In Deed an Alternative Security Device: The Nebraska Trust Deeds Act

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Comment

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I. INTRODUCTION

The mortgage is a traditional and well known vehicle by which a lender may secure real estate loans. In 1965, the Legislature provided lenders with an additional device for securing such loans by enacting the Nebraska Trust Deeds Act.¹ With the increased popularity of low equity financing lenders had sought a more efficient means of recov-


2. Low equity financing describes the amount of a purchaser's initial investment in property. The investment is measured by loan-to-value ratio, which indicate the borrower's investment as a percentage of the market value of the trust property. Typically, the pre-depression home mortgage did not exceed 50 to 60 percent of the appraised value of the real estate. With the advent of the depression, the housing industry fell into ruins. In order to revive it, Congress lifted loan-to-value ratios for Farmers Home Administration (FHA) insured mortgages to levels once considered to be unsafe. Current loan-to-value ratios can reach 95
ering their security upon default by borrowers.³ Foreclosure was considered to be a costly and time-consuming process which subjected the collateral to unnecessary risks.⁴ In contrast, the Trust Deeds Act authorized lenders to reserve a power of sale, which, when properly exercised, extinguishes a debtor's interests in the collateral without resort to judicial proceedings.⁵ Because of the relative ease with which a lender may recover his collateral under the Act, trust deeds have been praised as a means of encouraging increased lending activity in Nebraska.⁶

Since its inception, the Trust Deeds Act has received a lukewarm reception in Nebraska.⁷ Instead of utilizing the trust deed to secure real estate loans, lenders have continued to use the more familiar

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3. A trust deed is essentially an alternative to the use of the mortgage as a security device. The primary disadvantage of using a mortgage to secure debt is the delay to the lender in the recovery of the secured property. In contrast, a trust deed containing a power of sale provision will allow a lender to recover his security with substantially lower costs in time and money than those realized in judicial foreclosure. G. Osborne, Real Estate Finance Law § 7.19 (1979).

4. Proponents of the Trust Deeds Act took the position that because many home buyers had little or no equity in their homes, there was no incentive for the purchaser to make his monthly mortgage payments. Hearings on L.B. 616, supra note 1, at 5-6 (statement of Theodore Kessner). See also Kessner, supra note 1, at 387-88. The Trust Deeds Act was designed to protect the lender by providing a means by which the security could be recovered soon after default, so that the property does not have an opportunity to deteriorate.

5. Neb. Rev. Stat. § 76-1005 (Supp. 1984). A power of sale is a contractual right granted to the lender in a trust deed, mortgage, or separate instrument, whereby the collateral may be sold without recourse to judicial proceedings. Although such a sale is made without judicial supervision, it is generally held that the lender must comply with statutory notice procedures so as to protect the debtor's interests in the collateral. See infra notes 122-26 and accompanying text. Furthermore, in some jurisdictions the trustee's sale must be confirmed by a court. However, such practices have serious constitutional ramifications. See infra note 27. The Nebraska Trust Deeds Act authorizes the use of power of sale foreclosure of trust deeds, conditioning the exercise of such powers on the full compliance with all of its notice and filing requirements. Neb. Rev. Stat. § 76-1006 (Supp. 1984). In Nebraska, there is no judicial confirmation of the exercise of a power of sale.

6. Proponents of the Trust Deeds Act argued that unless Nebraska fostered a climate to protect lenders of low equity loans, it would be difficult to entice mortgage money into the State. In order to protect lenders, it was deemed necessary to legislatively authorize the use of a power of sale. This authorization shortens the period from default to the time that the lender realizes his security. Hearings on L.B. 616, supra note 1 (Introducer's Statement of Purpose). See also Kessner, supra note 1, at 386, 388.

7. The practitioner's unfamiliarity with the security device offers one possible explanation for why the trust deed was not widely used in Nebraska. Kessner relates: "The comment was made to me earlier this week when someone had seen the program for this meeting [discussion of trust deeds] that they had an estate with a trust problem in it and they were interested to see what I was going to talk
mortgage or installment land contract. Only recently have trust deeds gained acceptance in the lending community. Because of the limited use of trust deeds in Nebraska, case law interpreting the Act is almost nonexistent. Therefore, reference must be made to the law of other jurisdictions for guidance in the use of trust deeds. Furthermore, mortgage law may provide insight as to the proper resolution of issues that the Act does not address. As the economic function of a trust deed and a mortgage is the same, reference will be made to Nebraska mortgage law, when appropriate.

8. Traditional methods of securing real estate loans included the mortgage and the installment land contract. See generally R. VOLKMER, TRADITIONAL REAL ESTATE SECURITY DEVICES 2-10 (Sept. 1982); Hancock, Installment Contracts for the Purchase of Land in Nebraska, 30 Neb. L. Rev. 953 (1959); Comment, Installment Land Contracts: Remedies In Nebraska, 61 Neb. L. Rev. 750 (1981). Additionally, a deed absolute, coupled with a contract of defeasance, may be executed as a security device. If such a transaction is used to secure the payment of an obligation, the relationship will be treated as a mortgage by Nebraska courts. See Campbell v. Ohio Nat'l Life Ins. Co., 161 Neb. 653, 660, 74 N.W.2d 546, 552-53 (1956); Ashbrook v. Briner, 137 Neb. 104, 107, 288 N.W. 374, 376 (1939); Names v. Names, 48 Neb. 701, 706, 67 N.W. 751, 752-53 (1896); Stall v. Jones, 47 Neb. 706, 715-16, 65 N.W. 653, 656 (1896); Connally v. Giddings, 24 Neb. 706, 715-16, 66 N.W. 653, 656 (1896); Wilde v. Homan, 58 Neb. 634, 638, 79 N.W. 546, 547 (1898). In order to prove that a deed absolute coupled with a defeasance was intended to be a mortgage, there must be clear and convincing evidence that the transaction was intended to be a method of providing security and not an absolute conveyance. O'Hanlon v. Barry, 87 Neb. 522, 526, 127 N.W. 860, 862 (1910); Wilde v. Homan, 58 Neb. 634, 638, 79 N.W. 546, 547 (1899). Parol evidence is admissible to prove such an intent. Morrow v. Jones, 41 Neb. 867, 876, 60 N.W. 369, 372 (1894).


10. Prior to the enactment of the Trust Deeds Act, Nebraska recognized that a trust deed would be treated like a mortgage, notwithstanding the differences between the two security devices. Fiske v. Mayhew, 90 Neb. 186, 188-200, 133 N.W. 195, 196 (1911); Comstock v. Michael, 17 Neb. 288, 298, 22 N.W. 549, 550 (1889); Hurley v. Estes, 6 Neb. 386, 390-91 (1877). Furthermore, Nebraska statutes provided that if a deed was given as a security device and not as an absolute conveyance or real property, then the transaction would be considered a mortgage. NEB. REV. STAT. § 76-251 (1981). See also Koehn v. Koehn, 164 Neb. 169, 179, 81 N.W.2d 900, 907 (1957) (an instrument intended to be security for a debt shall be treated in equity as a mortgage). As a result, trust deeds were governed by Nebraska mortgage law, and were required to be foreclosed just as any mortgage.

11. Although a trust deed and a mortgage serve the identical purpose of securing debts, the Nebraska Supreme Court has indicated that the Trust Deeds Act created a body of law independent and distinct from mortgage law. Blair Co. v. American Sav. Co., 184 Neb. 557, 169 N.W.2d 292 (1969). The decision, however, should be limited to the facts before the court. It had been argued that as mortgage law prohibited power of sale foreclosure, the same should be true when a trust deed is foreclosed. Rejecting this argument, the court noted that the Act authorized a security device which was not formerly available in Nebraska, and thus was not subject to the restrictions placed on mortgages. Id. at 558-59, 169 N.W.2d at 294. Although Blair holds that mortgage law will not control trust
The purpose of this Article is to provide an overview of the Nebraska Trust Deeds Act so as to familiarize the practitioner with the trust deed as an alternative security device. This Article will first examine the general characteristics of a trust deed, distinguishing such an arrangement from a mortgage. The Nebraska Act will then be analyzed with a view toward raising several of the procedural and substantive issues left unanswered by the drafters of the Act. It is hoped that this Article will enable the practitioner to become familiar with trust deeds and thus stimulate the use of trust deeds as a security device in Nebraska.

II. THE TRUST DEED

A trust deed serves the same function as a mortgage, as it secures the performance of a debtor on a note or other obligation. A trust deed creates a three-party relationship whereby the debtor (trustor) conveys legal title to the trust property to a trustee, who in turn holds legal title as security for the lender (beneficiary). Although a trust deed serves the same purposes as a mortgage, there are distinct differences between the two security devices.

The primary distinction between a trust deed and a mortgage becomes clear when a debtor defaults on the underlying obligation. For example, when a mortgagor defaults on a note secured by a mortgage, the mortgagee is generally forced to resort to judicial proceedings in order to foreclose the borrower's interests. Although many jurisdictions allow a mortgagee to reserve a power of sale, Nebraska has long deed issues when the Trust Deeds Act conflicts with mortgage law, the decision should not be extended to the case involving an issue on which the Act is silent. In such an event, the practitioner should be allowed to consult mortgage law for guidance. Because real property law varies from state to state, Nebraska mortgage law would provide more insight than would the trust deeds law of other jurisdictions. Therefore, when the Trust Deeds Act fails to address an issue, Nebraska mortgage law should be consulted for guidance unless valid policy considerations exist for not doing so.

12. A trust deed should not be confused with a land trust ("Illinois Trust"), a device often used to conceal land ownership. Under the typical land trust, title to the real estate is held by a corporate trustee. The trustee's powers are restricted by an unrecorded trust agreement whereby the beneficiary retains full powers of management and control. In addition to the concealment of land ownership, land trusts are used to avoid probate, facilitate multi-party ownership of real estate, and insulate real estate holdings from claims of general creditors. See generally Garrett, Land Trusts, 1955 ILL. L. FORUM 655 (1955); Comment, The Illinois Land Trust and Nebraska Law, 47 Neb. L. Rev. 101 (1968).


14. A mortgagee has two distinct and exclusive options in Nebraska: (1) suit at law on the note, and (2) foreclosure. See infra notes 98-102 and accompanying text.

followed the rule that such provisions are invalid, 16 and thus, the Nebraska mortgagee must judicially foreclose the borrower's interests. In contrast, the Trust Deeds Act gives a beneficiary under a trust deed the option to exercise a power of sale or to foreclose the trustor's interests in the manner provided by foreclosure law. 17 As a result, the Act provides Nebraska lenders with a mechanism whereby they may exercise a power of sale and in effect reverses a long line of case law holding that power of sale provisions are invalid.

A trust deed may be further distinguished from a mortgage upon examination of the debtor's rights upon default. The Nebraska mortgagor is recognized to have a right to redeem mortgaged property after default. 18 In order to do so the mortgagor must pay all amounts out-

16. Although power of sale provisions are commonly found in mortgages in many states, the Nebraska courts have long adhered to the position that such provisions are void, so that a mortgagee must instead resort to judicial foreclosure. Staunchfield v. Jeutter, 4 Neb. (unoff.) 847, 848, 96 N.W. 642, 643 (1903); Cullen v. Casey, 1 Neb. (unoff.) 344, 347-48, 95 N.W. 605, 607 (1901); Comstock v. Michael, 17 Neb. 288, 291, 22 N.W. 549, 552 (1885); Kyger v. Ryley, 2 Neb. 20, 27-28 (1872). The decisions fail to explain the judicial hostility toward power of sale foreclosure and the rule appears to be based solely upon judicial mandate. In Wheeler v. Sexton, 34 F. 154 (D. Neb. 1888), the court noted that:

The validity of such a power, and of the sale made under it, at common law may be conceded; and it is also that in Nebraska statutes can be found no express prohibition upon such a power; yet it seems to me that the supreme court of Nebraska, by two or three decisions at an interval of many years, has ruled against the validity of a sale made under such power . . . .

Id. at 155.

17. NEB. REV. STAT. § 76-1005 (1984 Supp.). Under a Trust Deeds Act, if the trustee wishes to exercise a power of sale, such a right must have been reserved to him in the trust deed. Id. As the statute is explicit in requiring the power to be expressly reserved in the trust deed, the practitioner must take care to include such a provision.

18. The mortgagor's equity of redemption is regarded as an incident of every mortgage, even though not expressly provided for therein. See Campbell v. Ohio Nat'l Life Ins. Co., 161 Neb. 653, 674, 74 N.W.2d 546, 559 (1956) (right of redemption is an essential and inherent characteristic of a mortgage, although not expressed therein); Sedlack v. Duda, 144 Neb. 567, 576, 13 N.W.2d 892, 897 (1944) (right of redemption is a favorite of equity, and cannot be abrogated without strict compliance with steps necessary to divest it, and with due process). Snoke v. Beach, 105 Neb. 127, 128, 179 N.W. 389, 391 (1920) (equitable right of redemption which attaches to a mortgage cannot be cut off by contract or by understanding of the parties).

A mortgagor's equity of redemption has its roots in early common law, where a mortgage was essentially a conveyance of property to a creditor to secure the performance of an obligation. Upon breach, however, title became absolutely vested in the mortgagee. Courts of equity found this result distasteful, and looked beyond the terms of the transaction to the true character of the agreement. Because the transaction was one of security and not one of sale, the equity courts provided a mortgagor with the right to redeem the property following
standing on the obligation as well as any costs incurred by the mortgagor in enforcing debt. In contrast, when the beneficiary elects to exercise a power of sale foreclosure, a trustor has a thirty-day period in which a default may be cured and the debt reinstated. In order to cure a default, the trustor need only pay the amount in default, not the entire balance of the debt. The Act thus gives the trustor greater rights than those of a mortgagor: a default may be cured by paying only the arrearage, whereas a mortgagor must remit the entire balance of the debt owed in order to redeem the mortgaged property.

The trustee's power of sale makes the trust deed an attractive security device for lenders. However, there are certain disadvantages in the use of a trust deed. Of primary importance are the limitations breach by discharging the obligation in full. See generally G. OSBORNE, supra note 15, at §§ 302-06.

A mortgagor's equitable right to redeem should not be confused with a statutory right to redemption. A statutory right of redemption arises after the confirmation of the foreclosure sale and permits a mortgagor to redeem the property for a stated period of time, ranging from six months to over two years. Although Nebraska has not adopted a statutory right of redemption, 26 states provide such relief for the debtor. G. OSBORNE, supra note 3, at § 8.4 n.81.

The statutory right of redemption was created to give a mortgagor additional time to refinance his debt and thus save the property from the foreclosure sale. It was also deemed to be a method of forcing the mortgagor to bid up to fair market value at the foreclosure sale, lest the mortgagor obtain financing and reclaim the property by paying the bid price. G. OSBORNE, supra note 15, at § 8.

The statutory right of redemption has generally not accomplished its purposes. It has chilled bidding at foreclosure sales, as few purchasers want to endure the mortgagor's threat of re-entry. Moreover, statutory rights of redemption are generally viewed as resulting in a more expensive and time-consuming foreclosure process. See, e.g., United States v. Stadium Apartments, 425 F.2d 358 (9th Cir. 1970).

A mortgagor's right to redeem exists until judicial sale has been confirmed by a court of competent jurisdiction. The statute has been interpreted to mean that persons holding redemption rights may redeem at any time before a final order on appeal to the Supreme Court. Mummert v. Grant, 118 Neb. 651, 225 N.W. 773 (1929); Philadelphia Co. v. Gustus, 55 Neb. 435, 75 N.W. 1107 (1898). However, if the party asserting redemption rights was omitted from the original foreclosure action, then an action to redeem may be brought at any time within 10 years after a cause of action has accrued. Dorsey v. Conrad, 49 Neb. 443, 68 N.W. 645 (1896).

Generally, the mortgagor, as well as any person claiming an interest in real property as junior lienors or encumbrancers, may redeem after a foreclosure sale. Thus a junior lienor may redeem should the mortgagor elect not to do so. G. OSBORNE, supra note 15, at § 304. However, the right to redeem does not extend to a junior lienor in Nebraska when he has been made a party to a foreclosure action, for it is held that his interests are adequately protected by permitting him to bid at the foreclosure sale. Keller v. Boehmer, 130 Neb. 763, 266 N.W. 577 (1936).

See generally G. OSBORNE, supra note 15, at §§ 302-06. See infra notes 109-13 and accompanying text.
placed on a beneficiary's right to a deficiency judgment. While several jurisdictions prohibit the recovery of a deficiency after the beneficiary has exercised a power of sale, the Nebraska Act limits the amount recoverable in a deficiency action. In contrast, a mortgagee may recover all amounts not realized after a judicial sale of the encumbered property.

A second potential disadvantage to lenders in using trust deeds involves an element of uncertainty that surrounds the Act. Although the Act is quite specific in most respects, it leaves several questions unanswered. Furthermore, during the nineteen-year history of the Act, the Nebraska Supreme Court has had only one opportunity to interpret the Act. The effect of this uncertainty is to force the practitioner to look to Nebraska mortgage law, as well as to trust deeds acts of other jurisdictions, for guidance in resolving issues arising under the Nebraska Act.

Beyond the uncertainty associated with the Act, constitutional issues are raised whenever a trustee exercises a power of sale. Although the Act has survived a challenge under the Nebraska Constitution, the decision focused only on the limited issues concerning the constitutionality of a power of sale foreclosure. The issue remains open as to whether the Act violates federal due process principles. In light of recent Supreme Court decisions holding certain replevin and garnishment proceedings invalid, it would appear that nonjudicial sales might imply due process difficulties. However, sev-

21. NEB. REV. STAT. § 76-1013 (1981). By limiting the beneficiary's recovery, the Act provides the trustor protection from the lender. See infra notes 164-72 and accompanying text.
22. See, e.g., Federal Farm Mortgage Corp. v. Claussen, 138 Neb. 518, 293 N.W. 424 (1940); Federal Farm Mortgage Corp. v. Cramb, 137 Neb. 553, 290 N.W. 440 (1940).
23. The Act does not address the scope of the trustee's authority under the Act, see infra notes 78-85; or whether junior lienor's rights are extinguished by the trustee's sale, see infra notes 145-46. One ambiguity was addressed recently when the Legislature authorized the use of trust deeds to secure future advances. See infra note 48.
25. Id. In Blair, the Nebraska Trust Deeds Act was challenged under the Nebraska Constitution. It was contended that the Act was in conflict with a statute which provided that when a deed is given as security, it should be treated as a mortgage. See NEB. REV. STAT. § 76-251 (1981). It was argued that because a trust deed must be treated like a mortgage, and thus must be foreclosed like a mortgage, the power of sale provision contained therein was invalid. Upholding the validity of the Act, the court noted that it authorized the use of a security device not available prior to the Act's inception, as it permits foreclosure by sale without the necessity of judicial proceedings. The court concluded that the Act is complete and independent of mortgage law, as it prescribes in detail the procedures to be followed in the execution and enforcement of trust deeds.
eral federal courts have rejected due process challenges in cases involving statutory schemes similar to the Nebraska Act; thus, it appears that the Act would withstand such constitutional challenges.27

27. Although a comprehensive analysis of this issue is beyond the scope of this Article, it should be noted that the federal courts have entertained a number of suits challenging the validity of power of sale provisions on both fifth and fourteenth amendment due process grounds. The major question in this area is whether state action can be found in nonjudicial foreclosure proceedings, since the fourteenth amendment prohibits the state from depriving any person of property without due process of law. See Shelley v. Kraemer, 334 U.S. 1 (1948) (state courts enforcing racially discriminatory restrictive covenants violates due process). Similarly, the fifth amendment cases focus on finding such a deprivation by the federal government, and arise when federally regulated entities such as the Federal National Mortgage Association or the Farmers Home Administration exercise power of sale foreclosures. An overwhelming majority of the fourteenth amendment cases have recognized that power of sale provisions are contractual rights established between a lender and borrower. The courts have concluded that the state statutes providing for nonjudicial sales only serve to regulate the exercise of that right, so that state action is not present. See Levine v. Stein, 560 F.2d 1175 (4th Cir. 1977); Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23 (6th Cir. 1975); Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975); Kenly v. Miracle Properties, 412 F.Supp. 1072 (D. Ariz. 1976); Leisure Estates of Am. Inc. v. Carmel Dev. Co., 371 F. Supp. 556 (S.D. Tex 1974); Law v. U.S.D.A., 366 F. Supp. 1233 (N.D. Ga. 1973). Similarly, federal government action has been found absent in the fifth amendment cases, in which the courts have held that even with trust deeds containing power of sale provisions approved by the Department of Housing and Urban Development, the power of sale agreement is not a power of a governmental nature. Warren v. Government Nat'l Mortgage Ass'n., 611 F.2d 1229 (8th Cir. 1980).

One case, however, has found that a state statutory scheme regulating power of sale provisions violates fourteenth amendment notions by failing to provide for personal notice to the debtor and for an opportunity to be heard prior to the trustee's sale. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975). In Turner, the statutory scheme required that certain reports concerning the trustee's sale had to be filed with the clerk of the superior court. The clerk was required to verify the reports and was given contempt powers to punish those persons who failed to file reports. Due to the broad powers given to the clerk, state action was found to be present under this particular statutory scheme.

Nebraska's Act should be able to withstand a due process challenge, as it would be difficult to find state action under the Nebraska Trust Deeds Act. In contrast to Turner, Nebraska does not provide for judicial supervision of the trustee's sale. See infra notes 127-40 and accompanying text. It has been suggested that even though the Nebraska Act would most likely survive a due process challenge, a more prudent approach would be to ensure that the trustor and all junior lienors receive written notice of the trustee's sale regardless of whether they request it. McClymont & Thompson, The Nebraska Trust Deeds Act: Coming Out of the Closet, 1 Neb. Real Est. L.J. 49, 51 (1983).

For a more thorough discussion of whether a nonjudicial sale violates due process principles, see Comment, Leen, Galbraith, & Grant, Due Process and Deeds of Trust—Strange Bedfellows?, 48 Wash. L. Rev. 763 (1973); Muller, Deed of Trust Foreclosure, The Need For Reform . . . Fair Play and The Constitution Revisited, 29 J. Mo. B. 222 (1973); Nelson, Deed of Trust Foreclosure Under Powers
A final preliminary consideration surrounds the effect of power of sale foreclosure on the title of the encumbered property. Although power of sale foreclosure is more efficient and less costly than judicial foreclosure, the title that it produces may be less marketable than that generated by judicial foreclosure. That instability of title is the result of the lack of judicial supervision associated with power of sale foreclosure. Because judicial foreclosure is an adversary proceeding, potential defects will be brought to the attention of the court for judicial resolution. In contrast, a trustee’s sale is not subject to judicial supervision, making it difficult for a trustor to raise defects during the sale proceedings. Consequently, there is a lack of judicial finality to provide protection against a subsequent attack on the title generated by a trustee’s sale.28

III. NEBRASKA TRUST DEEDS ACT

A. Rights of a Trustor

A trust deed is defined by the Act as a deed that conveys real property as security for the trustor’s obligation to the beneficiary.29 The Act suggests that a trust deed, in contrast to a mortgage, conveys legal title to the trust property to the trustee rather than creating a lien thereon.30 Although it might seem that the trustor would relinquish


28. See generally G. OSBORNE, supra note 3, at § 7.18.
30. “Trust Deed shall mean a deed executed in conformity with sections 76-1001 to 76-1018 and conveying real property to a trustee to secure the performance of an obligation of the grantor or other person named in the deed to a beneficiary.” NEB. REV. STAT. § 76-1001(3) (1981) (emphasis added). The language of the Act suggests that legal title is conveyed to the trustee for the limited purpose of securing the trustor’s performance on the obligation. Thus, legal title passes to the trustee, while the trustor retains beneficial title in the trust property. See Ashbrook v. Briner, 137 Neb. 104, 288 N.W. 374 (1939) (when warranty deed is executed to secure indebtedness owing to the grantee, legal title passes to the grantee, while the grantor retains the right of redemption); Northwestern State Bank v. Hanks, 122 Neb. 262, 240 N.W. 281 (1932) (legal title, under absolute deed given to secure indebtedness owing to grantee, passes to grantee, and equity will regard the grantor as retaining an interest in the premises).

Because the Trust Deeds Act passes legal title to the trustee, it in effect reverses earlier case law which held that a trust deed was the equivalent of a mortgage, and operated to create a lien on the trustor’s property. Fiske v. Mayhew, 90 Neb. 196, 133 N.W. 195 (1911); Hurley v. Estes, 6 Neb. 386 (1877). In contrast, Nebraska mortgage law recognizes that a mortgagor retains legal title to
all legal rights to the trust property upon execution of a trust deed, it
is generally held that the trustor conveys only bare legal title to the
trustee. Thus, the trustee acquires only those rights which will en-
able him to convey the trust property to a purchaser at the trustee's
sale, while all other incidents of ownership remain in the trustor.
Consequently, there appears to be little difference under the Act be-
tween a trustee's title and a lien held by a mortgagee.

If the trustor or his successors acquire any right or interest in the
trust property after the execution of the trust deed, such interests in-
ure to the benefit of the trustee as security for the obligation secured
by the trust deed. If the trustor did not hold title to the trust prop-
erty at the execution of the trust deed, but subsequently acquired title,
then such interests automatically pass to the trustee. Consequently,
the Act is consistent with Nebraska mortgage law, which recognizes
that after-acquired interests in the mortgagor automatically pass to
the mortgagee.

Although the Act fails to define the term "interest" as used
therein, the term could reasonably be interpreted to include existing
improvements as well as subsequent improvements to the trust prop-
erty. As such, the trust deed operates to convey to the trustee any

30. See Butts v. Hale, 157 Neb. 334, 59 N.W.2d 583 (1953) (every right or interest held
by a mortgagor in the mortgaged property, together with all subsequently ac-
quired rights, easements, and privileges pass with the mortgage, though reference
is not specially made to them); Pulver v. Connelly, 93 Neb. 188, 139 N.W. 1014
(1913) (if a mortgage purports to convey the whole property, then an after-ac-
quired interest of the mortgagor will accrue to the title conveyed by the
mortgagor).
interest in property permanently attached to the real estate as well as all subsequent improvements. Such an interpretation would be consistent with Nebraska mortgage law which recognizes that annexations permanently affixed to the real estate are presumed to pass with a mortgage, and that permanent improvements made after the execution of a mortgage are deemed to become part of the mortgaged estate. If the parties to a trust deed want the security interest to extend to improvements to the trust property, the better practice would be to include such a recital in the trust deed, to evidence that intent.

The trustor generally has the same rights in the trust property as a mortgagor would have in property subject to a mortgage. Although

35. Although the term “interest” is not defined by the Act, the term “real property” is deemed to include: “any estate or interest in land, including all buildings, fixtures and improvements thereon and all rights-of-way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, used or enjoyed with said land, or any part thereof . . . .” Neb. Rev. Stat. § 76-1001(5) (1981).

36. Nebraska mortgage law recognizes a distinction between fixtures or improvements permanently attached to the encumbered property, and personal property, in that personal property is not subject to a mortgagee’s interest. The distinction between fixtures and personal property is made by examining the permanence of the improvement, the purpose for which it may be used, the intention of the party in making the improvement, and the expectations of the transferee. Thus, where goods were merely placed on the mortgaged premises for storage and were not permanently affixed, such goods were held to be personal property and thus not subject to the lender’s interest. Haver v. North American Hotel Co., 111 Neb. 13, 17, 195 N.W. 483, 487 (1923). However, where a grain bin was anchored to a concrete slab, it was considered to have been affixed to the real property in such a manner so as to pass with the property on sale. Stibor v. Farrell, 177 Neb. 437, 444, 129 N.W.2d 449, 452-53 (1964). This was true even though with respect to a third party lender, the grain bin constituted personal property. Id.

37. A building, intended to be a permanent improvement and placed on the real estate by a mortgagor while the property was encumbered, was held to become part of the mortgaged estate and thus subject to the lien of the mortgagee. Home Sav. & Loan Ass’n v. Mount Zion Baptist Church, 139 Neb. 867, 870-71, 299 N.W. 287, 289 (1941).

38. The case may arise in which the beneficiary wants to take a security interest in machinery or other improvements to the trust property as additional collateral for the loan. The Trust Deeds Act appears to be limited to interests in real property or fixtures and improvements, and does not extend to personal property. Neb. Rev. Stat. § 76-1001(5) (1981). As the precise nature of such items as machinery cannot be determined with absolute certainty, the beneficiary runs the risk that the collateral will be held to be personal property. As a result, the beneficiary becomes an unsecured creditor with regard to such equipment. In order to protect his interests in such items, the lender should file a financing statement that complies with Uniform Commercial Code requirements. A “fixture filing” is unnecessary, however, as it serves only to defeat conflicting interests of encumbrancers or owners of real estate. See U.C.C. §§ 9-313(1)(b); 9-313(4), (5), (6), (7) (1980). The lender is adequately protected by the security interest taken in the trust deed, if the equipment is ultimately determined to be real property.

39. See supra notes 30-32 and accompanying text.
the Act is silent on the issue of possession, the trustor, like the mortgagor, should have the right to remain in possession of the trust property until after the trustee's sale.\footnote{40} Furthermore, the trustor should be entitled to all rents and profits generated by the trust property until such time that the trustor's interests are extinguished.\footnote{41} Like a mortgagor, the trustor may assign his rights of possession or rents to the beneficiary by specifically providing for such an assignment in the trust deed.\footnote{42}

A trustor, like a mortgagor, should be able to transfer or assign his interests in the trust property even though the trustee holds legal title.\footnote{43} Such a transfer, however, may result in an acceleration of the outstanding debt if the trustor attempts to convey the trust property.

\footnote{40} The Act impliedly grants a trustor the right to possess the trust property, at least until one month after the filing of a notice of default, by allowing the trustor the right to cure a default during this time period. If the trustor were not allowed possession during this period, the right to cure would be meaningless. See Neb. Rev. Stat. § 76-1012 (1981).

The Act is silent as to the trustor's right to possession beyond the one month cure period. However, considerations that permit a mortgagor to remain in possession until the confirmation of the foreclosure sale apply in the case of the trustor. Because a mortgagor retains title to the encumbered property until after the confirmation of the judicial sale, he is entitled to the rents, profits, and possession of the property up to the date of confirmation. Westerfield v. South Omaha Loan & Bldg. Ass'n, 75 Neb. 53, 56, 105 N.W. 1087, 1088 (1905), reh'y denied, 75 Neb. 58, 107 N.W. 1010 (1906); Hatch v. Shold, 62 Neb. 764, 766, 87 N.W. 908, 909 (1901); Yeazel v. White, 40 Neb. 432, 441, 58 N.W. 1020, 1022 (1894). Similarly, because the trustor holds beneficial title in the trust property until the date of the trustee's sale, he too should be entitled to possession.

\footnote{41} If the trustor has rights of possession until the date of the trustee's sale, then he would also be entitled to all rents and profits generated by the property until that date. See Snoke v. Beach, 105 Neb. 127, 179 N.W. 389 (1920) (if an instrument is a mortgage, it follows that the mortgagor is entitled to possession as well as to the rents and profits generated by the premises); Connolly v. Giddings, 24 Neb. 131, 37 N.W. 939 (1888) (a mortgagor, in the absence of a contract to the contrary, is entitled to the possession of the mortgaged property until foreclosure and sale).

\footnote{42} If the case law generated under the Trust Deeds Act follows the approach of Nebraska mortgage law, the parties should be free to make whatever arrangements they wish for possession and rents upon default. See Central Sav. Bank v. First Cadco Corp., 186 Neb. 112, 181 N.W.2d 261 (1970) (provision in a mortgage assigning possession and rents to a mortgagee, effective upon default, is valid and enforceable, and such provisions may be enforced in a foreclosure action upon application of the mortgagee); Hanks v. State Bank, 143 Neb. 204, 9 N.W.2d 175 (1943) (parties to a mortgage may make arrangements as to the possession of the premises other than those the law would determine in the absence of an agreement); Felino v. Newcomb Lumber Co., 64 Neb. 335, 89 N.W. 755 (1902) (a provision in a real estate mortgage, that in the case of a default the mortgagee shall be entitled to possession of the premises, is valid as to the parties and subsequent purchasers and encumbrancers are chargeable with notice).

\footnote{43} The Act implicitly recognizes that such conveyances will occur when reference is made to the trustor or his successor in interest. See, e.g., Neb. Rev. Stat. § 76-1002 (Supp. 1984). See generally G. Osborne, supra note 3, at § 5.1. However, the trustor will remain personally liable for the underlying obligation, with a right of
without the beneficiary's prior consent.\textsuperscript{44}

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recovery against his grantee dependent upon whether the transfer was taken sub-
ject to the debt, or whether the transferee assumed the obligation. \textit{Id.} at § 5.2.
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\textsuperscript{44} Both mortgages and trust deeds commonly contain due-on-sale provisions which allow the lender the option of declaring the entire debt due and payable in the event that the debtor attempts to transfer the encumbered property without the lender's prior consent. Due-on-sale clauses became popular with the instability of long term interest rates. Such clauses were designed to eliminate assumable loans and instead force a purchaser to negotiate a loan at the prevailing rate of interest. Additionally, such clauses allow the lender to regulate the type of people that will own or occupy the encumbered premises. \textit{See generally G. OSBORNE, supra} note 3, at § 5.21.

Due-on-sale clauses have received a mixed reaction from the courts. Although no court has held a due-on-sale clause to be per se unlawful as an invalid restraint on alienation, such clauses have been closely scrutinized. Two general methods of judicial treatment have emerged. The first approach recognizes the validity of due-on-sale clauses, but places the burden on the lender to prove that enforcement of the clause is reasonable. \textit{See, e.g.,} Martin v. People's Mut. Sav. & Loan Ass'n, 319 N.W.2d 220 (Iowa 1982); Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n, 73 Mich. App. 163, 250 N.W.2d 804 (1977); First Fed. Sav. & Loan Ass'n v. Kelly, 312 N.W.2d 476 (S.D. 1981).

In contrast, the predominant approach tends to allow automatic enforcement of such clauses, and places the burden on the borrower to establish that enforcement is unfair or unconscionable. \textit{See, e.g.,} Krause v. Columbia Sav. & Loan Ass'n, 73 Mich. App. 163, 250 N.W.2d 804 (1977); First Fed. Sav. & Loan Ass'n v. Kelly, 312 N.W.2d 476 (S.D. 1981).

The California courts have held that due-on-sale clauses are an unreasonable restraint on the alienation of real property and thus are not enforceable unless the lender can demonstrate that enforcement is reasonably necessary to protect against the impairment of its security, or is necessary to protect against the likelihood of default. Wellenkamp v. Bank of America, 21 Cal. 3d 943, 582 P.2d 970, 976, 148 Cal. Rptr. 379, 385-86 (1978).

The parties to a trust deed may expressly allocate responsibilities in the trust instrument. Important provisions that should be agreed upon include establishing responsibility for the payment of taxes and assessments, insurance and maintenance of the trust property, as

U.S. 141 (1982), wherein the Court found the federal regulations preempted state law regulating due-on-sale clauses. The decision, however, did not address the enforceability of due-on-sale clauses in mortgages executed prior to the effective date of the regulations, nor did the decision extend to loans made by state chartered institutions.


45. It is generally held that taxes assessed against mortgaged property should be discharged by the mortgagor. See, e.g., Adams v. Sims, 177 Ark. 652, 9 S.W.2d 329 (1928); Hays v. Crawford, 159 Kan. 723, 158 P.2d 463 (1945); Williams v. Hilton, 35 Me. 547, 58 A.D. 729 (1853). As a trust deed is no different from a mortgage, the same considerations that make a mortgagor responsible for taxes and assessments would apply to the trustor. However, to ensure certainty, the parties to a trust deed should specify whether it is the trustor or trustee who will be required to pay taxes levied on the trust property.

In the event that the trustor fails to pay any taxes or assessments levied against the trust property, the trustee should be entitled to make those payments necessary to protect his security. The trustee would then be entitled to recover all payments made from the trustor. See, e.g., Leavitt v. Bell, 59 Neb. 595, 81 N.W. 614 (1900); White v. Atlas Lumber Co., 49 Neb. 82, 87, 68 N.W. 359 (1896); Johnson v. Payne, 11 Neb. 269, 9 N.W. 81 (1881).

46. It is well established that both a mortgagor and a mortgagee have an insurable interest in mortgaged property, and this proposition would be equally applicable in the trust deed relationship. In the absence of a particular agreement, however, a mortgagor is not obligated to insure the premises for the benefit of the mortgagee. United States Trust Co. v. Miller, 116 Neb. 25, 29, 215 N.W. 462, 464 (1927). However, when the mortgage provides that the mortgagor will insure the premises for the benefit of the mortgagee, the mortgagee is entitled to be reimbursed for any insurance premiums paid. Sanford v. Lichtenberger, 62 Neb. 198, 201-02, 77 N.W. 667, 668 (1898); White v. Atlas Lumber Co., 49 Neb. 82, 87, 68 N.W. 359, 361 (1896).

The parties should allocate duties and responsibilities regarding insurance. At a minimum, the trust deed should disclose the following with regard to insurance maintained on the trust property: party responsible for the payment of premiums; types and amounts of coverages to be purchased; insurer of the property; whether the lender has a right to the proceeds; duties of the parties in the event of a loss; application of proceeds to repair or payment of debt; which parties will settle with the insurer; what will happen in the event that the borrower fails to
well as any other obligations or conditions to which the parties agree. 48

A defaulting mortgagor in Nebraska has an equity of redemption in his property at all times until the judicial sale has been confirmed. 49 Accordingly, when the beneficiary of a trust deed elects judicial foreclosure, the trustor would have the same redemption rights as a mortgagor. 50 However, if the beneficiary elects to exercise a power of sale, pay premiums; and release of the debtor's interest upon the exercise of a power of sale foreclosure.

47. As a general rule a mortgagor may not commit acts of waste which would impair the sufficiency of the lender's security. In Nebraska, a mortgagee has the right to bring suit to prevent waste by a mortgagor in possession, when the security may be impaired or when there is a danger that the mortgaged property may suffer a loss in value to an amount below the amount of the debt secured. See, e.g., Vybiral v. Schildhauser, 130 Neb. 433, 438, 265 N.W. 241, 244 (1936) (cutting of timber devalued property to less than the amount of the outstanding mortgage note). The policy behind the rule prohibiting debtor waste would be equally applicable to a trust deed, so, a trustor would also be prohibited from committing those acts which may impair the value of the trust property.

48. Items which should be considered by the drafter of a trust deed include: lenders right to enter and inspect; disposition of proceeds upon condemnation; due-on-sale provisions; due-on-encumbrance provisions; whether forbearance by lender constitutes waiver of enforceable rights; methods and manner of giving notice; parties who request notice; future advances; lender’s right to possession or rents and profits upon a failure to cure within the statutory time period; allocation of the duty to defend in actions affecting the trust property; events constituting default; consequences of default; borrower’s statutory right to cure defaults; acceleration of the debt upon default; foreclosure by power of sale; acceptable manner of payment by a purchaser at the trustee’s sale; trustee’s fees for the conduct of the sale; and method of reconveyance. See generally 1 NEBRASKA CONTINUING LEGAL EDUCATION, INC., REAL ESTATE CONVEYANCING SYSTEMS, IV-D-1 (1979).

Although the Act originally did not specifically authorize the use of future advance clauses, the validity of such provisions was implicitly recognized when reference was made to the debtor's right of reinstatement. See NEB. REV. STAT. § 76-1012 (1981). Most recently, the Act was amended to specifically authorize future advances necessary to protect the security, and optional advances. L.B. 679, 88th Leg., 1st Sess., 1984 Neb. Laws § 17. Because it is now clear that future advances are permissible under a trust deed, the question arises as to whether Nebraska mortgage law would regulate their use. See NEB. REV. STAT. § 76-238.01 (1981) (authorizes future advances in mortgages provided that the maximum amount of the future advance is stated in the mortgage). Although the Nebraska Supreme Court has indicated that the Trust Deeds Act is separate and distinct from Nebraska mortgage law, there is no valid reason why future advances in trust deeds should not be subject to the regulations imposed on such clauses by Nebraska mortgage law. See supra notes 10 & 11.

49. See supra notes 18 & 19 and accompanying text.

50. NEB. REV. STAT. § 76-1005 (Supp. 1984): "[A] trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property." Since real property subject to a mortgage has an equity of redemption, it follows that when a trust deed is judicially foreclosed, the trustor also has an equity of redemption.
the trustor would lose his equitable right of redemption. Instead, the Act provides the trustor with a thirty-day period during which the default may be cured and the debt reinstated, thereby protecting the trustor from the loss of his property due to an inadvertent default.

B. Rights of the Trustee

Under the Act, only members of the Nebraska State Bar Association or Nebraska licensed real estate brokers are authorized to serve as trustees. The Act also permits several entities to serve as trustee, including banks, building and loan associations, savings and loan associations authorized to do business in Nebraska, and title in-

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53. NEB. REV. STAT. § 76-1003(1)(a) (1981). The original draft of the Trust Deeds Act provided that the only individuals that could act as a trustee were members of the Nebraska State Bar Association. Political pressure resulted in the addition of real estate brokers to the class of qualified trustees. The Act's proponents found this acceptable, because brokers, like lawyers, were subject to state regulation. Hearings on L.B. 616, supra note 1, at 8. Although individual lawyers or real estate brokers may serve as trustees, such authorization does not extend to law firms or real estate agencies unless such entities are within the class of acceptable trustees under the Act. Therefore, care must be taken to ensure that the trustee qualifies under the Act.
54. Because an entity organized in the corporate form may have perpetual existence whereas an individual may become incapacitated or leave the state, there might appear to be distinct advantages in naming an entity as trustee. However, the Act provides a simple procedure whereby a successor trustee may be appointed so that perpetual existence need not be a major concern. See infra notes 72-77 and accompanying text.
55. NEB. REV. STAT. § 76-1003(1)(b) (1981). The Act authorizes several financial institutions to serve as trustee, including any bank, building and loan associations, or savings and loan associations authorized to do business in Nebraska under the laws of the State or the United States. Financial institutions are permitted to act as trustees because they are regulated quite extensively by state and federal agencies. Furthermore, they have the expertise and resources to deal with trust deed transactions. Absent from the class of authorized institutions are industrial loan and investment companies, credit unions, and cooperative credit associations. These lenders are also subject to extensive state and federal regulation, so that policy considerations would support their inclusion in the class of authorized trustees. See NEB. REV. STAT. §§ 8-401 to -451 (1983) (industrial loan and investment company regulations); NEB. REV. STAT. §§ 21-1760 to -17,126 (1983) (credit union regulations); NEB. REV. STAT. §§ 21-1308 to -1332 (1983) (cooperative credit association regulations). See also 12 U.S.C. § 21 to 216(d) (1982) (reserve requirements for federally regulated banks); 12 U.S.C. § 1762 (1982) (reserve requirements for federally regulated credit unions).

Arguably, industrial loan and investment companies should qualify as trustees even though not specifically authorized by the Act. The Act provides that any bank authorized to do business in Nebraska may serve as a trustee. NEB. REV. STAT. § 76-1003(1)(b) (1981). The Nebraska Banking Act defines the term “bank” to include any incorporated banking institution which was formed under the laws of this State as they existed prior to May 9, 1933, as well as any corporation duly
insurance companies and corporations authorized to conduct a trust business in Nebraska. Additionally, banks, building and loan associations, savings and loan associations, and corporations authorized to conduct trust businesses may serve both as trustee and beneficiary under a single trust deed, while individuals and insurers are prohibited from doing so.

The Act creates a potential conflict of interest by permitting certain beneficiaries to serve as trustee for a single trust obligation. Because of this potential, several states have either prohibited the beneficiary from assuming the duties of a trustee, or limited his remedies upon default. Because the trustee's interest is similar to that of a mortgagor, arguably no conflict of interest arises when the beneficiary serves in the dual capacity as trustee. However, because the trustee, unlike a mortgagor, is permitted to dispose of the trust property without a judicial sale, the potential for manipulation is increased. In order to check the trustee's powers, the Act's drafters granted the trustor an absolute right to cure default and reinstate the debt. Further protection was afforded by limiting the beneficiary's right to a deficiency judgment. Finally, the Act reduces the potential

organized under the laws of this State for the purpose of conducting a bank within Nebraska under the provisions of §§ 8-101 to -1,129 of the Nebraska Banking Act. NEB. REV. STAT. § 8-101(4) (1983). Included within the provisions of §§ 8-101 to -1,129 is the regulation of industrial loan and investment companies. NEB. REV. STAT. §§ 8-401 to -451 (1983). Therefore, by way of statutory construction, it appears that industrial loan and investment companies are authorized to serve as trustees under the Trust Deeds Act.

58. NEB. REV. STAT. § 76-1003(2) (1981). An entity authorized to serve as trustee for a trust deed in which it is also a beneficiary should have the expertise and resources to manage the problems of trust deed administration. Furthermore, such an entity is subject to extensive regulation, so that any concern about the possibility of manipulation should be dispelled due to this increased supervision. Finally, such an entity will ordinarily be organized with perpetual existence, so that continuity and consistency is achieved in dealing with the trust deed transaction.
59. NEB. REV. STAT. § 76-1003(2) (1981). A major reason why individuals are prohibited from serving both as trustee and beneficiary under a single trust deed is that in the event of death or disability of the trustee, there would be no one available to appoint a successor trustee or to compel delivery of the trust deed to a successor. See NEB. REV. STAT. § 76-1004 (Supp. 1984). See also infra notes 72-77 and accompanying text.
61. The Nebraska Trust Deeds Act provides some measure of protection for the trustor by limiting the beneficiary's right to a deficiency judgment, so that it is unnecessary to prohibit the beneficiary from also acting as trustee.
for manipulative practice by allowing only those entities subject to state regulation to serve as both trustee and beneficiary.62

A second potential conflict not addressed by the Act arises when an attorney or real estate broker representing a beneficiary in the sale of trust property is subsequently retained to serve as trustee for the transaction. The individual who negotiated the sale arguably could not serve as an impartial trustee for the parties.63 A minority of jurisdictions have held that a trustee associated with a beneficiary is prohibited from exercising a power of sale even though a power of sale provision is included in the trust deed.64 In contrast, the majority of the courts addressing this issue have refused to limit the trustee’s powers simply because of his prior relationship to one of the parties.65

62. See supra note 54.
63. An attorney may violate the Code of Professional Responsibility if he represents the beneficiary while acting as a trustee under a trust deed. Under the American Bar Association Code of Professional Responsibility, three Canons are implicated: the duty to represent a client zealously, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983); the duty to exercise independent professional judgment, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1983); and, the duty to avoid even the appearance of professional impropriety, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1983). It has been suggested that an interested attorney should not serve as a trustee until an advisory opinion has been obtained from the Nebraska State Bar Association. McClymont & Thompson, supra note 27, at 54.
64. This line of reasoning has been restricted to the Federal Court of Appeals for the District of Columbia, which reasoned that the trustee owes a fiduciary duty to both the trustor and beneficiary and must act impartially toward both. Thus, where the son of a beneficiary acted as the trustee for a trust deed, it was held that he could not serve in such a capacity in the foreclosure suit. Kent v. Livingstone, 83 F.2d 316 (D.C. Cir. 1936). See also Admiral Co. v. Thomas, 271 F.2d 849 (D.C. Cir. 1959) (where officer of trustee of first trust deed made bid on trustee’s behalf and effect of sale eliminated security of second trust deed without notice, second trustee may set aside sale); Earll v. Picken, 113 F.2d 150 (D.C. Cir. 1940) (breach of trust for trustee to purchase second trust deed note at a discount and attempt to foreclose without consent of court or beneficiaries); Spruill v. Ballard, 38 F.2d 517 (D.C. Cir. 1932) (trustee must act fairly and in best interests of both parties); Holman v. Ryon, 86 F.2d 307 (D.C. Cir. 1932) (trustee should scrupulously avoid placing himself in a position in which his interests might conflict with the interests of those whom he represents).
65. The majority position is that the trustee is not a fiduciary of the parties, but is under a duty to act fairly in his dealings with the parties. Thus, when the trustee was both an officer and large shareholder in the beneficiary entity, it did not disqualify him from also acting as trustee. See Dali v. Lindsey, 237 S.W.2d 1006, 1008 (Tex. Civ. App. 1951). See also Witter v. Bank of Milpitas, 204 Cal. 570, 269 P. 614 (1928) (an officer of bank—the beneficiary under the trust deed— is not disqualified from acting as a trustee under the instrument); Copsey v. Sacramento Bank, 133 Cal. 659, 66 P. 7 (1901) (rule that trustees are forbidden to purchase at their own sale, and that such purchases are generally void, does not apply in exceptional cases of powers of sale under mortgages); Dollar Inv. Co. v. Patton, 236 Md. 94, 202 A.2d 646 (1964) (although inadvertence or error, trust deeds not invalid because trustee and obligee named on deed were the same corporate entity); Graham & Locke Inv. Co. v. Madison, 295 S.W.2d 234 (Tex. Civ. App. 1956) (while
Because of the safeguards provided for a trustor under the Nebraska Act, it would be unnecessary to impose any further restrictions on the trustee who may be associated in some manner with the beneficiary.\textsuperscript{66} However, in the event that a power of sale foreclosure is elected, the interested trustee should resign and allow the beneficiary to appoint an impartial successor trustee, so as to avoid any subsequent challenge.

For his services, the trustee is entitled to a fee, which is assessed to the borrower or lender, depending upon local practice.\textsuperscript{67} Although the Act limits the amount that a trustee may charge when a trust deed is reinstated following default,\textsuperscript{68} it provides no other regulation on the amount of the trustee's fee.\textsuperscript{69} As the Nebraska Act relegates the trustee to a relatively minor role in the trust deed relationship, the fee should be nominal.\textsuperscript{70} Moreover, competition among various institutions should serve to keep the trustee's fee at a reasonably low level.\textsuperscript{71}

If for any reason the trustee is unwilling or unable to serve in his capacity as trustee, or if the beneficiary for any reason wishes to name a new trustee, the Act authorizes the beneficiary to appoint a successor trustee.\textsuperscript{72} Thus if the trustee dies, leaves the State, or otherwise is...

\textsuperscript{66} Extensive notice requirements and limitations on the amount of recoverable deficiency judgment provide adequate safeguards for the trustor. \textit{See infra} notes 103-08 & 164-72.

\textsuperscript{67} At the Act's inception, it was assumed that the cost of the trustee's fee would be treated no differently than the cost of obtaining a mortgage. \textit{Hearings on L.B. 616, supra} note 1, at 9 (statement of Mr. Albert R. Stelling, Vice Pres., Omaha Nat'l Bank).

\textsuperscript{68} \textit{Neb. Rev. Stat.} § 76-1012 (1981) (trustee's fee may not exceed $50.00, or one-half of one percent of the entire unpaid principal, whichever is greater).

\textsuperscript{69} Apparently the Legislature wanted to avoid problems that could arise if it attempted to establish regulations on the amount of the trustee's fee. \textit{Hearings on L.B. 616, supra} note 1, at 6-7 (statement of Theodore Kessner).

\textsuperscript{70} \textit{Id} at 10 (statement of Senator Bauer). The trustee has few duties under the Act, except in the event of default or when the note secured by the trust deed is paid in full. \textit{See infra} notes 91-97 & 98-102.

\textsuperscript{71} One concern was that the trustee's fees would become too expensive. Proponents of the Act argued that competition, as well as the fact that the trustee plays a relatively minor role under the Act, would tend to keep trustee's fees nominal. \textit{Hearings on the L.B. 616, supra} note 1, at 9 (statement of Albert R. Stelling, Vice President, Omaha Nat'l Bank). It has been suggested, however, that there is no competition in Nebraska among those persons qualified to serve as trustees. The Article faults the Trust Deeds Act for the general lack of qualified trustees, and concludes that banks or other financial institutions will serve as trustees only in the event that one of their own loans is involved in the transaction. \textit{McClymont & Thompson, supra} note 27, at 54.

\textsuperscript{72} \textit{Neb. Rev. Stat.} § 76-1004(1) (Supp. 1984). The Act provides that a beneficiary may appoint a successor trustee at any time. The beneficiary does not have to
unavailable to perform his duties, the Act provides a relatively simple procedure whereby the beneficiary may appoint a successor. In order to name a successor trustee, the beneficiary must mail a notice of substitution to the trustee and to all persons entitled to receive a notice of default under the terms of the trust deed. After mailing the notice of substitution, the beneficiary must file the notice with the register of deeds in the county in which the trust property is located. The Act does not require the original trustee to convey title to a successor. Rather, upon compliance with all notice and recording requirements, the successor is deemed to acquire all rights and title held by the original trustee, and has the capacity to convey good title to a subsequent purchaser of the trust property.

Beyond establishing the duties of a trustee relating to the exercise of the power of sale, the Act fails to clearly define the rights and show cause for the removal of the original trustee, even though such a removal may constitute breach of contract.

73. NEB. REV. STAT. § 76-1004(3) (Supp. 1984).
74. The notice of substitution must identify the original parties to the trust deed, the date and place where the trust deed was recorded, and the name of the new trustee. The notice must be executed and acknowledged by all of the beneficiaries under the trust deed, or their successors in interest. NEB. REV. STAT. § 76-1004(2) (Supp. 1984). Before recording the notice of substitution, the beneficiary must attach affidavits to the notice stating that copies of the notice have been sent to all persons to whom a copy of notice of default should be sent. NEB. REV. STAT. § 76-1004(3) (Supp. 1984). Furthermore, the notice of substitution must contain or be attached to an acknowledgement, signed by the trustee being replaced, that attests to the receipt of a copy of the notice of substitution. Alternatively, the beneficiary must file an affidavit stating that the trustee was personally served with a copy or that service was accomplished by publication and mailing. NEB. REV. STAT. § 76-1004(4) (Supp. 1984). For a copy of the approved form of notice of substitution of trustee, see Appendix.
75. If the Act were to require the original trustee to convey trust property title to a successor trustee, there would be great deal of confusion upon the death or incapacity of the original trustee. Such a requirement would result in title defects, since in the absence of the original trustee, a stranger to the chain of title would have to execute a deed to the successor trustee. This point was raised at the Act's inception. Hearings on L.B. 616, supra note 1.
77. NEB. REV. STAT. § 76-1004(5) (Supp. 1984). Any affidavits contained in or attached to the notice of substitution of trustee constitute prima facie evidence of compliance with the notice requirements for the substitution of trustee. As to bona fide purchasers and encumbrancers for value, such statements constitute conclusive evidence of compliance with all requirements for a valid substitution of trustee. NEB. REV. STAT. § 76-1004(5) (Supp. 1984).
78. Specific duties imposed on the trustee by the Act include: recording all notices of default, NEB. REV. STAT. § 76-1006 (Supp. 1984); recording all notices of sale, NEB. REV. STAT. § 76-1006 (Supp. 1984); mailing all notices of default or sale to the parties entitled thereto, NEB. REV. STAT. § 76-1008 (Supp. 1984); publication of notice of sale, NEB. REV. STAT. § 76-1007 (1981); conducting the public sale of the trust property, NEB. REV. STAT. § 76-1009 (1981); executing the trustee's deed to the purchaser at the trustee's sale, NEB. REV. STAT. § 76-1010(1) (1981); distribu-
obligations of a trustee. In the absence of statutory authority, the issue arises as to what duty of care the trustee owes to the trustor and the beneficiary. While some jurisdictions have recognized that a trustee owes a fiduciary duty to both, the prevailing view is that the trustee has a duty to act in good faith so as to preserve the interests of all parties to the trust instrument. As such, the trustee can not act exclusively for the benefit of either the trustor or beneficiary, and instead must measure his actions so as to protect the interests of both.

Prior to the enactment of the Trust Deeds Act, Nebraska recognized that a trustee’s duty of care was to be determined by reference to the trust instrument. Where the trust agreement clearly defined the rights and obligations of the parties thereto, it was held that the agreement would control in establishing the trustee’s duty of care. Although the trust deed could contain provisions limiting the trustee’s liability for acts done in good faith, the trustee could not be excul-

79. Admiral Co. v. Thomas, 271 F.2d 849 (D.C. Cir. 1959); Earll v. Picken, 113 F.2d 150 (D.C. Cir. 1940); Kent v. Livingstone, 83 F.2d 316 (D.C. Cir. 1936); Spruill v. Ballard, 58 F.2d 517 (D.C. Cir. 1932); Holman v. Ryon, 56 F.2d 307 (D.C. Cir. 1932). Imposing a fiduciary duty on the trustee, with its resulting higher standards of care, may be unreasonable in light of the fact that the trustee was intended to play a relatively minor role in the trust deed transaction. Hearings on LB. 616, supra note 1, at 10 (closing statement of Senator Bauer).


81. E.g., Refshague v. Sesostris Temple, 139 Neb. 775, 298 N.W. 755, reh’g denied, 140 Neb. 706, 1 N.W.2d 320 (1941).

82. See Fleener v. Omaha Nat’l Co., 131 Neb. 253, 257 N.W. 462 (1936). Fleener involved a trust deed that contained a provision allowing the trustee to accelerate all payments due upon default. Upon the debtor’s default, the trustee failed to invoke the acceleration clause, and instead allowed the debtor to make late payments. The beneficiaries sued the trustee, claiming the trustee had an absolute duty to enforce the acceleration clause. The court found that the trust deed did
exculpated for intentional wrongs or acts of gross negligence. Additionally, the law imposes duties on the trustee independent of the terms of the trust agreement. For example, it has been held that the trustee is under a duty to give notice to the beneficiary of any matter material to the trust relationship. Therefore, the trustee must look first to the express terms of the trust instrument, and then to the common law, in order to measure the obligation to trustor and beneficiary.

C. Transfer, Assignment, and Reconveyance of The Trust Deed

The Act provides that the transfer of an obligation secured by a trust deed operates as a transfer of the security. When a beneficiary transfers or assigns his interests in a note secured by a trust deed, the assignee thus assumes all rights and responsibilities under the trust deed. The Act further provides that the assignment of any interest in a trust deed may be recorded. However, merely recording the assignment of an interest does not operate to place a trustor on notice of the transaction, and will not invalidate any payments made by the trustor to the person holding the note that the trust deed secures.

not require immediate acceleration, but allowed the trustee to exercise his own business judgment in using the acceleration clause. The court concluded that under the circumstances, the trustee was not liable for a mistake of sound business judgment. In support of its decision, the court relied on a provision in the trust deed which allowed that as long as the trustee acted in good faith and exercised reasonable prudence and care in the administration of the trust deed, the trustee would not be liable for any losses sustained by the beneficiaries.

83. Id. at 257, 267 N.W. at 466.
84. It is recognized that beyond the terms of the trust deed, the trustee owes the beneficiary good faith and ordinary vigilance in protecting the beneficiary's interests. See, e.g., Newlander v. Riverview Realty Co., 238 Wis. 211, 298 N.W. 603 (1941); Marshall & Illsley Bank v. Guaranty Inv. Co., 213 Wis. 415, 250 N.W. 862 (1933).
85. Streight v. First Trust Co., 133 Neb. 340, 275 N.W. 278 (1937); Fleener v. Omaha Nat'l Co., 131 Neb. 253, 267 N.W. 462 (1936); First Trust Co. v. Carlsen, 129 Neb. 118, 261 N.W. 333 (1935). Where it appears that a trustee has practiced concealment, evasion, or misrepresentation, thereby depriving the beneficiary of material information relative to the trust, the trustee, as well as the persons participating in the deception, may be required to respond in damages. Id. at 128-29, 261 N.W. at 337.
87. The Act follows Nebraska mortgage law, which recognizes that the debt is the principal concern while a mortgage is merely incidental, so that when a debt is transferred to an assignee, the assignee also receives a corresponding interest in the security. See Frerking v. Thomas, 64 Neb. 193, 89 N.W. 1005 (1902); Anderson v. Kreidler, 56 Neb. 171, 76 N.W. 581 (1898); Eggert v. Beyer, 43 Neb. 711, 62 N.W. 57 (1895); Waddle v. Owen, 43 Neb. 489, 61 N.W. 731 (1895); Whipple v. Fowler, 41 Neb. 675, 60 N.W. 15 (1894); Daniels v. Densmore, 32 Neb. 40, 48 N.W. 906 (1891); Studebaker Bros. Mfg. Co. v. McGuigan, 20 Neb. 500, 30 N.W. 686 (1886).
89. NEB. REV. STAT. § 76-1017 (1981).
Instead, the trustor is entitled to actual notice of such an event. Although the Act does not require the recording of an assignment of interest, all assignments should be recorded as a matter of practice, so as to maintain a clear chain of title.90

When the underlying obligation secured by a trust deed has been satisfied, the trustee must, upon written request by the beneficiary, execute a trustee’s deed to convey legal title in the trust property back to the trustor.91 Although a trustee’s deed purports to convey title to the trustor, it should have the same effect as the recording of a release of a mortgage.92 The trustor may be identified in the trustee’s deed by name as the grantee.93 Alternatively, if the trust property has been sold during the term of the trust relationship, the grantee may be identified as “the person or persons entitled to the trust property.”94 In addition to the trustee’s deed, the beneficiary must also deliver to the trustor, or to his successor in interest, the note or other evidence of indebtedness for which the trust deed was given.95 If the beneficiary fails to deliver such documents within thirty days of a written demand by the trustor, suit may be brought for damages or to compel reconveyance.96 The Act thus tracks the Nebraska procedure for the notice of such assignments. See Nebr. Rev. Stat. § 76-256 (1981). See also Shriver v. Sims, 127 Neb. 374, 378-79, 255 N.W. 60, 63 (1934) (merely recording assignment of mortgage does not put mortgagor on notice so as to invalidate payments made to the mortgagee).

90. Although assignments should be recorded, there is one instance when it is essential to record an assignment of the debt. If a trustee were to be substituted after the transfer of a beneficiary’s interest, the record would allow only the assigning beneficiary to make the substitution of trustee when the parties fail to record the assignment. Since only a beneficiary of record may make a substitution of trustee, it would be difficult for the assignee to request such a substitution. Therefore, to preserve a clear title in the event of a subsequent substitution of trustee, it is advisable to record all assignments of interests in the debt.


92. As the trustee’s interest in the trust property is similar to a lien held by a mortgagee, the trustee’s deed should do nothing more than operate as a release does under mortgage law. Hearings on L.B. 616, supra note 1, at 8 (statement of Mr. Theodore Kessner).


94. Id. In most cases, the grantee named in the trustee’s deed would be the original trustor. However, if the trustor sold the property, then he could not be named as the grantee in the trustee’s deed. Anticipating sales during the term of the trust deed, the Act provides that the trustee’s deed may contain general language identifying the grantee, in order to eliminate any title problems upon reconveyance by the trustee.

95. The Act requires the beneficiary, rather than the trustee, to deliver the trustee’s deed and the note secured by the trust deed. Nebr. Rev. Stat. § 76-1014 (1981). This follows from the proponents’ desire to keep the trustee’s responsibilities to a minimum, so that the trust deed relationship closely resembles a mortgage. See supra note 73.

96. The Act provides the trustor with two alternative remedies in the event that the beneficiary fails to obtain a deed of reconveyance. The trustor may bring an ac-
release of a mortgagee's interests in mortgaged property.97

IV. DEFAULT

If the trustor defaults on the underlying obligation during the term of the trust deed relationship98 the beneficiary may pursue one of three alternative courses of action. The Act provides: (1) the beneficiary may foreclose the trust deed in the manner provided by law for the foreclosure of mortgages on real property;99 (2) the beneficiary may bring an action at law on the note for the recovery of the debt;100

97. See NEB. REV. STAT. § 76-255 (1981). The statute provides that a release must be recorded by a mortgagee within seven days of the receipt of a request for release. If the mortgagee fails to comply, the mortgagor may recover $100.00 plus all actual damages incurred.

98. Because a trust deed is a contract, the parties should clearly delineate the items constituting default and the remedies of beneficiary. See supra notes 45-48 and accompanying text.

99. NEB. REV. STAT. § 76-1005 (Supp. 1984). Although the primary purpose of the Trust Deeds Act was to provide lenders with a security device whereby a power of sale could be exercised, there may be instances when judicial foreclosure would be elected over the exercise of a power of sale. Foreclosure might be preferred when a judicial resolution of a dispute is desired. Furthermore, judicial foreclosure might be the only means of establishing a marketable title by resolving the interests of the parties in an adversary proceeding. It has been suggested there might be specific instances where foreclosure would be preferred over the power of sale: when the parties contest the amount due under the obligation; when a dispute arises as to whether the trust deed was in default; and, when the relative priorities of junior lienors is in dispute. McClymont & Thompson, supra note 27, at 51.

If the beneficiary elects to foreclose the borrower's interests, he has 10 years from the date that the cause of action accrued to initiate foreclosure proceedings. NEB. REV. STAT. § 25-202 (Supp. 1982). In contrast, the Trust Deeds Act provides that a trustee's sale must be held within the period of time prescribed by law for the commencement of an action on the obligation secured by the trust deed. NEB. REV. STAT. § 76-1015 (1981). Ordinarily, the underlying obligation would be a note, so that Nebraska law would provide a five-year statute of limitations. NEB. REV. STAT. § 25-205 (Supp. 1983). If the event giving rise to the default is more than five years old, the beneficiary must elect judicial foreclosure of the trust deed.

100. Nebraska case law has long recognized that a mortgagee may either initiate foreclosure proceedings in equity or bring an action at law on the note. See, e.g., Maxwell v. Home Fire Ins. Co., 57 Neb. 207, 77 N.W. 681 (1898); Grable v. Beatty, 56 Neb. 642, 77 N.W. 49 (1889).

The remedies afforded a mortgagee are independent, separate, and distinct. Linder v. Terre Haute Brewing Co., 139 Neb. 638, 637, 298 N.W. 545, 546 (1941);
or (3) the beneficiary may exercise a power of sale foreclosure if the trustor has signed a written acknowledgement consenting to it at the time the trust deed was executed, and if such a right was expressly reserved in the trust deed. Each remedy must be pursued in strict

Federal Farm Mortgage Co. v. Thiele, 137 Neb. 626, 632, 290 N.W. 471, 474 (1940). A mortgagee is prohibited from pursuing both remedies concurrently, and instead must exhaust one remedy before resorting to the other. NEB. REV. STAT. § 25-2140 (1979). The statute provides that once a foreclosure action is instituted, a mortgagee is prohibited from maintaining an action at law during the pendency of the foreclosure action. Moreover, Nebraska law provides that if the mortgagee elects to maintain an action at law on the note, then it is prohibited from initiating foreclosure proceedings in equity until it exhausts its remedy at law. Thus, once the mortgagee obtains a judgment on the note, it cannot bring a foreclosure action until it is shown that the mortgagor has no other property against which to execute. NEB. REV. STAT. § 25-2143 (1979). The statutory prohibition against concurrent actions prevents the prosecution of proceedings at law to recover on the debt concurrent with proceedings in equity to foreclose the mortgage, and thus eliminates the possibility of the debtor defending two suits. The rule also eliminates the possibility that two judgments could be rendered against the debtor on the same debt. See Federal Farm Mortgage Co. v. Adams, 142 Neb. 202, 207, 5 N.W.2d 384, 386-87 (1942) (statute requiring petition for foreclosure, to state whether any proceedings have been bad at law, is for protection of debtor and to prevent probability of two judgments against him on the same debt); Linder v. Terre Haute Brewing Co., 139 Neb. 636, 637, 296 N.W. 545, 546 (1941) (action to recover money judgment on note secured by mortgage is "action at law," independent from "suit in equity" to foreclose and satisfy the mortgage, even if an attachment is issued and levied on the realty in a proceeding ancillary to the action on the note); Federal Farm Mortgage Co. v. Claussen, 138 Neb. 518, 520, 293 N.W. 424, 425 (1940) (purpose of statute is to protect debtor and prevent prosecution at law to recover the debt concurrently with proceedings to foreclose the mortgage, and to prevent two judgments being rendered against the debtor on the same debt); Federal Farm Mortgage Co. v. Thiele, 137 Neb. 626, 290 N.W. 424 (1940); Federal Farm Mortgage Co. v. Cramb, 137 Neb. 553, 557, 290 N.W. 440, 443 (1940) (suit on a note secured by real estate mortgage is suit at law independent, separate and distinct from suit in equity to foreclose and set aside a mortgage).

The Nebraska prohibition against concurrent actions does not operate to limit the lender's choice of remedies. Rather, the law specifies that once a remedy is chosen, the lender must pursue it to exhaustion. Nor does the rule operate to deny a deficiency judgment. If upon the completion of a foreclosure suit the debt has not been fully satisfied, the mortgagee is then permitted to initiate an action on the note for any deficiency. See, e.g., Federal Farm Mortgage Co. v. Claussen, 138 Neb. 518, 520, 293 N.W. 424, 425-26 (1940) (statute does not deny the mortgagee the right to maintain an action at law to recover judgment for the deficiency); Federal Farm Mortgage Co. v. Thiele, 137 Neb. 626, 630, 290 N.W. 471, 473-74 (1940) (there was no agreement that the mortgagee would look only to the realty for satisfection of the loan, therefore, statute did not deprive the mortgagee of right to pursue deficiency judgment).

101. NEB. REV. STAT. § 76-1005 (Supp. 1984). The most crucial section of the Nebraska Trust Deeds Act expressly conditions the exercise of a power of sale on the disclosure of two provisions. The beneficiary must obtain a written acknowledgement from the trustor stating that the trustor understands the document to be executed is a trust deed and not a mortgage, and that his rights thereunder differ substantial from those under a mortgage. NEB. REV. STAT. § 76-1005(2) (Supp.
If the beneficiary elects to foreclose the trustor's interests by exercising a power of sale, the only disclosures that need to be made to the owner of the property are the power of sale notice and the notice of sale. See supra note 100. Although there is no Nebraska authority on this point, since mortgage law controls judicial foreclosure of a trust deed, the rule against concurrent actions should apply. However, if the beneficiary elects to exercise a power of sale, it is not clear whether a concurrent action on the note would be prohibited. This uncertainty springs from the fact that the Trust Deeds Act, unlike Nebraska mortgage law, contains no express prohibition against concurrent actions. In contrast, the prohibition against concurrent actions is quite specific under mortgage law. If the beneficiary of a trust deed elects judicial foreclosure, it is clear that a concurrent action on the note would be prohibited. See supra note 100. Although there is no Nebraska authority on this point, since mortgage law controls judicial foreclosure of a trust deed, the rule against concurrent actions should apply. See supra note 100.

An analysis of policy considerations supporting the rule against concurrent actions under mortgage law indicates that the same considerations do not exist when a power of sale is exercised. Such considerations include: protecting the mortgagor from the burden of defending two suits on the same debt; and protecting the mortgagor from the possibility that two judgments might be rendered against him on the same debt. Federal Farm Mortgage Co. v. Claussen, 138 Neb. 518, 520, 293 N.W. 424, 426 (1940). As the trustee's sale does not involve judicial action, there would be but one suit for the trustor to defend, and but one judgment that could be entered against the trustor. Analogous case law tends to support the position that the rule against concurrent actions should not apply when the trustee utilizes a power of sale foreclosure. See Luikart v. Bank of Benkelman, 132 Neb. 501, 503, 272 N.W. 324, 325 (1937) (in suit brought to foreclose a contract which was not a mortgage, it was held that because the instrument was not a formal mortgage, the statutory prohibition against concurrent actions did not apply). See also Bankers Life Ins. Co. v. Ohrt, 131 Neb. 858, 865, 270 N.W. 497, 501 (1936); Dimick v. Grand Island Banking Co., 37 Neb. 394, 399, 55 N.W. 1066, 1068 (1893). In Connecticut Gen. Life Ins. Co. v. Leahy, 125 Neb. 644, 251 N.W. 278 (1933), the court examined a suit to foreclose installment land contract. The plaintiff failed to comply with a statute requiring pleading that no concurrent action at law was maintained, and the court held that the statutory prohibition against concurrent actions applies only to formal mort-
cising a power of sale, he must forward his request to the trustee along
with a summary of the events which constitute default. Before a sale
may be held, however, the trustee must comply with the Act's exten-
sive notice requirements. The trustee must first record a notice of de-
fault with the register of deeds in the county where the trust property
is located. The notice must describe the trust deed by identifying
the trustor as well as the trust property, and must specify where the
trust deed is recorded. Furthermore, the notice of default must
contain a statement that an obligation has been breached, describe the
nature of the breach, and declare that an election has been made to
sell the trust property to satisfy the obligation. Within ten days of
recording the notice of default, the trustee must mail a copy of the
notice to each person who has made a formal request to receive notice
of default. In the event that the trustor has failed to request a no-
gages and not to mortgages or liens arising out of the equities between the parties. Id. at 645, 231 N.W. at 279.

103. NEB. REV. STAT. § 76-1006 (Supp. 1984). The Act provides that "the trustee shall
first file for record in the office of the register of deeds of each county wherein
the trust property or some part or parcel thereof is situated, a notice of default
. . . ." Id. In the event that the trust property involves a large tract of land
located within the boundaries of more than one county, the Act states the trustee
must file in each county where some parcel of the trust property may be found.


105. NEB. REV. STAT. § 76-1006 (Supp. 1984). The notice of default serves to put the
trustor, as well as those claiming an interest in the trust property through him,
on notice that a breach has occurred so that action may be taken to cure the
breach. The trustee must advance specific allegations of default, so that junior
leinors may fully evaluate their options for curing the default.

The notice of default should also serve a purpose similar to that served by the
lis pendens in mortgage law. See NEB. REV. STAT. § 25-531 (1979). Any party ac-
quiring an interest in the trust property after the recordation of the notice would
be on notice of the fact that a default had occurred and that the trustor's interest
is threatened.

106. NEB. REV. STAT. § 76-1008 (Supp. 1984). The trustee is required to send a notice of
default to those persons who have recorded a formal request for notice of default
prior to the date that the trustee records the notice. A request for notice of de-
default may be made in the trust deed, or in a subsequent filing with the register of
deeds. The request must contain the name and address of each person desiring
notice of default, and must identify the trust deed by stating the names of the original
parties thereto, the date of its filing, and the book and page where the
trust deed is recorded. Id. For statutory form for request of notice of default, see
Appendix.

Since the trustee is required to mail the notice of default to only those persons
who have recorded a formal request, a junior lienor or encumbrancer should al-
ways record a request for notice of default. Such a request will protect his inter-
ests by allowing him the opportunity to cure a default and avert the sale of the
trust property.

If the trustor or junior lienor has had a change of address since the date that
the original request was filed, a new request should be filed with the register of
deeds. This is because the Act only requires that the trustee mail a notice of
default to the address listed within the recorded requests. It would appear that
notice of default, the Act requires the trustee to give such notice by publication. After giving all notices of default, the trustee must then wait one month before proceeding to exercise the power of sale. During this period, the trustor is allowed an opportunity to cure the default.

The trustor's right of reinstatement is one of the unique features of the Trust Deeds Act. The Act provides that the trustor may cure a default and reinstate the obligation by paying all arrearages, other than that portion of the principal which would not then be due had the trustee discharged his obligation under the Act if notice was mailed to a record address, and there is no requirement that the interested party actually receive a notice of default. See, e.g., Lupechino v. Carvahal, 35 Cal. App. 3d 742, 751, 111 Cal. Rptr. 112, 117 (1973) (neither trustee nor beneficiary is under a duty to keep track of a trustor's address so that notice of default mailed and returned marked "moved, not forwardable" was sufficient notice); Strutt v. Ontario Sav. & Loan Ass'n, 28 Cal. App. 3d 665, 687, 165 Cal. Rptr. 395, 403 (1972) (sending notice to address in record; request is sufficient even if returned as undeliverable); Evarts v. Meyers, 112 Cal. App. 2d 210, 211, 245 P.2d 1119, 1120 (1962) (when addressee refused to accept mailed notice and it was returned "refused and unclaimed" addressee was held to have had notice of sale); Dillard v. Broyles, 633 S.W.2d 636, 641 (Tex. Civ. App. 1982) (service is complete upon deposit in mail, so that trustee is under no duty to inquire as to a change of address when letter is returned unclaimed); Martinez v. Beasley, 616 S.W.2d 689, 690 (Tex. Civ. App. 1981) (regardless of whether it was actually received, a certified letter mailed to a debtor's residence was sufficient notice of trustee's intent to foreclose).

107. The Act should be amended to limit the trustee's ability to exercise a power of sale foreclosure upon notice by publication, and should instead condition the sale upon receipt of actual notice by the trustor and all junior encumbrancers. Because of potentially severe consequences of an inadvertent default, the trustor should be required to serve the trustor and junior lienors with actual notice of default. The Act could adopt a method of notice that parallels Nebraska's service by process procedure, NEB. REV. STAT. § 25-505.01 (Supp. 1984), and could restrict notice by publication to those instances where actual notice is not feasible. In such cases, the trustee should be required to obtain a court order authorizing such notice. See, e.g., NEB. REV. STAT. § 25-518.01 (Supp. 1984).

108. The Act fails to expressly prohibit the debtor's waiver of notice provisions in the trust deed or debt instrument. Because the protections afforded by the trustor's right to cure defaults are conditioned upon the trustor's receipt of notice of default, the Act should be amended to prohibit such waivers. If the trustor were to be permitted to waive his right to notice of default, the statutory right to cure would be meaningless.

Even if the trust deed were to contain provisions waiving the trustor's right to notice of default, the beneficiary should insist that the trustee nonetheless comply with the notice provisions of the Act. Compliance should ensure the marketability of the trust property following issuance of the trustee's deed.
default not occurred.\textsuperscript{109} In addition, the trustor must pay the costs and expenses actually incurred by the beneficiary in enforcing the default, as well as all trustee’s fees incurred due to the default.\textsuperscript{110} In contrast, a defaulting mortgagor must generally pay the entire outstanding balance of the underlying obligation in order to redeem the property and avoid a judicial sale.\textsuperscript{111}

If the trustor cures a default within the statutory period, all proceedings that may have been instituted must be dismissed, and the trust deed will remain in effect as if no default had occurred.\textsuperscript{112} Furthermore, the trustee must, upon the request of any person having an interest in the trust property, record a cancellation of the notice of default so that the title to the trust property remains clear.\textsuperscript{113}

If the trustor fails to cure the default within one month after receiving the notice of a default, the trustee must give notice of sale.
Notice of sale is given by publication in a newspaper having a general circulation in the county in which the trust property is located. The notice must be published at least once a week for five consecutive weeks, with the last publication to be at least ten days, but not more than thirty days, before the sale. The notice must contain the time and place of the sale along with a description of the property to be sold.

As with the notice of default, the notice of sale must be sent to all persons who have requested such notice by making a request in the trust deed or by filing a request for notice of sale with the register of deeds. Notice must be sent by registered or certified mail and must be mailed at least twenty days before the trustee's sale. Additionally, if the federal government has recorded a tax lien on the trust property more than thirty days prior to the sale, the trustee must give notice of sale to the District Director of the Internal Revenue Service. Such notice must be in writing and must be given at least twenty-five days before the trustee's sale is held. If notice is properly given, a federal tax lien will be discharged by the trustee's sale. However, the Secretary of the Treasury is allowed 120 days from the date of the sale in which to redeem the trust property.

The Act provides that a power of sale shall not be exercised until both notice of default and notice of sale have been given in the appropriate manner. The Act fails to provide a remedy for a trustor or

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116. Neb. Rev. Stat. § 76-1008 (Supp. 1984). The Act provides that any person desiring personal notice of the trustee's sale must make a written request for such notice after the execution of the trust deed and before the filing of any notice of default. In contrast, Nebraska mortgage law requires that before a mortgagor or junior lienor's redemption rights will be extinguished, such persons must have been made parties to the foreclosure action. Sedlack v. Duda, 144 Neb. 567, 13 N.W.2d 892 (1944); Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N.W.2d 545 (1943); Clement v. Doaks, 140 Neb. 265, 299 N.W. 505 (1941). As a consequence, mortgage foreclosure procedures provide junior lienors greater protection against the inadvertent loss of their security interests, whereas the Act may operate to cut off their interests without personal notice.
117. Neb. Rev. Stat. § 76-1008 (Supp. 1984). As the Act requires only that notice of sale be mailed to each person who has recorded a request for notice of default, the trustee is not obligated to prove receipt of notice. See supra note 106.
118. I.R.C. § 7425(b)(1) (1976). If the trustee fails to comply with the federal notice provisions, the tax lien will survive the trustee's sale and the subsequent purchaser will take the property subject to the federal tax lien. Id.
121. I.R.C. § 7425(d) (1976).
122. Neb. Rev. Stat. § 76-1006(1),(2) (Supp. 1984). The Act prohibits the exercise of power of sale only until such time as notice has been given. Arguably, the Act could be interpreted to provide that a sale conducted in violation of the notice
junior lienor who has been denied the proper form of notice. Clearly, the aggrieved party may seek an injunction if the defect is discovered prior to the date of sale.\footnote{123} However, once the trust property has been sold and a trustee’s deed has been executed to a bona fide purchaser without notice of the defect, the rights of the respective parties become more complicated. If the deed contains recitals attesting to the trustee’s compliance with the Act’s notice requirements, then the deed operates as conclusive evidence that all notice requirements were met.\footnote{124} Consequently, the aggrieved party will not be able to challenge the purchaser’s title based on a defective sale,\footnote{125} and instead has to bring an action against the trustee for damages.\footnote{126}

provisions is void. Such an interpretation is unlikely, however, because the Act contains provisions allowing a defective sale to be cured so as to vest the purchaser at the trustee’s sale with good title. Because the Act’s drafters have anticipated defective sales and have provided a remedy for a purchaser, it is clear that such defects will not cause the sale to be void. See infra note 149.

\footnote{123} Although courts are reluctant to grant injunctions, such a remedy is designed to prevent future injuries or non compliance with the law. See Walling v. Lippold, 72 F. Supp. 339, 351 (D. Neb. 1947). Because the trustee’s sale and the subsequent execution of a trustee’s deed operate to extinguish the trustor’s interests in the trust property, an injunction is the proper remedy if the defect in notice procedure is discovered before sale. See, e.g., Propst v. Board of Educ. Lands & Funds, 156 Neb. 226, 55 N.W.2d 653 (1952), cert. denied, 346 U.S. 823 (1953); Leeman v. Vocelka, 149 Neb. 702, 32 N.W.2d 274 (1948).

\footnote{124} NEB. REV. STAT. § 76-1010(1) (1981). If the trustee’s deed omits recitals outlining the trustee’s compliance with the Act’s notice provisions, or if the purchaser is a party who had notice of a defective sale, then an aggrieved party may attack the purchaser’s title based on the improper sale. See infra notes 143-50.

\footnote{125} It is not clear under the Act whether a junior encumbrancer’s lien would remain intact in the event that a bona fide purchaser received a trustee’s deed containing the necessary recitals constituting conclusive evidence of compliance with the Act. This is because the trustee’s deed is deemed to relate back in time to the date of the execution of the trust deed. See infra note 145. Consequently, the trustee’s deed operates to cut off the interests of a junior lienor. In contrast, Nebraska mortgage law recognizes that a party not properly served and made a defendant in a foreclosure action is not bound by the foreclosure decree. Hassett v. Durbin, 132 Neb. 315, 271 N.W. 867 (1937) (defendant in foreclosure action who does not appear and upon whom personal service is not made is not bound by foreclosure decree).

\footnote{126} The Oregon Trust Deeds Act provides that the trustee’s failure to give notice to a person entitled to notice of sale invalidates the sale as to that person. As to all other persons, however, the sale remains valid. OR. REV. STAT. § 86.770(1) (1983). The Oregon provision equates a notice of sale with a summons in a civil action, so that parties not served with notice are not bound by the sale. If Nebraska were to adopt such a provision, it would create a conflict with section 1010(1) of the Trust Deeds Act. Section 1010(1) operates to cut off interests of junior lienors as well as trustors upon the execution of the trustee’s deed. Furthermore, the Oregon provision operates so that the trustee’s error is borne by an innocent purchaser, as it is his title that becomes subject to attack by the omitted party. A more equitable
After meeting all notice requirements, the trustee's sale may be held. The Act provides that the trustee shall sell the property at public auction, conducted by either the trustee or his attorney. The sale must be held between the hours of 9:00 a.m. and 5:00 p.m. and must take place on the trust property or at the courthouse in the county in which the trust property, or a portion thereof, is located.

The trustee is responsible for the conduct of the sale, and must fairly represent the interests of both the beneficiary and the trustor. Misconduct on the part of the trustee may lead to a successful attack on the validity of the sale. Inadequacy of sale price, however, is ordinarily solution would hold the trustee strictly liable for a failure to give notice, and specifically authorize the aggrieved party to recover damages from him.

127. NEB. REV. STAT. § 76-1009 (1981). Beyond establishing that the sale must be conducted by the trustee or his attorney, the Act fails to indicate whether a professional auctioneer may be appointed to conduct the sale. There is authority supporting the position that the duty to conduct the sale is not delegable. This position rests on the presumption that the debtor selected the trustee with confidence in the trustee's integrity and discretion. See, e.g., Slaughter v. Qualls, 139 Tex. 340, 346, 162 S.W.2d 671, 675 (1942) (one trustee or duly appointed substitute can sell the property); Barksdale v. Stickland & Hazard, 220 Ala. 86, 89, 124 So. 234, 237 (1929) (trustee cannot delegate authority to conduct sale and must be present to supervise it, although he may employ an auctioneer to cry the sale); Fuller v. O'Neil, 69 Tex. 349, 350, 6 S.W. 181, 181 (1887) (office of trustee cannot be delegated without express authority). A more reasonable approach would be to allow the sale duties to be delegated to a professional auctioneer. This position recognized that the sale is merely a ministerial function of the trustee. Palmer v. Young, 96 Ga. 246, 22 S.E. 928 (1885).

128. The Act does not specify whether the trustee must sell the trust property in whole or in parcels. In other jurisdictions, two divergent practices have evolved. One practice holds that because the trust property was encumbered as one unit, it must be sold as one unit. Other courts have recognized that the trustee must sell by parcels if it would result more favorably for the debtor. See generally, G. Osborne, supra note 15, at § 340.

Nebraska mortgage law provides that the court issuing a decree of sale may order the sale of the mortgaged property in whole, or alternatively, may order the sale of only that part which is necessary to discharge the amount due on the debt. NEB. REV. STAT. § 25-2138 (1979). In the absence of a court order, the general rule in Nebraska is that distinct tracts of land should be separately appraised and sold. Laughlin v. Schuyler, 1 Neb. 409 (1871). Exceptions to this rule have been recognized, however, so that the sale of the mortgaged property in gross is permitted if it is in the best interests of the debtor. Michigan Mut. Life Ins. Co. v. Richter, 58 Neb. 463, 464, 78 N.W. 932, 933 (1899) (the trustee's sale of mortgaged property in gross will be presumed valid in the absence of evidence indicating that the property consisted of separate and distinct tracts or lots.); Kane v. Jonasen, 55 Neb. 757, 758, 76 N.W. 441, 442 (1898) (the district court has the power to provide for the appraisement and sale of mortgaged property either in parcels or en masse, as the bests interests of the parties may require.); Craig v. Stevenson, 15 Neb. 362, 363, 18 N.W. 510, 511 (1883) (adjoining city lots were properly sold in gross since there was no evidence establishing them to be separate and distinct from each other, and "[t]he fact that the tract of land as sold in one body was composed of what was formerly distinct parts of separate city lots is of no consequence."

The Act provides that any person, including the beneficiary, may bid at the sale, and that every bid is deemed to be an irrevocable

(when sale was not held on date advertised in notice of sale, sale was set aside as void); Smith v. Haley, 314 S.W.2d 909, 914-15 (Mo. 1958) (trustee's fraud or deceit in conduct of sale was held to void sale). But see Biddle v. National Old Line Ins. Co., 513 S.W.2d 135, 138 (Tex. Civ. App. 1974) (trustee's conduct at sale did not chill bidding so as to void sale); First Fed. Sav. & Loan Ass'n v. Sharp, 359 S.W.2d 902, 903 (Tex. Civ. App. 1962) (trustee's refusal to allow highest bidder a reasonable amount of time to obtain cash was held to void sale).

Deficiencies in the sale procedure must be raised in an independent action initiated by the trustor, as the trustee's sale is not conducted under the supervision of a court. In contrast, a mortgagor may raise a defect in sale at the confirmation of the sheriff's sale. See NEB. REV. STAT. § 25-1531 (1979). The trustor's remedies are limited to an injunction, an action at law for damages, or an action to quiet title.

130. Under Nebraska mortgage law, inadequacy of sale price generally is not grounds for objection to a judicial sale. The court, however, may review the sale price and refuse to confirm the sale if, in its opinion, the mortgaged property has a value equal to or greater than the amount realized at sale. NEB. REV. STAT. § 25-1530 (1979). See Nebraska Fed. Sav. & Loan Ass'n v. Patterson, 212 Neb. 29, 30, 321 N.W.2d 71, 72 (1982) (order confirming foreclosure sale of property valued at $55,000 to $60,000 and sold for $34,008.44 not reversed on appeal for inadequacy of price); Hollstein v. Adams, 187 Neb. 781, 783, 194 N.W.2d 216, 218 (1972) (confirmation of judicial sale of mortgaged property was not abuse of discretion notwithstanding claim as to inadequacy of sales price); Forsythe v. Bermel, 138 Neb. 802, 805, 295 N.W. 693, 694 (1941) (confirmation of mortgage foreclosure sale will not be reversed for inadequacy of price, in the absence of showing of fraud, or shocking discrepancy between value and sales price). But see County of Scotts Bluff v. Bristol, 159 Neb. 634, 637, 68 N.W.2d 197, 199 (1955) (confirmation of tax sale should be vacated where sale price was inadequate); Ehlers v. Campbell, 147 Neb. 572, 577, 23 N.W.2d 727, 730 (1946) (where sale price is inadequate, it is duty of court to deny confirmation of execution sale).

131. NEB. REV. STAT. § 76-1009 (1981). As the Act provides that "any person, including the beneficiary" may bid at the trustee's sale, it would appear to authorize the trustee's purchase of the trust property. It is generally held, however, that a trustee is prohibited from purchasing at his own foreclosure sale, and the fact that he acts in good faith will not prevent the sale from being found void. Mills v. Mutual Bldg. & Loan Ass'n, 216 N.C. 664, 6 S.E.2d 549 (1940). But see Fuqua v. Burrell, 474 S.W.2d 333 (Tex. Civ. App. 1971); Whitlow v. Mountain Trust Bank, 215 Va. 149, 207 S.E.2d 837 (1974).

Because the potential conflict of interest that is created when a trustee is permitted to purchase at his own sale, several states prohibit bidding by the trustee. See, e.g., MONT. CODE ANN. § 71-1-315(3) (1983); OH. REV. STAT. § 86.755(1) (1983); WASH. REV. CODE ANN. § 61.24.070 (Supp. 1983). But see ARIZ. REV. STAT. ANN. § 33-810A (1974) (any person, including the trustee or beneficiary may bid at the sale).

The issue of a purchasing trustee would most likely arise in a case where the beneficiary elects to act as trustee. In such a case, the beneficiary-trustee should be allowed to bid at the sale in order to protect his investment in the trust property. There is a lack of authority in Nebraska expressly permitting or prohibiting the trustee from purchasing. The safest course of action would be for the trustee to resign and have a successor trustee appointed to conduct the sale.
offer. The Act does not specify whether payment must be made in cash, or whether an alternative form of payment would be acceptable. Although the trustee is generally under no obligation to delay the sale to allow a bidder time to obtain cash or another form of payment, it has been held to be an abuse of discretion for a trustee to refuse a trustor's request for a reasonable delay.

The person conducting the sale may, for any reason he deems necessary, postpone the sale. Thus, if the bids are inadequate in relation to the value of the trust property, or if inclement weather would hinder the sale, then the sale should be postponed. If the sale is to be postponed for less than one day, the person conducting the sale must give public notice of the delay.

132. Neb. Rev. Stat. § 76-1009 (1981). The Act provides that if the highest bidder fails to pay the amount bid, then the trustee may re-auction the property and sell to the next highest bidder. The defaulting bidder is then liable for any loss caused by his failure to pay the amount bid.


134. Although the Act does not specify the form of payment, this provision will most likely parallel the practice under Nebraska mortgage law. In Nebraska, a sheriff is not permitted to sell the mortgaged property for other than cash, unless the foreclosure decree authorizes otherwise. Hooper v. Castetler, 45 Neb. 67, 63 N.W. 135 (1895). It should be possible, however, for the beneficiary to specify in the trust deed that an alternative form of payment is acceptable.

135. McHugh v. Church, 583 P.2d 210, 214 (Alaska 1978) (trustee required to take reasonable and appropriate steps to avoid sacrifice of trustor's property and interest; however, in the absence of fraud or unfair dealing, courts seldom set aside the trustee's sale); Foge v. Schmidt, 101 Cal. App. 2d 681, 683, 226 P.2d 73, 74 (1951) (denial of 15-minute delay for high bidder to obtain cash was unreasonable and suspect behavior by trustee); Golden v. Tamiyasu, 79 Nev. 503, 513, 387 P.2d 989, 994 (1963) (sale will not be invalidated merely on the basis of inadequacy of sale price without additional evidence of fraud, unfairness, concealment, oppression or other satisfying grounds); First Fed. Sav. & Loan Ass'n v. Sharp, 359 S.W.2d 902, 903 (Tex. Civ. App. 1962) (refusal to delay sale for a few minutes while highest bidder obtained cash was unreasonable and arbitrary).


137. The trustee is under no obligation to postpone a sale due to inadequate bidding, as an inadequate sales price, in the absence of fraud or some other form of irregularity, will not invalidate a sale. See supra note 130. However, the beneficiary may want to postpone the sale in order to protect his right to a deficiency judgment, since the Act limits the measure of a deficiency to the amount of indebtedness less the greater of fair market value or sales price of the trust property. Neb. Rev. Stat. § 76-1013 (1981). See infra notes 164-72 and accompanying text.

138. Neb. Rev. Stat. § 76-1009 (1981). The notice need not be written, rather the trustee must only make a public declaration of the fact that the sale is to be postponed. Although the Act does not require an announcement of the date and time of the postponed sale, the better practice would include such details in the announcement of postponement, so that all bidders present could return to the sale, when held.
be postponed for more than one day, the Act requires that notice of the delay must be given in the same manner as the original notice of sale was given.\textsuperscript{139} Although the Act is not entirely clear on this point, a reasonable interpretation suggests that the trustee must send written notice of the postponement to all parties who have recorded a request for notice of default.\textsuperscript{140}

The Act does not limit the number of postponements that are permissible. Instead, broad discretion is given to the judgment of the person conducting the sale.\textsuperscript{141} As the trustee’s ability to postpone the sale has led to abuse in other jurisdictions, it may become necessary in Nebraska to limit the trustee’s ability to postpone the sale.\textsuperscript{142}

Upon receipt of a satisfactory form of payment, the trustee must execute and deliver to the purchaser a trustee’s deed.\textsuperscript{143} The trustee’s deed operates to convey to the purchaser the trustee’s title, along with any interests that the trustor or his successors may have had in the trust property.\textsuperscript{144} Although the Act does not clearly indicate whether the interests of junior lienors are cut off by the trustee’s sale, the weight of authority supports the position that the trustee’s deed extinguishes such interests.\textsuperscript{145} Consequently, the purchaser takes title to

\textsuperscript{139} NEB. REV. STAT. § 76-1009 (1981).

\textsuperscript{140} The Act provides that in the event that the sale is postponed for longer than one day beyond the date designated in the notice of sale, “notice thereof shall be given in the same manner as the original notice of sale is required to be given.” NEB. REV. STAT. § 76-1009 (1981). This provision is vague and could be interpreted to require the trustee give written notice of sale, and publish such notice, before the postponed sale may be held. Such an interpretation would require at least a 45 day delay, as the Act requires publication for at least five weeks, followed by a ten day delay before sale. NEB. REV. STAT. § 76-1007 (1981). Requiring such a procedure, with its resulting delay, would defeat one of the primary purposes of the Act—the swift recovery of collateral by lenders. Furthermore, it would discourage postponements of sales for more than one day. Therefore, it may be more reasonable, in the event of a postponement for more than one day, to require the trustee to send written notice of the postponement (containing the time and date of the rescheduled sale) to all persons entitled to receive notice of default.

\textsuperscript{141} NEB. REV. STAT. § 76-1009 (1981). “The person conducting the sale may, for any cause he deems expedient, postpone the sale . . . .” Id. (emphasis added).

\textsuperscript{142} See, e.g., Craig v. Buckley, 218 Cal. 78, 79, 21 P.2d 430, 431 (1933) (23 postponements of sale over a period of five months was held not unreasonable); First Nat’l Bank v. Coast Consol. Oil Co., 84 Cal. App. 2d 250, 256, 190 P.2d 214, 217 (1947) (trustee allowed to postpone public sale over a period of more than four years); Holland v. Pendleton Mortgage Co., 61 Cal. App. 2d 50, 574, 143 P.2d 493, 496-97 (1943) (sale postponed three times in one year and then held without notice of sale was void).

\textsuperscript{143} NEB. REV. STAT. § 76-1010(1) (1981).

\textsuperscript{144} NEB. REV. STAT. § 76-1010(2) (1981).

\textsuperscript{145} NEB. REV. STAT. § 76-1010(2) (1981). Although the Act fails to clearly establish whether a power of sale foreclosure extinguishes the liens of all junior encumbrancers, authority supports such a reading of the statute. As a result, the deed given to a purchaser at the trustee’s sale will relate back in time to the execution
the trust property free of any rights of redemption, and free and clear of all liens or encumbrances that arose after the execution of the trust deed. No confirmation of the trustee's sale is required, and title passes to the purchaser upon delivery of the trustee's deed.¹⁴₆

As suggested earlier, the trustee's deed should include recitals that the trustee has complied with the notice provisions of the Act.¹⁴⁷ With respect to bona fide purchasers for value and without notice of a defect in the sales procedure, such recitals constitute conclusive evidence of the trustee's compliance with the Act.¹⁴₈ Thus, a purchaser without knowledge of an irregularity in the sale procedure is protected in the event that the trustor challenges the validity of the sale based on defective notice. As to all other persons, however, such recital-

¹⁴⁶ NaB. Rn. STaT. § 76-1010(2) (1981). In contrast to the Trust Deeds Act, Nebraska mortgage law recognizes that a sheriff's deed operates to convey an inchoate estate to a purchaser. NaB. Rn. STaT. § 25-1533 (1979). Title to property purchased at a sheriff's sale does not vest in the purchaser until the sale is confirmed by the court issuing the decree of sale. Smith v. Carnahan, 83 Neb. 667, 670, 120 N.W. 212, 213 (1909); Yeazel v. White, 40 Neb. 432, 436, 58 N.W. 1020, 1021 (1894); State Bank v. Green, 10 Neb. 130, 134, 4 N.W. 942, 943 (1880). Even after the confirmation of the sheriff's sale, the purchaser's interests are subject to redemption at any time until a final appeal is taken. Mummert v. Grant, 118 Neb. 651, 652, 225 N.W. 773, 773 (1929); Philadelphia Co. v. Gustus, 55 Neb. 435, 437, 75 N.W. 1107, 1108 (1898).

¹⁴⁷ NaB. Rn. STaT. § 76-1010(1) (1981). Although the Act is permissive in nature, and does not require that the trustee's deed contain recitals as to the validity of the sale proceedings, it is inconceivable that the recitals would be excluded from the trustee's deed. Title examiners would require some evidence of compliance with the Act's notice provisions. Thus, to ensure the future marketability of the trust property, the recitals should be included in the trustee's deed as a matter of course. Specific provisions that should be included in the deed include: recitals as to all mailings; personal delivery and publication of the notice of default; any mailing of the notice of sale; publication of notice of sale; and provisions relating to the conduct of the trustee's sale. Id.

als constitute merely *prima facie* evidence of the trustee's compliance with the Act.\(^{149}\) Therefore, if the trustee or any other purchaser with notice of a defect in the sale purchases the trust property, the Act provides only a presumption of validity—rebuttable by the presentation of evidence on the issue.\(^{150}\)

After the trustee’s deed has been executed and delivered to the purchaser, title, as well as the right to possession of the trust property, vests in the purchaser. The Act, however, does not indicate how a purchaser should obtain possession of the trust property in the event that a recalcitrant trustor remains in possession after the trustee’s sale. As self-help is not a viable alternative under Nebraska law,\(^{151}\) the pur-

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149. *Id.* One commentator has categorized defects arising in the exercise of a power of sale foreclosure in three ways. First, there are those defects so substantial they render the sale void. Examples include forged trust deeds, or a case in which power of sale is exercised when the underlying obligation is not in default. Because the sale is void, no title or interest can pass to a purchaser at the trustee’s sale. Thus, recitals in the trustee’s deed that the trustee has complied with notice provisions of the Act do not operate to perfect title in a bona fide purchaser, as the recitals relate to the sale procedure, and not to the validity of the sale.

A second type of defect is described as a *voidable* defect, whereby legal title passes to a purchaser at the trustee’s sale, subject to attack by the party harmed as a result of an improper exercise of the power of sale. An example of a voidable defect is the case where a trustee fails to give notice of sale to a junior lienor. Recitals in the trustee’s deed, as proscribed by the Act, operate to perfect title in a bona fide purchaser for value, as the recitals go to the defect raised. Since the purchaser’s title is immune from attack, the aggrieved party’s only remedy is to seek damages from the trustee.

Finally, some defects are so inconsequential as to render the sale neither void nor voidable. In the case where a minor defect in notice arises, the sale will probably not be subject to attack, and the aggrieved party’s only remedy is to seek damages from the trustee. G. OSBORNE, *supra* note 3, at §§ 7.20 - 21.

150. If the trustee is allowed to purchase at the trustee’s sale, recitals in the trustee’s deed should not operate to provide a presumption of compliance with the notice provisions of the Act. Because the purchasing trustee supervises the sale, he would be chargeable with actual knowledge of any defects and the recitals will not protect his interest from attack. Thus, in the situation where a lender acts both as trustee and beneficiary under a single trust deed, recitals will not provide additional protection for the lender’s title.

A more difficult question arises when a beneficiary purchases the trust property, for it is not clear whether the trustee’s knowledge of sale defects will be imputed to the beneficiary, thus denying him the protection provided by recitals in the trustee’s deed. Arguably, knowledge of the trustee’s actions should be imputed to the beneficiary so as to discourage rascality on the part of the beneficiary or trustee in the exercise of the power of sale. However, valid considerations weigh against imputing such knowledge to the beneficiary. Recitals add stability to the titles of property foreclosed by power of sale. The argument can be made, therefore, that the beneficiary should receive the full protection of the recitals so as to protect the title of the trust property in the hands of a subsequent purchaser.

chaser has two alternative means of obtaining possession. First, the purchaser may bring an action for ejectment. Since the purchaser must establish title in order to prevail in an ejectment action, the proceeding would be costly and would cause delays in obtaining possession of the property. An alternative remedy is an action in forcible entry and detainer. However, such an action would not conclusively establish title in the purchaser. Neither remedy is en-

152. An action for ejectment is an appropriate remedy if there are questions about the validity of the purchaser’s title, since title is tried in an ejectment action. See, e.g., Johnson v. Robertson, 171 Neb. 324, 330, 106 N.W.2d 192, 196 (1960) (ejectment is appropriate remedy for recovery of real estate by one claiming legal title from one in possession claiming an estate therein); Malloy v. Malloy, 35 Neb. 224, 227, 52 N.W. 1097, 1098 (1892) (for plaintiff to recover via ejectment, he must possess legal estate in the premises and be entitled to immediate possession).

153. It is clear in Nebraska that the plaintiff must plead and prove title in himself in order to sustain an ejectment action. Neb. Rev. Stat. § 25-2124 (1979). See Kozak v. State Game & Parks Comm’n, 189 Neb. 525, 527, 203 N.W.2d 516, 518 (1973) (in ejectment action, there is no burden on defendant to prove title; rather plaintiff must establish title in himself and cannot rely upon a defect in defendant’s title); Reams v. Sinclair, 97 Neb. 542, 545, 150 N.W. 825, 827 (1915) (plaintiff in ejectment action must prove that he had legal title at the commencement of the action and was entitled to possession); Bridenbaugh v. Bryant, 79 Neb. 329, 333-34, 112 N.W. 571, 573 (1907) (plaintiff cannot recover in ejectment action unless he shows legal title in himself, right to possession, and unlawful detention by the defendant); Zion Church v. St. John’s Church, 75 Neb. 774, 774, 106 N.W. 1010, 1010 (1906) (plaintiff must have both legal title and right to possession to maintain ejectment action); Comstock v. Kerwin, 57 Neb. 1, 5, 77 N.W. 387, 388 (1898) (plaintiff in ejectment action cannot rely on defect in adversary’s title, but must recover, if at all, on the strength of his own title or right to possession).

154. An action for ejectment must be initiated by complaint, service of process, and a trial. Thus there is substantial delay and expense in obtaining possession. Actually establishing title in the purchaser should not be difficult, however, if the trustee’s deed (under which he holds title to the property) contains recitals as to the validity of the sale. See supra notes 147-50 & accompanying text. However, the purchaser will remain out of possession until such time that he prevails in the ejectment action, and must bear the costs of the proceeding. This would tend to decrease the marketability of the trust property.

155. Forcible entry and detainer actions are generally restricted to landlord-tenant relationships. Nebraska, however, recognizes the right of a purchaser to bring such an action. Neb. Rev. Stat. § 24-569 (1979) (“proceedings . . . may be had in all cases against tenants . . . [and] in all cases of sales of real estate or executions, orders or other judicial process when the judgment debtor was in possession at the time of the rendition of judgment of decree, by virtue of which such sale was made . . . .”). Id. See Knapp v. Reed, 88 Neb. 754, 757-58, 130 N.W. 430, 431 (1911) (right to recover possession of realty by forcible entry and detainer is not necessarily limited to cases involving landlord/tenant relationship); Green v. Morse, 57 Neb. 391, 395, 77 N.W. 925, 926 (1899) (action in forcible entry and detainer lies in favor of a purchaser at a judicial sale to recover possession of premises purchased when the judgment or decree was rendered).

156. In an action in forcible entry and detainer, the only issue before the court is the plaintiff’s right to possession. The court is prohibited from trying title; it can only determine which party has the right to possess the lands in dispute. See e.g., Kresha v. Kresha, 211 Neb. 92, 96, 317 N.W.2d 776, 779 (1982); Hogan v. Pelton, 210
tirely satisfactory, as both involve judicial actions with the resulting delay and expense being passed on to the purchaser.\footnote{\textquoteright157}{\textquoteright}

Following the trustee's sale, the trustee must dispose of proceeds generated by the sale in accordance with the priorities established by the Act.\footnote{\textquoteright158}{\textquoteright} The trustee must first pay all costs and expenses incurred in exercising the power of sale.\footnote{\textquoteright159}{\textquoteright} After the costs of the sale have been paid, the balance of the funds must be used to satisfy the obligation secured by the trust deed.\footnote{\textquoteright160}{\textquoteright} Next, junior trust deeds, mortgages, or other liens must be paid, with any surplus to be paid to the persons legally entitled to it.\footnote{\textquoteright161}{\textquoteright} Although the Act does not establish with any certainty those persons who would be entitled to a portion of any surplus generated by the trustee's sale, such parties would most likely include tax claimants and general creditors of the trustor, as well as the trustor himself.\footnote{\textquoteright162}{\textquoteright} As the trustee cannot be certain of the priority

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Although an action in forcible entry and detainer provides the benefit of a swift recovery of the trust property, it does not conclusively establish title in the purchaser. Furthermore, such a remedy entails an adversarial process, involving the costs of any other judicial proceeding.

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\textit{NEB. REV. STAT. \S 76-1011 (Supp. 1984).}
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\textit{NEB. REV. STAT. \S 76-1011 (Supp. 1984). The Act provides that the proceeds of the trustee's sale should be used to pay all trustee's fees actually incurred, not to exceed the amount provided for in the trust deed. Additional expenses of the sale would include publication costs, costs of preparing the property for sale, auctioneer's fees, and any costs incurred for recording all notices. The Act fails to specify whether a trustee's attorney fees are an allowable expense. Such fees would most likely be considered an expense of exercising the power of sale.}
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\textit{The Trust Deeds Act was recently amended to specifically include holders of junior trust deeds, mortgages, and other liens as persons entitled to a portion of any surplus generated by the sale of trust property. L.B. 679, 88th Leg., 1st Sess., 1984 Neb. Laws. \S 22. The Act thus follows Nebraska mortgage law, which recognizes that persons entitled to a surplus upon the sale of encumbered property include the mortgagor and any junior encumbrancers. Omaha Nat'l Bank v. Continental W. Corp., 203 Neb. 264, 269, 278 N.W.2d 339, 343 (1979) (first mortgage on encumbered real estate will be enforced against entire security and any surplus remaining after satisfaction of first lien should be apportioned among junior

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of such claims, the best course of action would be to deposit the surplus with the court in an interpleader action, and allow the court to distribute the funds.\textsuperscript{163}

If the proceeds from the trustee's sale fail to satisfy the balance due on the obligation secured by the trust deed, the beneficiary has a limited right to a deficiency judgment. The Act provides that an action for a deficiency must be brought within three months after the completion of the trustee's sale.\textsuperscript{164} Failure to initiate an action within the statutory period bars a subsequent attempt to recover a deficiency.

The Act limits the beneficiary's recovery in a deficiency action to the difference between the amount of the indebtedness and the fair market value of the trust property, established as of the date of the trustee's sale.\textsuperscript{165} In no event, however, may the deficiency exceed the

\textsuperscript{163} NEB. REV. STAT. § 25-325 (1979). Where the trustee's sale has generated a surplus, the trustee should institute an interpleader action to resolve the distribution of any surplus. Provident Sav. & Loan Ass'n v. Booth, 138 Neb. 424, 429, 293 N.W. 293, 296 (1940) (interpleader is an equitable remedy whereby a disinterested stakeholder in possession of a fund or other property claimed by rival defendants may require them to litigate among themselves the issue of ownership); Citizens Nat'l Bank v. McNamara, 120 Neb. 252, 253, 231 N.W. 781, 781 (1930) (where one, owing a debt claimed by two or more persons, makes the respective claimants of the debt parties to the proceeding and at the same time deposits the debt with the court, then the applicant shall be released). The issue of disposing of a surplus does not arise when a mortgage is foreclosed, since the court that issues the decree of foreclosure has jurisdiction to provide for the disposition of the proceeds of the sheriff's sale. Omaha Nat'l Bank v. Continental W. Corp., 203 Neb. 264, 269, 278 N.W.2d 339, 339, 342 (1979) (trial court has the power to include in the decree of foreclosure an order for disposition of the proceeds of sale of the property); Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp., 192 Neb. 588, 593, 223 N.W.2d 425, 428-29 (1974) (if surplus remains after sale and satisfaction of the mortgage, district court has full power to determine the interests of all of the parties in the surplus); Mauzy v. Elliott, 146 Neb. 865, 870-71, 22 N.W.2d 142, 145 (1946) (if surplus remains after the payment of the mortgage debt and costs, the court may, in exercise of its equitable jurisdiction, bring in all parties necessary to a determination of fund ownership).

\textsuperscript{164} NEB. REV. STAT. § 76-1013 (1981).

\textsuperscript{165} The amount of the indebtedness includes interest, costs, expenses of the trustee's sale, and the trustee's fee. NEB. REV. STAT. § 76-1013 (1981). The Act does not limit the trustee's fee, assessable upon the exercise of a power of sale, as compared to the limitations imposed on the trustee's fee for default. See supra notes 67-71 and accompanying text.

Upon the bringing of a deficiency action, the court is instructed to make a finding of fact as to the fair market value of the trust property on the date of the
difference between the sale price and the amount of the debt. In contrast, a Nebraska mortgagee may recover the difference between the amount realized at the judicial sale and the amount of the unpaid debt. Thus, if a trust deed is foreclosed by judicial proceedings rather than by a power of sale foreclosure, the beneficiary may be able to realize a greater deficiency judgment.

The restrictions the Act places on deficiency judgments after a power of sale foreclosure are not uncommon. Several jurisdictions either impose similar restrictions, or prohibit altogether the recovery of a deficiency judgment when a power of sale is exercised. The Act provides an upper limit on the amount recoverable in a deficiency action, which is also the traditionally recognized amount recoverable in a mortgage foreclosure action. An example may help to clarify the operation of the Act: Assume that the trust property had a fair market value of $100,000 as of the date of the sale; that the debt outstanding was $120,000; and that the trustee's sale yielded $90,000. The Act would operate to limit the deficiency judgment to the difference between the fair market value and the debt outstanding, or $20,000, with such judgment not to exceed the difference between the amount of the debt owed and the sum realized at the trustee's sale, or $30,000. Because the beneficiary recovers the smaller of the two measures, judgment would be entered in the amount of $20,000.

The Act provides that a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. Since the beneficiary will want to prove that the fair market value of the trust property was equal to or less than the sales price realized, the issue of valuation will be a major point of contention in a deficiency action. Therefore, both the beneficiary and the trustor must be prepared to produce evidence of the value of the trust property.

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cause a trustee's sale, unlike a sheriff's sale, is not subject to judicial supervision, such limitations are deemed necessary in order to protect the trustor from the beneficiary's attempts to manipulate the sale and subsequent deficiency judgment. Consequently, the Act forces the beneficiary to secure the highest possible price for the trust property at the trustee's sale. Moreover, it will induce the beneficiary to bid at the sale, so as to prevent a third-party bidder from realizing a bargain purchase at the beneficiary's expense.

V. CONCLUSION

Although several questions are left unanswered by the Trust Deeds Act, trust deeds should prove to be a viable alternative to the traditional real estate mortgage. The Act is fair to both the borrower and lender, and operates to balance the interests of each. The Act provides a lender with a quick and inexpensive means of recovering his collateral by authorizing the use of power of sale foreclosure. At the same time, the Act preserves the rights of borrowers, as it requires the full disclosure that the instrument is a trust deed and not a mortgage, grants the borrower the right to cure a default and avoid the sale of his property, and limits the borrower's potential liability in the event of a deficiency action. Because the Act has provided lenders with a mechanism to avoid judicial foreclosure while protesting the interests of the borrower, the trust deed may ultimately replace the mortgage as the primary means of securing real property loans in Nebraska.

Richard P. Garden, Jr., '84
Substitution of Trustee

(insert name and address of new trustee) is hereby appointed successor trustee under the trust deed executed by _______ as trustor, in which _______ is named beneficiary and _______ as trustee, and filed for record _____, 19_, and recorded in book _____, page _____, Records of _______ County, Nebraska.

Signature __________________________

Notice of Trustee's Sale

The following described property will be sold at public auction to the highest bidder at the ____________ door of the county courthouse in ____________, County of ____________, Nebraska, on ____________, 19_.

(Name of Trustee)

Request for Notice of Default

Request is hereby made that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record _____, 19_, and recorded in book _____, page _____, Records of _______ County, Nebraska, executed by _______ as trustor, in which _______ is named as beneficiary and _______ as trustee, be mailed to _______ (insert name) at _______ (insert address).

Signature __________________________

Cancellation of Notice of Default

The undersigned hereby cancels the notice of default filed for record _____, 19_, and recorded in book _____, page _____, Records of _______ County, Nebraska, which notice of default refers to the trust deed executed by _______ as trustor, in which _______ is named as beneficiary and _______ as trustee, and filed for record _____, 19_, and recorded in book _____, page ___, Records of _______ County, Nebraska.

Signature of trustee __________________________