to securing the performance of a contract, the parties may agree in writing that the provisions of the Act will not apply to the transaction.²⁸ Apparently the latter section was designed to allow the exclusion of the subdivision trust²⁹ and the express trust of real property from the scope of the Act.³⁰

The contract secured by the deed of trust may be executed in a

23. ARIZ. REV. STAT. ANN. §§ 33-801(4), (5), (7) (Supp. 1972).

24. See *id.* § 44-3102(A) (1967), which provides that article 9 of the UNIFORM COMMERCIAL CODE applies to "any transaction (regardless of its form) which is intended to create a security interest in personal property. . . ." But cf. *id.* § 44-3147. It has been recommended that a separate security instrument be executed to cover the personal property. Eagan, *Deed of Trust Transactions*, in CALIFORNIA LAND SECURITY AND DEVELOPMENT § 1.21 (1960); 1 MILLER & STARR, *supra* note 12, at 386.

25. See ARIZ. REV. STAT. ANN. § 44-3147(D) (1967).

26. See *Voight v. Ott*, 86 Ariz. 128, 132, 341 P.2d 923, 925-26 (1959); *Trask v. Moore*, 24 Cal. 2d 365, 371, 149 P.2d 854, 858 (1944). For the requisites necessary for a chattel to be considered a fixture, see *Gomez v. Dykes*, 89 Ariz. 171, 359 P.2d 760 (1961). The fixtures may still be subject to the requirements of the UNIFORM COMMERCIAL CODE. See ARIZ. REV. STAT. ANN. §§ 44-3102(A), -3104(10) (1967); *id.* § 44-3134 (Supp. 1972-73).

27. ARIZ. REV. STAT. ANN. § 33-801(4) (Supp. 1972). Generally, the rights and duties of parties to a mortgage or trust deed are determined by the laws of the state in which the encumbered property is located. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 228, 229 (1971); G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 346-50 (3d ed. 1963). Therefore, if a trust deed attempts to convey title to property part of which is located outside Arizona, the result will be twofold: first, the out-of-state property will be subject to the mortgage or trust deed laws of that state; second, the trust instrument will fail to meet the definition of a deed of trust under the Act, and may be treated as a mortgage for purposes of dealing with that part of the land located within Arizona. See ARIZ. REV. STAT. ANN. §§ 33-702(A), -721 (Supp. 1972).

28. ARIZ. REV. STAT. ANN. § 33-819 (Supp. 1972).

29. The subdivision trust secures the performance of a land purchase contract. The vendor conveys title of real property to a trustee who, in turn, conveys portions of the property to the purchaser upon payment of predetermined amounts. The trustee, like the trustee of a deed of trust, has legal title and a power of sale in the event of default. See generally Carlock, *The Subdivision Trust—A Useful Device in Real Estate Transactions*, 5 ARIZ. L. REV. 1 (1963); Rehnquist, *Subdivision Trusts and the Bankruptcy Act*, 3 ARIZ. L. REV. 165 (1961); "Subdivision Trusts," 11 ARIZ. L. REV. 61, 159 (1969).

30. There are other forms of trusts affecting real property to which the Act should not be applicable. See generally G. BOGERT, TRUSTS & TRUSTEES § 246 (trust indenture), § 248 (trust for creditors), § 249 (investment trust), § 250 (land trust), § 291 (business trust) (2d ed. 1964).

separate instrument or may be included in the provisions of the trust deed.³¹ There is no requirement in the Act, however, that the contract be in writing. Thus, a trust deed may apparently secure the performance of an otherwise enforceable oral agreement, provided that the trust instrument itself is in writing and recorded.³²

If the trustor acquires any interest in the realty after execution of the trust deed, that interest inures to the trustee as security for the original obligation.³³ Thus, if the trustor does not have legal title to the property at the time the trust deed is executed, but subsequently acquires title, that interest automatically vests in the trustee.³⁴ Although the term "interest" is not defined in the Act, conceivably it may include after acquired property of the trustor.³⁵ In that event, fixtures and improvements which become an accession to the property should be subject to the trust deed.³⁶ It is unclear whether the deed of trust may also secure future advances from the creditor to the trustor. Since a mortgage in Arizona may validly contain such an "open-end" or additional advance clause,³⁷ a similar provision in a trust deed probably will be given effect.

Rights of the Trustor

The trustor generally has the same rights with respect to his property as does the mortgagor. Thus, the trustor has the right to transfer or assign his interest in the trust property, notwithstanding the fact that legal title is in the trustee.³⁸ The extent to which the terms of the trust deed may restrict this right is not clear. Standard forms for the mortgage and trust deed commonly provide that the creditor may

31. See ARIZ. REV. STAT. ANN. § 33-801(2) (Supp. 1972).

32. *Id.* §§ 33-401, -411, -412 (1956). The oral agreement may be unenforceable, however, due to the Statute of Frauds. See *id.* § 44-101 (1967). It is thus good practice to include in the trust deed a reference to the oral contract. Such a recital should constitute a sufficient memorandum to remove the oral contract from the Statute of Frauds. See *T.D. Dennis Builder, Inc. v. Goff*, 101 Ariz. 211, 214, 418 P.2d 367, 370 (1966); *Young v. Bishop*, 88 Ariz. 140, 144-45, 353 P.2d 1017, 1020 (1960); *Durham v. Dodd*, 79 Ariz. 168, 171, 285 P.2d 747, 749 (1955); *Favour v. Joseff*, 16 Ariz. App. 470, 475, 494 P.2d 370, 375 (1972).

33. ARIZ. REV. STAT. ANN. § 33-806(A) (Supp. 1972).

34. The trustor is held to be estopped from denying the title of the trustee. See 1 G. GLENN, MORTGAGES § 24 (1943); 5 G. THOMPSON, REAL PROPERTY § 2520 (J. Grimes repl. 1957). The estoppel theory has been applied to the after acquired title of a mortgagor in Arizona. See *Molina v. Ramirez*, 15 Ariz. 249, 138 P. 17 (1914).

35. ARIZ. REV. STAT. ANN. § 33-806(A) (Supp. 1972) refers to any "interest or claim" acquired by the trustor after execution of the trust deed. *Cf. id.* § 33-703 (B) (1956), which provides that "title" subsequently acquired by a mortgagor inures to the mortgagee as security for the contract.

36. See G. OSBORNE, MORTGAGES § 38 (2d ed. 1970).

37. *Griffith v. State Mut. Bldg. & Loan Ass'n*, 46 Ariz. 359, 51 P.2d 246 (1935).

38. *Moss v. Minor Properties, Inc.*, 262 Cal. App. 2d 847, 69 Cal. Rptr. 341 (1968).

accelerate the principal and interest if the trustor attempts to convey or assign the property without the creditor's prior consent.³⁹ Such "due on sale" clauses have been sustained by the Arizona court of appeals⁴⁰ and the California supreme court,⁴¹ both courts rejecting the argument that the provisions constitute unreasonable restraints on the alienation of property. If the creditor can prove that the transfer or sale endangered his security, the acceleration clause will be upheld.⁴²

When the beneficiary consents to the transfer and does not accelerate the balance due on the contract, he may still charge a fee on the transfer not to exceed \$100 or 1 percent of the contract balance, whichever is greater.⁴³ If the transfer does not impair the creditor's security, however, a fee in excess of the actual costs incurred in handling the transaction may be unreasonable. Provided the original trustor is released from liability on the secured obligation, the creditor may also increase the annual interest rate, but not to exceed one-half of 1 percent.⁴⁴ No increase in the interest rate is permitted if the trustor remains personally liable for the obligation.⁴⁵ Since these restrictions apply only to trust property consisting of 2½ acres or less which is limited to and utilized for no more than four single-family dwelling units,⁴⁶ most commercial accounts will receive no benefit from the fee and interest limitations.

In Arizona a mortgagor in default may redeem his property within 6 months following the foreclosure sale.⁴⁷ Accordingly, when the beneficiary of a trust deed elects judicial foreclosure, the trustor has the same redemption right as does the mortgagor.⁴⁸ If the beneficiary elects to foreclose through the trustee's sale, on the other hand, the trustor has no right of redemption after the sale.⁴⁹ To offset the loss of the redemption period, the Act gives the trustor a 90-day reinstate-

39. For an example of the "due on sale" or "due on encumbrance" clause, see J. HETLAND, *CALIFORNIA REAL ESTATE SECURED TRANSACTIONS* 182 (1970).

40. *Baltimore Life Ins. Co. v. Harn*, 15 *Ariz. App.* 78, 486 P.2d 190 (1971).

41. *La Sala v. American Sav. & Loan Ass'n*, 5 *Cal. 3d* 864, 489 P.2d 1113, 97 *Cal. Rptr.* 849 (1971).

42. 15 *Ariz. App.* at 81, 486 P.2d at 193; 5 *Cal. 3d* at 881, 489 P.2d at 1124, 97 *Cal. Rptr.* at 860; *cf.* *ARIZ. REV. STAT. ANN.* § 33-806.01(A) (Supp. 1972).

43. *ARIZ. REV. STAT. ANN.* § 33-806.01(B) (Supp. 1972).

44. *Id.* § 33-806.01(C).

45. *Id.*

46. *Id.* § 33-806.01(D). The language of this subsection is confusing in light of sections 33-729 and 33-814(E). The latter sections refer to trust property consisting of 2½ acres which is limited to and utilized for either a single one or two family dwelling. Apparently, section 33-806.01(D) applies equally to single one and two family dwellings. Section 33-806.01(D) also applies to property having up to four dwelling units, however, while sections 33-729 and 33-814(E) apply only to a single unit. There appears to be no real basis for this distinction.

47. *Id.* §§ 12-1282(B) (Supp. 1972-73), -1283 (1956).

48. *See id.* § 33-807(A) (Supp. 1972) (a trust deed may be foreclosed "in the manner provided by law for the foreclosure of mortgages on real property").

49. *Id.* § 33-811(B).

ment period prior to the trustee's sale to cure the default.⁵⁰ To reinstate, the trustor must pay the total amount due on the contract other than that portion of the principal which would not have been due had no default occurred.⁵¹ Thus, even if the beneficiary accelerates the principal balance and declares the entire sum due, the trustor need only pay the amount of his default to reinstate the trust deed.⁵² Once reinstated, the trust deed is deemed to be in full effect as if there had been no default.⁵³ Reinstatement must be made prior to the filing of an action to foreclose or before the date of the trustee's sale.⁵⁴ Consequently, while the beneficiary can cut off the trustor's right to reinstate by filing a foreclosure action, the trustor is then entitled to the 6-month post-sale redemption period. Regardless of which alternative remedy the beneficiary elects, therefore, the debtor is assured of an additional period of time to cure his default and recover his land.

The statutory reinstatement right was designed for the protection of the debtor and should not be subject to a pre-default waiver in the trust instrument. Such a waiver would contravene the intent of the legislature in providing the trustor with a "redemption" right comparable to the mortgagor's statutory redemption period. Even when the trustor, after default, voluntarily waives his right to reinstate, the waiver should be ineffective. The Arizona supreme court has held invalid a post-default waiver of redemption by a mortgagor.⁵⁵ The court declared that the purpose of the redemption statute, to give the debtor time to pay his obligation and thus avoid the loss of his land, cannot be violated by agreement.⁵⁶ Since the reinstatement right serves a similar purpose, the court's reasoning should be applied to prohibit a post-default waiver of reinstatement in a deed of trust.⁵⁷

50. *Id.* §§ 33-813(A), -807(C). A subordinate lienholder or beneficiary under a subordinate trust deed may also reinstate the primary trust deed.

51. *Id.* The trustor must also pay any attorney's fees actually incurred but not exceeding the larger of \$100 or one-half of 1 percent of the unpaid principal balance. Recording fees and trustee's fees may also be assessed.

52. When the breach of the contract is a non-money default, such as failing to maintain the premises, the trustor may still reinstate provided he cures the default. *Cf.* CAL. CIV. CODE § 2924(c) (West Supp. 1972), which only allows reinstatement when the trustor fails to pay principal and interest, taxes, insurance and other assessments or advances. If the trustor transfers or assigns his interest in the trust property, the remedy of reinstatement may be unavailable. Since the transfer itself probably constitutes a default under the terms of the instrument, this default may be impossible to cure.

53. ARIZ. REV. STAT. ANN. § 33-813(B) (Supp. 1972).

54. *Id.* § 33-813(A). If the beneficiary files the foreclosure action and also records the notice of sale, and the trustor then tenders payment, the beneficiary must reinstate the trust deed or cancel the notice of sale and foreclose judicially.

55. *Elson Dev. Co. v. Arizona Sav. & Loan Ass'n*, 99 Ariz. 217, 407 P.2d 930 (1965).

56. *Id.* at 224, 407 P.2d at 935-36.

57. In California, an express waiver of the reinstatement right is void. CAL. CIV. CODE § 2953 (West 1954). A waiver after execution of the trust deed may be valid, however. *Cf. Morello v. Metzenbaum*, 25 Cal. 2d 494, 154 P.2d 670 (1945).

Whether the trustor has the right to remain in possession of the property before and after default is unclear under the Arizona Act. Since legal title is vested in the trustee, it is possible that he should be entitled to possession of the property. In those states which subscribe to the "title" theory of mortgages,⁵⁸ the mortgagee's right of possession accrues immediately upon execution of the instrument.⁵⁹ Arizona, however, follows the "lien" theory, holding that the mortgagee has only a security interest with the mortgagor retaining all possessory rights.⁶⁰ As the trustee's title is, in legal effect, equivalent to a lien, the trustor, like the mortgagor in Arizona, should have the right to remain in possession, at least prior to default. In California, although the trustee has legal title, both the trustor and the mortgagor are held to retain possession in the absence of an express agreement to the contrary.⁶¹

Apparently a mortgage in Arizona may expressly provide that the mortgagee may take possession of the debtor's property in the event of a default.⁶² Accordingly, a similar provision in a deed of trust will probably be given effect. Since the beneficiary has ways to protect the value of his security,⁶³ it may be unnecessarily harsh to deprive the trustor of his property during the only period within which he may cure his default.⁶⁴ A trust deed may also contain an assignment to the beneficiary of the trustor's interest in the rents, profits and income from the land.⁶⁵ The assignment may be enforced by the beneficiary taking possession of the property, before or after default, and without regard to the adequacy of the security.⁶⁶ Allowing the creditor to assume possession of the debtor's property at any time prior to the trustee's sale, however, may render illusory the trustor's right of reinstatement.⁶⁷

58. At common law a mortgage conveyed legal title to the mortgagee. 1 G. GLENN, MORTGAGES § 28 (1943). In this country, by statute, the majority of states hold that a mortgagee has only a security interest or "lien." See G. OSBORNE, MORTGAGES §§ 13-16 (2d ed. 1970).

59. See, e.g., *Atlas Subsidiaries of Florida, Inc. v. Kornegay*, 288 Ala. 599, 601, 264 So. 2d 158, 161 (1972); *First Auburn Trust Co. v. Buck*, 137 Me. 172, 177, 16 A.2d 258, 261 (1940). In several states, the mortgagee's right of possession arises only upon default. These states follow the "intermediate" theory. See 1 G. GLENN, MORTGAGES § 29 (1943); G. OSBORNE, MORTGAGES § 126 (2d ed. 1970).

60. *Dart v. Western Sav. & Loan Ass'n*, 103 Ariz. 170, 172, 438 P.2d 407, 409 (1968); *D & S Farms v. Producers Cotton Oil Co.*, 16 Ariz. App. 180, 182, 492 P.2d 429, 431 (1972); ARIZ. REV. STAT. ANN. § 33-703(A) (1956).

61. *Kinnison v. Guaranty Liquidating Corp.*, 18 Cal. 2d 256, 115 P.2d 450 (1941); *Lee v. Ski Run Apt. Associates*, 249 Cal. App. 2d 293, 57 Cal. Rptr. 496 (1967).

62. See ARIZ. REV. STAT. ANN. § 33-703(A) (1956).

63. See *id.* § 33-806(B) (Supp. 1972).

64. After reinstatement, the contract or trust deed is deemed to be "reinstated and in force as if no breach or default had occurred. . . ." *Id.* § 33-813(B) (emphasis added). Thus, even when the beneficiary has taken possession upon default, the trustor should be entitled to regain possession after reinstatement.

65. *Id.* § 33-702(B).

66. *Id.* Three other remedies are available to the creditor: appointment of a receiver, direct collection of the rents and injunction.

67. In addition to his other remedies, the beneficiary may secure the appoint-

The Trustee

The only individuals who may serve as trustee are real estate brokers and insurance agents licensed in Arizona and members of the Arizona bar.⁶⁸ Qualified corporations and associations may serve as trustee and in addition may act as both beneficiary and trustee under a single deed of trust.⁶⁹ An individual trustee may not also be the beneficiary.⁷⁰ If for any reason the trustee fails to qualify or is unwilling or unable to serve, the beneficiary has the right to appoint a successor.⁷¹ The beneficiary may also remove the trustee for any reason and designate a successor.⁷² There is no requirement that the original trustee convey title to the successor. As the trustee holds only bare record title, recording the notice of substitution should be sufficient to "transfer" title.⁷³

The trustee and the beneficiary can enjoin any act by the trustor or any other person which may cause physical injury to the property or impair the security provided by the trust deed.⁷⁴ Where waste or

ment of a receiver to take possession of the property. *Id.* § 33-702(B)(1). Prior to the statute, a mortgagee in Arizona was not entitled to have a receiver appointed if the security was adequate and no waste was threatened. *Dart v. Western Sav. & Loan Ass'n*, 103 Ariz. 170, 438 P.2d 407 (1968). Section 33-702(B) apparently modifies *Dart* by allowing a receiver to be appointed "without regard to the adequacy of the security. . . ."

68. *Id.* §§ 33-803(A)(2), (3), (4).

69. *Id.* §§ 33-803(A)(1), (5), (6); (B). To qualify as a trustee, an association or corporation must be doing business in Arizona as a bank, trust company, savings and loan association, credit union, insurance company, thrift company or small loan company. *Id.* § 33-803(A)(1). Corporations licensed under certain federal agencies are also eligible to serve as trustee. *Id.* § 33-803(A)(5).

Upon first analysis, allowing the corporate beneficiary to serve as its own trustee would seem to create a conflict of interest, and several states prohibit the beneficiary from acting as trustee. See, e.g., IDAHO CODE § 45-1502(1) (Supp. 1972); MONT. REV. CODES ANN. § 52-403(1) (Supp. 1971); ORE. REV. STAT. § 86.705(1) (1971); WASH. REV. CODE § 61.24.020 (Supp. 1972). Since the trustee's title is, in legal effect, equivalent to a lien, however, the apparent conflict is no greater than that created when the mortgagee holds a lien on the property. In addition, the trustee is bound to act in "good faith" if he also serves as the beneficiary. ARIZ. REV. STAT. ANN. § 33-803(B) (Supp. 1972).

70. ARIZ. REV. STAT. ANN. § 33-803(B) (Supp. 1972). There are several reasons why a corporation or association qualified under the Act may serve as both trustee and beneficiary, while an individual may not act in both capacities. Generally, the corporations and associations listed in the Act should have the expertise and resources to handle efficiently the problems of trust deed transactions. Moreover, those qualified to act as beneficiary and trustee are subject to annual examinations and audits by various governmental agencies. Minimum capital and reserve requirements are also imposed on several of the qualified corporations and associations. See, e.g., 12 U.S.C. § 1 (comptroller of the currency), § 21 (national banks), § 1421 (federal home loan banks), § 1461 (federal savings and loan associations), § 1751 (federal credit unions), § 1811 (Federal Deposit Insurance Corporation) (1970); ARIZ. REV. STAT. ANN. § 6-101(1) (state banks), (3) (small loan companies) (Supp. 1972); *id.* § 6-401(6) (savings and loan associations), -501(2) (credit unions), -851(3) (trust companies) (Supp. 1972).

71. ARIZ. REV. STAT. ANN. § 33-804(A) (Supp. 1972).

72. *Id.* § 33-804(B). Notice of the substitution of trustee must be recorded, and copies of the notice mailed to the trustor, trustee and the successor trustee. *Id.* § 33-804(C).

73. See *Witter v. Bank of Milpitas*, 204 Cal. 570, 577-78, 269 P. 614, 618 (1928).

74. ARIZ. REV. STAT. ANN. § 33-806(B) (Supp. 1972).

injury has already occurred, the trustee or beneficiary may bring an action for damages.⁷⁵ Apparently a damage action may be brought even after the trustee's sale, as long as the injury occurred while the trustor was in possession or control of the property.⁷⁶

The trustee may be liable for damages if he fails to record certain instruments on time. Upon satisfaction of the obligation, for example, the trustee must execute and, if necessary, deliver an appropriate release to the trustor.⁷⁷ Failure to comply within 10 days after the debtor requests such a release renders the trustee liable in the amount of \$100 and any actual damages sustained.⁷⁸ In addition, if the trust deed is reinstated after the notice of sale has been recorded, the trustee must record a cancellation of the notice of sale.⁷⁹ If the trustee fails to record the cancellation within 30 days after reinstatement, he is liable for any actual damages incurred by the trustor.⁸⁰

Upon satisfaction of the indebtedness, it is probably unnecessary for the trustee to reconvey title to the trustor. Payment of the debt should extinguish the "title" held by the trustee, just as the "lien" of a mortgage is extinguished when the debt is satisfied.⁸¹ The trustor is still entitled to some record of discharge, since the trustee will appear on the record to hold legal title. The Deeds of Trust Act does not require any affirmative action by the trustee once the debt is paid. Section 33-707(A), which existed prior to the Act and was not amended by it, provides, however, that a mortgage or trust deed may be discharged by a release, deed of release or an acknowledgment of satisfaction entered on the margin of the record.⁸² The section also provides

75. *Id.* Waste may be caused by voluntary as well as permissive neglect. *Jowdy v. Guerin*, 10 Ariz. App. 205, 457 P.2d 745 (1969).

76. ARIZ. REV. STAT. ANN. § 33-806(B)(3) (Supp. 1972). If the beneficiary forecloses judicially, he may petition the court for the appointment of a receiver to take possession of the property. The beneficiary must demonstrate that the value of the land has been impaired and that there is no adequate remedy at law. *Id.* § 12-1241 (1956). This remedy is not available to the beneficiary who elects the trustee's sale, however, since the statute requires that a court action be pending in order for a receiver to be appointed. *Id.*; *Ferguson v. Superior Court*, 76 Ariz. 31, 258 P.2d 421 (1953). But see text of note 67 *supra*.

77. ARIZ. REV. STAT. ANN. § 33-707(A) (Supp. 1972).

78. *Id.* § 33-712.

79. *Id.* § 33-813(C).

80. *Id.*

81. See, e.g., *Valley Nat'l Bank v. Milmo*, 74 Ariz. 290, 297, 248 P.2d 740, 744 (1952); *Robinson v. Chisen*, 154 Colo. 90, 96, 388 P.2d 759, 763 (1964); *Thrift Funds Canal, Inc. v. Foy*, 261 La. 573, 585, 260 So. 2d 628, 630 (1972); *Kvame v. Patrick*, 57 Wash. 2d 343, 345, 357 P.2d 167, 169 (1960). Several states, however, require a reconveyance of title upon satisfaction of the debt. See, e.g., IDAHO CODE § 45-1514 (Supp. 1972); MONT. REV. CODES ANN. § 52-406 (Supp. 1971); NEB. REV. STAT. § 76-1014 (1971); NEV. REV. STAT. § 107.030.5 (1969); UTAH CODE ANN. § 57-1-33 (1963); WASH. REV. CODE ANN. § 61.24.110 (Supp. 1972).

82. ARIZ. REV. STAT. ANN. § 33-707(A) (Supp. 1972). For further discussion of these methods of discharge, see *Nilson v. Sarment*, 153 Cal. 524, 530, 96 P. 315, 317 (1908); *Swain v. McMillan*, 30 Mont. 433, 440, 76 P. 943, 945 (1904); *Bagley v. Kerr*, 166 Ore. 368, 381, 112 P.2d 459, 464 (1941); 2 R. & C. PATTON,

that the trustee need not join in the release or acknowledgment. As the trustee holds legal title under the Act, however, any attempt to clear the record without his signature may be ineffective. On the other hand, if the trustee's title is extinguished upon satisfaction of the indebtedness, the trustee may not be a necessary party to the discharge. Until the Arizona courts construe section 33-707(A) to apply to a trust deed executed in conformity with the Act, however, the cautious trustor should demand a quit claim deed from the trustee in addition to the release or acknowledgment.⁸³

The Trustee's Sale

If the trustor defaults under the contract, the beneficiary has the option of judicial foreclosure or out of court sale by the trustee.⁸⁴ This election may be exercised at any time up to the date of the private sale.⁸⁵ Consequently, the beneficiary initially could pursue both remedies, but the foreclosure action must be dismissed before the trustee's sale can be held.

The Arizona Act requires that the foreclosure action be commenced or the trustee's sale conducted within the statutory time for maintaining an action on the contract secured by the trust deed.⁸⁶ Thus on a written contract, the beneficiary must pursue his remedy within 6 years after the default.⁸⁷ This limitation provision of the Act avoids the anomalous situation existing in California. There, a mortgagee is barred from seeking judicial foreclosure after the statute of limitations has run,⁸⁸ whereas a trustee under a deed of trust may sell the property at an out of court sale even though an action on the debt would be barred.⁸⁹ Since the statute of limitations only runs against a remedy which requires judicial action, it has no effect on the trustee's power of sale. By providing that both remedies be sought within 6

LAND TITLES § 567 (2d ed. 1957); 9 G. THOMPSON, REAL PROPERTY § 4816 (J. Grimes repl. 1958).

83. In legal effect there is probably little difference between the quit claim deed and the deed of release. See 1 R. DEVLIN, LAW OF DEEDS §§ 16, 27 (3d ed. 1911); 5A G. THOMPSON, REAL PROPERTY § 2702, at 1067 (J. Grimes repl. 1957).

84. ARIZ. REV. STAT. ANN. § 33-807(A) (Supp. 1972).

85. *Id.* § 33-807(B).

86. *Id.* § 33-816.

87. *Id.* § 12-548 (1956) requires that an action on a written contract of debt be commenced and prosecuted within 6 years after the cause of action accrues. Apparently, the beneficiary's cause of action arises when the contract is breached. See *Waddell v. White*, 51 Ariz. 526, 542, 78 P.2d 490, 497 (1938); *Hawkinson Tire Co. v. Paul E. Hawkinson Co.*, 13 Ariz. App. 343, 344, 476 P.2d 864, 865 (1970).

The statute of limitations protection cannot be waived at the time the contract is executed nor by a subsequent agreement. *Ross v. Ross*, 96 Ariz. 249, 393 P. 933 (1964); *Steinfeld v. Marteny*, 40 Ariz. 116, 10 P.2d 367 (1932).

88. *Mitchell v. Automobile Owners Indem. Underwriters*, 19 Cal. 2d 1, 118 P.2d 815 (1941).

89. *Hohn v. Riverside County Flood Control & Water Conservation Dist.*, 228 Cal. App. 2d 605, 39 Cal. Rptr. 647 (1964).

years, the Arizona Act accords the trustor the full statute of limitations protection.⁹⁰

Upon notification by the beneficiary of default and the election to sell, the trustee must comply with the extensive notice requirements of the Arizona Act. There are several different procedures, each of which must be followed. A written notice of sale must be recorded and posted at the court house in each county in which any of the trust property is located,⁹¹ and the notice of sale must be published in a newspaper of general circulation in each county.⁹² Not later than 30 days after recording the notice of sale, the trustee or beneficiary must mail a copy of the notice to all persons who at the time of recording appear on the records of the county recorder to have an interest in any of the trust property.⁹³ Most importantly, notice must be delivered by certified or registered mail to each of the parties to the trust deed.⁹⁴ Additionally, any person may file a request in the county recorder's office for a copy of the notice after the trust deed is recorded, and the trustee or beneficiary must mail a copy of the notice to that person.⁹⁵ General creditors of the trustor and subordinate lienholders who are not of record should utilize this provision to ensure adequate notice of the sale in the event of default.

90. While the Act is silent as to the defaulting trustor's remedy to clear record title after the statute of limitations has run on the secured contract, it is doubtful that the Arizona courts would allow such a trustor to maintain an action to quiet title. A defaulting mortgagor is generally denied relief on the theory that since a quiet title action is an equitable remedy, he who seeks equity must do equity. *Linville v. Cheney*, 60 Ariz. 325, 137 P.2d 395 (1943); *Farrell v. West*, 57 Ariz. 490, 114 P.2d 910 (1941); *Maricopa County v. Bloomer*, 52 Ariz. 28, 78 P.2d 993 (1938).

91. ARIZ. REV. STAT. ANN. §§ 33-808(A)(2), (3) (Supp. 1972).

92. *Id.* § 33-808(A)(1).

93. *Id.* § 33-809(B)(2).

94. *Id.* § 33-809(C).

95. *Id.* §§ 33-809(A), (B)(1). Idaho's notice requirements, which are similar to those in the Arizona Act, have been held sufficient to meet the constitutional mandates of due process. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958). The Idaho Act, however, requires personal notice of the sale to be served on all occupants on the property. IDAHO CODE § 45-1506(5) (Supp. 1972).

Recent decisions of the United States Supreme Court may require in addition to notice that the trustor have an opportunity to be heard prior to the trustee's sale. *Cf. Fuentes v. Shevin*, 407 U.S. 67 (1972) (state replevin statutes held to violate due process for failing to assure pre-seizure notice and opportunity for a hearing); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment of wages without prior notice and an opportunity for a hearing held violative of fourteenth amendment due process). See also Comment, *Creditors' Prehearing Remedies and Due Process*, 14 ARIZ. L. REV. 834 (1972). The *Sniadach* and *Fuentes* rationale, however, has been applied to real property attachment statutes by relatively few courts. See, e.g., *Holman v. Wagner*, No. C261513 (Maricopa Co. Ariz. Super. Ct. Jan. 31, 1973); *Real Estate Capital Corp. v. Thunder Corp.*, 31 Ohio Misc. 169, 287 N.E.2d 838 (1972). While the due process rights protected by *Fuentes* and *Sniadach* seem clearly applicable to the defaulting debtor under a real property mortgage or trust deed, it is questionable if the exercise of a power of sale constitutes sufficient "state action" to invoke the fourteenth amendment mandate. See *Strutt v. Ontario Sav. & Loan Ass'n*, 11 Cal. App. 3d 547, 554, 90 Cal. Rptr. 69, 73 (1970), and *Federal Nat'l Mortgage Ass'n v. McMillan*, CCH Pov. L. REP. ¶ 12,904 (L.A. County Super. Ct. Nov. 17, 1970) (both cases holding that no state action existed).

A possible deficiency of the Act is the failure to prohibit the use of a waiver of notice clause in the trust deed. The protection afforded by the reinstatement period is conditioned on the trustor receiving timely notice of the trustee's sale. Consequently, if the trustor may validly waive his right to notice, this protection becomes illusory. Any attempt to circumvent the statutory notice requirements by a waiver in the trust instrument should be ineffective.⁹⁶

If the trustor claims that the debt has been satisfied or otherwise challenges the alleged grounds for default, a writ of injunction should be available to restrain the trustee's sale.⁹⁷ The trustor may, however, be required to pay the full balance due on the contract before a court of equity will enjoin the sale.⁹⁸ When the trustor has tendered and the beneficiary has refused to accept an amount sufficient to reinstate the trust deed, the trustor should not be required to pay the entire balance in order to seek the court's assistance.

Ninety days after the notice of sale has been recorded, the property may be sold at the trustee's sale.⁹⁹ The sale must be held either on the trust property or at the court house or principal place of business of the trustee in any county in which part of the trust property is located.¹⁰⁰ The property may be sold as a whole or in designated parcels, but the trustee must sell the property by the combination producing the highest total price.¹⁰¹ If the property is sold by lots, however, the trustee is not required to stop the sale even though enough lots have been sold to satisfy the amount of the unpaid balance on the contract plus costs. Allowing the sale to continue under these circumstances may work a hardship on the trustor, especially when the land sells for substantially less than its fair market value.¹⁰² For the debtor's pro-

96. Cf. CAL. CIV. CODE § 2953 (West 1954). A debtor may constitutionally waive his right to notice, however, provided the waiver is "voluntarily, intelligently and knowingly" made and is part of a bargained-for exchange. *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972); cf. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972). See also *Lomanto v. Bank of America*, 22 Cal. App. 3d 663, 668, 99 Cal. Rptr. 442, 444 (1972) (deed of trust treated as contract of adhesion).

97. ARIZ. REV. STAT. ANN. §§ 12-1801(1), (3) (1956), provide that a superior court may grant a writ of injunction when the relief sought requires the restraint of an act prejudicial to the applicant, or in any case where the applicant would be entitled to an injunction under principles of equity. See generally 4 J. POMEROY, EQUITY JURISPRUDENCE § 1345 (5th ed. 1941).

98. See, e.g., *Sipe v. McKenna*, 88 Cal. App. 2d 1001, 1006, 200 P.2d 61, 64 (1948); *Coile v. Finance Co. of America*, 221 Ga. 584, 585, 146 S.E.2d 304, 305 (1965); *Johnson v. Gore*, 224 Miss. 600, 619, 80 So. 2d 731, 739 (1955); cf. *Schwertner v. Provident Mut. Bldg.-Loan Ass'n*, 17 Ariz. 93, 97, 148 P. 910, 911 (1915) (defaulting mortgagor need not tender unpaid balance to restrain sale barred by statute of limitations).

99. ARIZ. REV. STAT. ANN. § 33-807(C) (Supp. 1972).

100. *Id.* § 33-808(B).

101. *Id.* § 33-810(A). The trustee must entertain bids for the property as a whole and as divided. He then must determine which conditional sale results in the highest total price for the land.

102. Foreclosure sales rarely command full market prices for the secured property.

tection, therefore, the sale should be discontinued once the proceeds satisfy the amount of the outstanding balance on the contract plus costs.¹⁰³

The trustee is responsible for the conduct of the sale, and he must, in good faith, represent the interests of all parties.¹⁰⁴ Misconduct on his part has been held sufficient reason to invalidate the sale.¹⁰⁵ Mere inadequacy of the sale price, however, in the absence of fraud, is ordinarily not sufficient to set aside the sale.¹⁰⁶ In the performance of his duties, the trustee of a deed of trust is not generally subject to the strict fiduciary standard applied to a "trustee" at common law.¹⁰⁷ Instead, the trustee is usually regarded as the common agent of the trustor and beneficiary.¹⁰⁸

Any person, including the trustee and beneficiary, may bid at the out of court sale.¹⁰⁹ If the trustee is allowed to bid for the property, however, a conflict of interest could arise. The trustee's interest as a purchaser in acquiring the property at a reasonably low price is inconsistent with his duty as trustee to obtain the highest possible price for the land.¹¹⁰ Since the trustor is entitled to any excess proceeds from

See *Great Falls Nat'l Bank v. McCormick*, 152 Mont. 319, 324, 448 P.2d 991, 993 (1968) (dictum); *Cotellesse, Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice*, 49 TEX. L. REV. 1085, 1086 (1971).

103. Cf. ARIZ. REV. STAT. ANN. § 12-1622(B) (Supp. 1972-73), which provides that when sufficient property has been sold at an execution sale to satisfy the judgment plus costs, no more property may be sold.

104. See 1 MILLER & STARR, *supra* note 12, at 496.

105. E.g., *Smith v. Haley*, 314 S.W.2d 909 (Mo. 1958) (trustee purchased trust property 30 minutes after the sale for 50 percent more than the sale price); *First Fed. Sav. & Loan Ass'n v. Sharp*, 359 S.W.2d 902 (Tex. 1962) (trustee refused personal check of highest bidder and refused to delay the sale to allow the bidder to obtain cash); *Foge v. Schmidt*, 101 Cal. App. 2d 681, 226 P.2d 73 (1951) (trustee purchased property valued at \$11,000 for \$700 after refusing the owner time to obtain cash to cover his higher bid).

106. *Central Nat'l Bank v. Bell*, 5 Cal. 2d 324, 54 P.2d 1107 (1936); *Crummer v. Whitehead*, 230 Cal. App. 2d 264, 40 Cal. Rptr. 826 (1964). An execution sale will not be set aside in Arizona unless the sale price is "unconscionably" low. *Smith v. Arizona Eng'r Co.*, 21 Ariz. 624, 627, 193 P. 303, 304 (1920); *Johnson v. Jefferson Standard Life Ins. Co.*, 5 Ariz. App. 587, 588, 429 P.2d 474, 475 (1967).

107. *Woodworth v. Redwood Empire Sav. & Loan Ass'n*, 22 Cal. App. 3d 347, 366, 99 Cal. Rptr. 373, 387 (1972); *Fleisher v. Continental Auxiliary Co.*, 215 Cal. App. 2d 136, 30 Cal. Rptr. 137 (1963).

The standard of conduct required of a trustee under the Arizona Act is unclear. The Act may impose only a duty of "good faith" on the trustee. See ARIZ. REV. STAT. ANN. §§ 33-803(B), -812(B), -820(A) (Supp. 1972). On the other hand, the Arizona supreme court has applied the common law fiduciary standard to a trustee of a subdivision trust. *Lane Title & Trust Co. v. Brannan*, 103 Ariz. 272, 440 P.2d 105 (1968). Because the trust deed and the subdivision trust share common characteristics, see text of note 29 *supra*, *Lane* may be helpful in determining the duty of a trustee under the Arizona Act.

108. *Newman v. Samuels*, 17 Iowa 528 (1864); *Edwards v. Smith*, 322 S.W.2d 770, 777 (Mo. 1959); *First Fed. Sav. & Loan Ass'n v. Sharp*, 347 S.W.2d 337 (Tex. Civ. App. 1961); *Feldman v. Rucker*, 201 Va. 11, 109 S.E.2d 379 (1959); *Moore v. Hamilton*, 151 W. Va. 784, 155 S.E.2d 877 (1967); *Schroeder v. Arcade Theater Co.*, 175 Wis. 79, 184 N.W. 542 (1921).

109. ARIZ. REV. STAT. ANN. § 33-810(A) (Supp. 1972).

110. To avoid such a conflict, several states prohibit bidding by the trustee.

the sale,¹¹¹ he may suffer a substantial loss if the property sells for a price far below its reasonable value.

The purchaser is required to pay the sale price in a form satisfactory to the trustee.¹¹² Although the trustee generally need not delay the sale to allow a bidder to obtain cash or other suitable form of payment, it has been held to be an abuse of discretion for the trustee to refuse a reasonable delay requested by the trustor.¹¹³ In addition, for any cause deemed to be in the best interest of the trustor or beneficiary, the trustee may postpone or discontinue the sale.¹¹⁴ Thus, if the bids received are wholly inadequate in relation to the value of the land, the sale should be postponed.¹¹⁵ At the time of postponement the trustee must announce when the sale will resume.¹¹⁶ The Arizona Act does not limit the number of times a sale may be postponed. Since the trustee's right to postpone the sale has been subject to abuse in other states,¹¹⁷ a reasonable limitation should be imposed on the frequency of postponement.

When the trustee receives satisfactory payment he must execute and deliver his deed to the purchaser.¹¹⁸ The deed should be acknowledged and recorded.¹¹⁹ The purchaser acquires "absolute" title, not subject to a redemption right of the trustor and free and clear of all liens or encumbrances subordinate to the trust deed.¹²⁰ As to bona fide purchasers, the trustee's deed constitutes conclusive evidence of compliance with the notice requirements of the Act.¹²¹ Thus a purchaser for value without knowledge of an irregularity is protected in the event the trustor successfully attacks the validity of the sale. As to all other persons, however, the deed raises only a presump-

See, e.g., MONT. REV. CODES ANN. § 52-409(2) (Supp. 1971); ORE. REV. STAT. § 86.755(1) (1971); WASH. REV. CODE ANN. § 61.24.070 (Supp. 1972).

111. ARIZ. REV. STAT. ANN. § 33-812(A)(4) (Supp. 1972).

112. *Id.* §§ 33-810(A), -811(A). Although the first sentence of section 33-810(A) states that the trustee shall sell the property for "cash" to the highest bidder, other forms of payment are apparently permissible since both the above sections provide that the purchaser may pay "in form satisfactory to the trustee." Generally, a trustee may accept a check, promissory note or even extend credit when the beneficiary has consented. See *Nomellini Constr. Co. v. Modesto Sav. & Loan Ass'n*, 275 Cal. App. 2d 114, 118, 79 Cal. Rptr. 717, 721 (1969); 1 MILLER & STARR, *supra* note 12, at 498.

113. *Foge v. Schmidt*, 101 Cal. App. 2d 681, 226 P.2d 73 (1951) (trustee refused to delay the sale for 15 minutes so that the trustor could cash a check to cover his bid).

114. ARIZ. REV. STAT. ANN. § 33-810(B) (Supp. 1972).

115. 1 MILLER & STARR, *supra* note 12, at 496.

116. ARIZ. REV. STAT. ANN. § 33-810(B) (Supp. 1972).

117. See, e.g., *Craig v. Buckley*, 218 Cal. 78, 21 P.2d 430 (1933) (sale upheld after 23 postponements); *First Nat'l Bank v. Coast Constr. Oil Co.*, 84 Cal. App. 2d 250, 190 P.2d 214 (1948) (trustee's sale held valid although postponed for 4 years after the original date of sale).

118. ARIZ. REV. STAT. ANN. § 33-811(A) (Supp. 1972).

119. See *id.* §§ 33-401, -411, -412 (1956).

120. *Id.* § 33-811(B) (Supp. 1972).

121. *Id.* § 33-811(A).

tion of compliance.¹²² If the trustee purchases the property, therefore, he is only aided by the statutory presumption, which may be rebutted by evidence of the defective notice.¹²³ If the beneficiary purchases the property without knowledge of the notice deficiency, the trustee's deed is conclusive in his favor since the trustee's knowledge is not imputed to the beneficiary.¹²⁴

The Arizona Act fails to provide a bona fide purchaser with a means of obtaining possession of the property within a reasonable time after the sale. The buyer's only remedy, in the face of a recalcitrant trustor, may be an action of ejectment.¹²⁵ Since the title may be tried in the ejectment action,¹²⁶ however, the proceeding can be lengthy and expensive.¹²⁷ It is suggested that the purchaser should be given a statutory right to petition a court for a writ of possession or assistance placing him in possession.¹²⁸

Following the sale, the trustee must dispose of the proceeds in the manner provided in the Act.¹²⁹ When all expenses, fees and obligations have been satisfied, the trustor is entitled to any surplus.¹³⁰ At his election, the trustee may deposit the proceeds with the clerk of the superior court, and thereafter the trustee is discharged from all responsibility for acts done in good faith.¹³¹ Any interested party may then apply to the court for an order directing the proper disposition of the proceeds.¹³²

If the proceeds from the trustee's sale do not satisfy the balance

122. *Id.*

123. In the usual situation where the trustee is responsible for recording and mailing the notice of sale, he would have knowledge of any deficiency in the notice and could not be a bona fide purchaser.

124. ARIZ. REV. STAT. ANN. § 33-811(A) (Supp. 1972).

125. The forcible entry and detainer action is available in Arizona only to parties in a landlord-tenant relationship. *Phoenix-Sunflower Indus., Inc. v. Hughes*, 105 Ariz. 334, 464 P.2d 616 (1970). If the trust deed expressly provides that the trustor becomes a tenant at will or sufferance upon his failing to surrender possession after the trustee's sale, the unlawful detainer action may be available to the purchaser. *E.g.*, *Thompson v. Mazo*, 245 A.2d 122 (D.C. Ct. App. 1968); *Lanier v. Dyer*, 112 Ga. App. 558, 145 S.E.2d 621 (1965); *Bein v. Mueson Realty Corp.*, 17 Misc. 2d 661, 184 N.Y.S.2d 246 (N.Y. Mun. Ct. 1959).

126. *See Taylor v. Stanford*, 100 Ariz. 346, 348, 414 P.2d 727, 729 (1966).

127. *See generally* 2 J. RASCH, NEW YORK LANDLORD & TENANT—SUMMARY PROCEEDINGS § 993 (2d ed. 1971).

128. *Cf.* ARIZ. REV. STAT. ANN. § 33-727(B) (Supp. 1972), which directs the court to issue a writ of possession in favor of the purchaser when the mortgagor fails to deliver possession after the redemption period has run.

129. *Id.* § 33-812(A).

130. *Id.* § 33-812(A)(4).

131. *Id.* § 33-812(B).

132. *Id.* This approach could be detrimental to the beneficiary, however. If creditors of the trustor or subordinate lienholders contest the order directing disposition, the litigation could be lengthy. Perhaps the trust deed should include a requirement that the trustee pay to the beneficiary an amount equal to the outstanding balance due on the contract after costs and expenses of the sale are deducted. Thereafter, for the protection of the debtor, any surplus proceeds should be deposited with the court.

due on the contract, the beneficiary's right to recover a deficiency is restricted. He may bring an action for the balance within 90 days after the sale, but his recovery is limited to the amount of the indebtedness plus interest and costs, less either the fair market value of the property or the sale price, whichever is higher.¹³³ This restriction should force the beneficiary to secure the highest possible price for the land, since he probably will not realize the full amount of the debt if the property sells for less than its fair market value. Moreover, the Act prohibits any deficiency judgment when the trust property consists of 2½ acres or less, and is limited to and utilized for single one or two family dwellings.¹³⁴ The consumer will benefit by this latter restriction to the extent that his personal assets will not be subject to attachment if the real property fails to sell at a price sufficient to satisfy the original debt. The trustor, however, continues to be personally liable for any waste or injury incurred on the property while he was in possession regardless of the sale price.¹³⁵

CONCLUSION

As the modern institutional lender searches for faster and less costly methods for realizing on secured property after default, the need for countervailing protection of the rights of the debtor becomes more acute. The Deeds of Trust Act, although primarily creditor-oriented, should afford the consumer greater protection than is currently provided under Arizona's real property mortgage laws. Although the post-sale redemption period is not available to the trustor, he is assured a reasonable period of time prior to the nonjudicial sale to cure his default and thus avoid the loss of his property. Moreover, the personal assets of the consumer are immune from any deficiency judgment after the trustee's sale.

The deed of trust should prove to be a viable alternative to the traditional realty mortgage. If the California experience is any indication, the deed of trust may ultimately replace the mortgage as the primary means of financing real property transactions in Arizona.¹³⁶

133. *Id.* § 33-814(A).

134. *Id.* § 33-814(E). A purchase money mortgage given to secure real property which is limited to and utilized for single one or two family dwellings is subject to a similar restriction. *Id.* § 33-729; see *Boyd v. Balentine, Arizona's Consumer Legislation: Winning the Battle But...*, 14 ARIZ. L. REV. 627, 654-56 (1972).

135. ARIZ. REV. STAT. ANN. § 33-806(B)(3) (Supp. 1972).

136. See Eagan, *Deed of Trust Transactions*, in CALIFORNIA LAND SECURITY AND DEVELOPMENT 3 (1960); Gose, *The Trust Deed Act in Washington*, 41 WASH. L. REV. 94, 95n.7 (1966). See also Fry, *The Deed of Trust: A New Device in Arizona Real Estate Financing*, 7 ARIZ. B.J. 5 (Winter 1972).