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IN THE SUPREME COURT OF [illegible]

STATE OF UTAH

BANK OF EPHRAIM
A Utah Corporation,
Plaintiff-Respondent,

vs,

HALBERT DAVIS, et al,
Defendant-Appellant

[illegible]

APPEAL FROM AN [illegible]
IN AND FOR [illegible]
THE HONORABLE [illegible]

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IN THE SUPREME COURT OF THE

STATE OF UTAH

BANK OF EPHRAIM, A Utah Corporation, Plaintiff-Respondent,	*	
vs.	*	Case No. 15349
HALBERT DAVIS, et al, Defendant-Appellant.	*	

BRIEF OF RESPONDENT

APPEAL FROM AN ORDER OF THE DISTRICT COURT
IN AND FOR SANPETE COUNTY, UTAH
THE HONORABLE DON V. TIBBS, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE

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BANK OF EPHRAIM, A Utah Corporation,	*	
	*	
Plaintiff-Respondent,	*	Case No. 15349
vs.	*	
HALBERT DAVIS, et al,	*	
Defendant-Appellant.	*	
	*	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an Order of the Sixth Judicial District Court, in and for Sanpete County, Honorable Don V. Tibbs, District Judge, denying Appellant's Motion to have a Writ of Attachment discharged.

DISPOSITION IN LOWER COURT

Defendant filed a Motion to have a Writ of Attachment, previously obtained by the Plaintiff, discharged on the ground that it was improperly issued. Both parties submitted written Memorandum, the motion was argued orally to the court, and the court issued an order denying Defendant's Motion, from thich this appeal is taken.

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RELIEF SOUGHT ON APPEAL

Respondent seeks to have the Court affirm the decision of the lower Court and to dismiss the Appellant's Appeal herein.

STATEMENT OF FACTS

Plaintiff, Bank of Ephraim, sued the defendant, Halbert Davis, to foreclose a real estate mortgage obtaining a Judgment and Decree of Foreclosure against the Defendant on February 6, 1976. On the same date the plaintiff obtained a Writ of Attachment on certain personal property of the defendant, which was located in a building situated on a portion of the real property sought to be foreclosed. The Writ was based upon the Affidavit of Rawlin Jacobson, President of the Plaintiff, Bank of Ephraim, which among other things, alleged as follows:

1. That the defendant Halbert Davis has upon and within the aforedescribed property certain items of personal property not covered by the Judgment.

2. That the amount of defendant's Judgment amounts to the sum of $59,997.96, and that only a portion of that amount is entitled to a first lien on the property.

3. That along with other creditors, there are Judgments totaling in excess of $85,957.56, plus accruing interest at a rate of 8% per annum or greater.

4. That the total judgments are greater than the sums that can reasonably be expected at Sheriff's Sale and a deficiency Judgment in favor of the Plaintiff will result.

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5. That the affiant is informed and does believe that the defendant, Halbert Davis is about to remove the said property in an attempt to avoid creditors, and that unless a Writ of Attachment issues, irreparable damage will result to the plaintiff.

6. That the Attachment herein is not sought to hinder, delay, or defraud any creditors of the defendant and the payment of said indebtedness as it relates to a deficiency judgment has not been secured by a mortgage lien upon real property or personal property situate or being in the State of Utah. Further, that the security which plaintiff has upon real property has become impaired without any act of the plaintiff and will not cover full amounts of any judgment against it.

All of the allegations in the affidavit of Rawlin Jacobson have proven to be true.

The Writ directed the Sheriff of Sanpete County to attach all of the property of the defendant, within the building known as Hal's Palace Cafe, and was served on the defendant on February 9, 1976.

The Sheriff apparently failed to file a copy of his Certificate of Inventory of the attached property, but did deliver a copy to the Plaintiff. The Sheriff further did not take actual physical custody of the property, but left the same in the custody of the defendant, who for a period of time continued to operate the cafe business and use the personal property. At a later date a receiver was appointed to take possession of the cafe property, but in actuality the defendant continued in physical custody and control of the real property, and the personal property until June 29, 1977. On that date the Court ordered the

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defendant to deliver the keys to the plaintiff in the sa
order in which the Court denied the defendant's Motion t
Dismiss the Writ of Attachment.

Simultaneously with the Judgment and Decree of Foreclosure on February 6, 1976, the Plaintiff obtained from the court an Order of Sale of Real Property. The property was not noticed for sale immediately because of an appeal to this Court concerning the priorities of the several Judgment Creditors. That appeal having finally been concluded the property was sold on April 12, 1977.

The plaintiff was the purchaser of the property under the sale, but the defendant still refused to deliv the property which resulted in the Plaintiff's Motion to Deliver Property and Defendant's Motion to Dismiss the Writ and this subsequent Appeal.

A R G U M E N T

POINT I: THE WRIT OF ATTACHMENT WAS NOT A PRE-JUDGMENT WRIT OF ATTACHMENT AND FROM THE FACTS, PLAINTIFF WAS JUSTIFIED IN SEEKING A WRIT OF ATTACHMENT AGAINST THE DEFENDANT PRIOR TO THE SALE OF THE MORTGAGED PROPERTY.

The appellant is correct in his general statement as to Utah following the one action rule. Where appellant is in error is in his supposition that the plaintiff was attempting to obtain more than one action for the recove

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of the debt secured by the mortgage. The facts simply do not bear out any such thing.

A careful reading of plaintiff's Affidavit reveals that the Judgments against the defendant were in excess of $85,957.54 plus interest, that only a portion of the plaintiff's judgment was entitled to a first lien on the property, that the total judgments were greater than the sums which could reasonably be expected from the sale of the property and that a deficiency judgment would result.

Further, the affiant was informed that defendant Davis was attempting to remove the personal property from the premise. (The information was received from the Plaintiff's Attorney who had gained the information in a personal conversation with the defendant, Halbert Davis.) And the security which plaintiff has upon the real property had become impaired.

It is clear that what plaintiff was attempting to do was to have additional security in the event of a deficiency, and not to have more than one action for the recovery of a debt secured by the mortgage. (The defendant was advised of this on several occasions).

Whether or not a mortgage may have additional security in a foreclosure suit has never been decided by this court. In the only case which raised the issue at all,

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this court, chose not to settle the question, saying the issue wasn't really before the court.

Bacon v. Raybould 11P.510, at page 511.

Respondent's contention is that where the facts exist as set forth in the plaintiff's Affidavit for a Writ of Attachment, the additional security should be allowed.

The position of the plaintiff is also supported by that part of its Affidavit of Writ of Attachment, which alleged that the security of the plaintiff had become impaired without any act of plaintiff. The impairment of the plaintiff's security was giving of second and third mortgages by the defendant, and allowing tax liens to attach against the same.

It has been held that where the security has been lost through no fault of the mortgagee, an action may be maintained directly upon the personal obligation of the mortgagor, Donaldson v. Grant, 15 Utah 231, 49 P. 779 and Cache Valley Banking Co. v. Logan Lodge No. 1453 B.P.O.E., 88 Utah 577, 56 P2d 1046.

POINT II: EVEN IF THE WRIT WAS A PREJUDGMENT WRIT OF ATTACHMENT, THE LAW WITH RESPECT TO SUCH WRITS WAS FOLLOWED AND DEFENDANT'S RIGHTS OF DUE PROCESS WERE NOT VIOLATED.

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To start with, it should be again pointed out that the plaintiff in seeking the Writ was not attempting to obtain more than one action for recovery of the debt secured by the mortgage, but rather was attempting to have additional security in the event of a deficiency. The Affidavit for Writ of Attachment bears this out as does the action of the plaintiff after the Writ was served. He never to this date has attempted to execute on the property, but was content to hold the same subject to the property being sold and a deficiency judgment resulting, which in fact also happened.

Pre-Judgment Writ or not, the plaintiff followed the rules for obtaining a Writ of Attachment.

The Appellant in its brief at Page 6, cites the Writ of Attachment having issued on February 6, 1977. Elsewhere in his brief he cites the Writ as having been issued on February 6, 1976. A very brief glance at the record reveals that the Writ was actually issued on February 6, 1976. Rule 64A, Utah Rules of Civil Procedure, cited in Plaintiff's brief, was at that time a Writ of Arrest, and in fact Rule 64A as it presently exists was not approved by this Court until March 11, 1976, more than a month after plaintiff obtained its Writ.

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Rule 64A, as it presently exists, is, indeed, a rule for the issuance of Pre-Judgment Writ of Attachment, as well as Garnishment and Replevin.

On February 6, 1976 the present Rule 64A did not exist and plaintiff obtained its Writ by following the only rule then available for the issuance of a Writ of Replevin, Rule 64C.

In filing its Affidavit for the Writ the plaintiff followed Rule 64C(a), including an allegation that the original security had been impaired without any act of the plaintiff. It is interesting to note that to this day the defendant has never questioned the sufficiency of the Affidavit, but has claimed other procedural problems with the Writ as the basis for its claim.

While this Court approved the present Rule 64A to bring it into conformity with U. S. Supreme Court decisions, the court did so of its own volition and the Utah law as it related to pre-judgment writs of garnishment has never been declared invalid.

Defendant would now ask this Court to impose a duty on the plaintiff, which did not exist at the time the Writ was issued and would further require plaintiff to apply standards not then formulated as it applied for its

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Writ. With that type of clairvoyance the plaintiff could have foreseen that the defendant would have defaulted on its notes and never have loaned the money in the first place.

On page nine of his brief the appellant cites the fact that the Sheriff never did file a copy of his inventory. While this may be true, the plaintiff who complied with all his requirements under the law should not be held accountable for the error on the part of the Sheriff, especially when the defendant was present when the property was inventoried, and thereafter continued in actual possession of the property, in fact, continuing to operate the facility as a cafe for a period of time after the Writ was issued.

His claim that he was unable to deliver several items of equipment to other creditors who had security interests in such equipment is without any foundation, as the defendant was constantly advised by the plaintiff's Attorney that no claim was made on any such equipment, and in fact all other creditors received the property they had a lien on at such time as they requested the same.

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POINT III: EVEN IF THE WRIT WAS A PRE-JUDGMENT WRIT OF ATTACHMENT, AND EVEN IF APPELLANTS' RIGHT TO DUE PROCESS OF LAW WAS VIOLATED, THE DEFENDANT IS ESTOPPED TO CLAIM THE WRIT WAS NOT PROPER UNDER THE DOCTRINE OF LACHES.

A chronological listing of the events which are pertinent to the appeal is helpful in understanding the respondent's position in this case. They are as follows:

a. February 6, 1976 entry of Judgment and Decree of Foreclosure

b. February 6, 1977, Affidavit for Writ of Attachment, Undertaking for Writ, and Writ of Attachment issued. (Served February 9, 1976)

c. February 6, 1976, Order of Sale of Real Property

d. April 12, 1977 - Sale of Real Property

e. June 3, 1977 Plaintiff files Affidavit for Order to Show Cause and Order to Show Cause Issues requiring defendant to show cause why he should not deliver up possession of real property and be restrained from disposing of any of the personal property on the said premises.

f. June 15, 1977, defendant files Motion to Dismiss Writ of Attachment.

g. June 29, 1977 Court gives custody of property to plaintiff denies defendant's motion to dismiss Writ of Attachment.

In order for the Court to sustain a defense of laches the following must appear:

1. Conduct on the part of the defending party giving rise to the situation for which the Complaint is made and for which the Complainant seeks a remedy.

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2. Delay in asserting the Complainant's rights. Complainant having knowledge of defending person's conduct.

3. Lack of knowledge or notice on the part of the defending party that the complainant would assert the right on which he bases his suit or action.

4. Injury or prejudice to the defendant in the event relief is accorded the complainant.
27 Am Jur 2d 701, Equity § 162

It is the contention of the respondent that each one of the above elements is present in the present case.

Assuming, but not admitting, the Writ of Attachment was improperly issued, that would certainly amount to conduct on the part of the Bank of Ephraim, which would give rise to the situation of which Halbert Davis seeks his remedy, i.e. the Motion for Dismissal of the Writ of Attachment.

Chronological events a. through f. shows a lapse of sixteen months between the issuance of the Writ and the Motion to Dismiss. Since the Appellant could have made his motion at any time after February 9, 1976, the time the writ was served on Appellant, and when he had knowledge of Respondent's conduct, the sixteen months delay amounts to a significant lapse of time.

There is nothing in the record which would indicate that the Bank of Ephraim thought the Appellant would assert the claim on which he based his action or Motion to Dismiss the Writ.

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The sale of the property having been completed and a deficiency having resulted after the sale, the respondent will certainly be injured by the loss of the property under the Writ in the event the court finds that the appellant's action is not barred.

C O N C L U S I O N

The Respondent submits that it was justified in seeking a Writ of Attachment. The facts clearly show that a deficiency judgment would result after the sale of the real property and Respondent's acts in obtaining the Writ was to obtain additional security to protect itself against the impending deficiency judgment.

The facts further show that the Respondent followed the law which was applicable at the time the Writ was issued, and having done so, there was no violation of any of the Appellant's rights.

Further, even if the items set forth in Appellant's brief were correct, which they are not, the delay on the part of the appellant in moving to dismiss the Writ raises the Doctrine of Laches as a bar to his recovery in this action.

Finally, it should be noted that the deficiency judgment on the sale of the real property was in excess of $50,000.00, a sum which is far and a way above any value which can be attached to the personal property,

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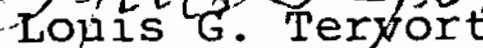
which is the subject of the Writ of Attachment, and that even if the Respondent prevails in this action, it will still have lost a large sum of money and interest as a result of the Appellant's default on its note and mortgage.

Respectfully submitted,



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