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James G. Clawson and Joan M. Clawson; Tex R. oldsen and Monna Lee Olsen; and Ken Chamberlain and Jeannine W. Chamberlain v. Bruce L. Moesser and Ruth Anne Moesser : Response to Petition for Rehearing

Utah Supreme Court

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Ken Chamberlain; Olsen and Chamberlain; Attorneys for Plaintiffs.

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES G. CLAWSON and JOAN M. CLAWSON, his wife; TEX R. OLSEN and MONNA LEE OLSEN, his wife; and KEN CHAMBERLAIN and JEANNINE W. CHAMBERLAIN, his wife,	)
Plaintiffs and Respondents,	)
vs.	) No. 13653
BRUCE L. MOESSER and RUTH ANNE MOESSER, husband and wife,	)
Defendants and Appellants.	)

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiffs and Respondents,

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BRUCE L. MOESSER and RUTH ANNE MOESSER, husband and wife,

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POINT I

THE DECISION OF THE COURT WILL NOT REPEAL LONG-STANDING RULES CONCERNING MORTGAGE FORECLOSURE.

The primary thrust of the Respondents' petition for rehearing is that the court's decision will inexorably repeal a long-standing rule of the court that the mortgagor or his grantee is entitled to the use of the mortgaged property until the sheriff's sale is final. The Respondents are obviously referring to the court's statement that the Clawsons' title was defunct, and that it could not be revitalized by any redemption by Spaulding.

It is the law that a mortgage foreclosure extinguishes all interests inferior to that of the mortgage foreclosed and, in deed, the judgment of foreclosure in the present case expressly stated that the Clawsons lost all interest and title to the property in question. This same point was brought out in Appellants' Brief at pp. 5 through 10. An additional authority expressing the same rule in express terms is the follows:

> A judgment or decree of foreclosure concludes the rights of a claimant under a legal title adverse to that of the mortgagor and mortgagee where such rights were properly made the subject of adjudication in the foreclosure proceeding. 59 C.J.S. Mortgages §704(d).

To rephrase the question that has apparently caused so much consternation among the Respondents, "What then becomes of the title to the property between the time of sale and the time of redemption?" The answer to that question will not repeal any long-standing rule of law in the State of Utah. On the contrary, it is stated succinctly at 59 C.J.S. Mortgages §520 (1949).

> A completed foreclosure divests the mortgagor's title to the mortgaged premises and vests it in the mortgagee or purchaser.

A footnote to that same section clarifies the situation even further. 59 C.J.S., supra, 849-50 n.62, recites the holding of In Re Nelson:

> Mortgage foreclosure sale and sheriff's certificate of sale extinguished all of mortgagor's property in realty involved, except bare legal title with statutory rights of possession and redemption.

Between the time of judgment and the time of redemption, then, the property is in the custody of the court with certain statutory rights resting in the mortgagor or his grantee (possession, redemption), and with certain statutory rights resting in the mortgagee or purchaser (sale, redemption, elimination of all inferior interests, equitable title).

The court's decision in this case will not overrule the long-standing principle that:

> The landowner's title and right to possession, use and benefit of property sold on mortgage foreclosure or execution sale is reserved to him during the redemption period and until the sheriff's deed. (Res. Petition for Rehearing and Brief in Support Thereof, p. 1)

The court's decision does not repeal any long-standing rules concerning mortgage foreclosure. The elements of title remain divided, as stated, and the property rests in the custody of the court pending disposition.

POINT II

> THE DECISION OF THE COURT WAS MADE ON THE BASIS OF A THEORY PROPERLY SUBMITTED BEFORE THE COURT IN BOTH BRIEFS AND ORAL ARGUMENT, AND A REHEARING CANNOT BE GRANTED MERELY TO ALLOW RESPONDENTS THE LUXURY OF FILING ADDITIONAL BRIEFS AND RE-ARGUING POINTS ALREADY ARGUED AND ADJUDGED.

As pointed out above, Point I of Appellants' Brief goes directly to the question of the vitality of the Clawsons' defunct claim. The matter has already been submitted to the

court in both brief and oral form. Appellants' Brief devotes five pages to the defunct nature of the Clawsons' claim, and Appellants were careful to point out in oral argument that the foreclosure judgment expressly extinguished all claims or interests of the Clawsons. The fact that Respondents chose not to address themselves to that question in their brief does not entitle them to a rehearing at this time for the purpose of re-arguing a matter already submitted, or for filing an additional brief. The law is clear that a rehearing will not be ordered so that one party can re-argue an issue already submitted to the court. It is stated at 5 C.J.S. Appeal and Error §1411 (1958):

> If no omissions or new authorities or points of law or fact are shown, the appellate court will seldom permit a rehearing simply for the purpose of obtaining a re-argument on, and a reconsideration of, points, authorities and matters which have already been fully considered by the court, on the assertion of counsel that, notwithstanding the court fully considered everything wished to be urged on the rehearing, it reached the wrong conclusion. Id. 540.

In the present case the Respondents are arguing no new facts, and the great majority of the cases cited by them have already been cited by the parties hereto in their respective briefs. The only new cases cited by the Respondents are the Carlquist, Layton and Local Realty cases, and all of those cases simply restate hornbook law on redemption. The cases are inapplicable to the question before the court. For the same reason it is also held that

> . . .a rehearing will not be granted. . . to enable. . .additional briefs to be filed. . . . Id. 541.

The cases in support of this point are numerous, and several from this region are worthy of note. In Phelps Dodge Corporation v. Industrial Commission, 90 Ariz. 379, 368 P.2d 450 (1962), the court stated:

> A rehearing is not granted to re-argue matters determined by the decision. /Citations omitted./ Id. 452.

In Climate Control, Inc., v. Hill, 87 Ariz. 201, 349 P.2d 771 (1960), the court stated:

> Finally, Appellant has advanced other grounds for reversing this court's decision. They consist primarily of a re-argument of its initial position. By long-established rule of court they are not grounds for reconsideration. /Citation omitted/ Id. 773.

In Town of Glenrock v. Chicago & Northwestern Railway Company, 73 Wyo. 395, 281 P.2d 455 (1955), the court stated:

> This court has previously pointed out that when the reason advanced for a re-hearing is simply re-argument and repetition of counsel's views which have already received consideration, we will decline to re-travel those paths. /Citation omitted./ Id. 456.

And, in London Guaranty and Accident Company v. Officer, 78 Colo. 441, 242 P. 989 (1926), the court apparently became quite aggravated with the petitioner in a similar situation:

> In addition thereto, that portion of the application contains nothing new, but is a mere re-argument of the questions as heretofore presented. It is, therefore, a gross violation of the rule of this court, and, in addition, is so discourteous as to merit at least the disposition now made of it. The application is stricken from the files. Rehearing is denied. Id. 995.

It has previously been pointed out that Appellants devoted five pages of their Brief to the question now raised by Respondents, and it has also been pointed out that Respondents chose to respond only peripherally to that issue, at p. 18 of their Brief. Respondents now apparently wish to re-argue that point and to file a brief of authorities relative thereto. This cannot be done.

> Ordinarily a rehearing will not be granted merely because of the failure of counsel sufficiently to present the cause for the determination of the appellate court. Accordingly, all points relied on must be presented originally, rather than reserved to be urged on the court in the event of an adverse decision, and a rehearing will not be granted because of the petitioner's failure to argue or present important points on hearing. . . . 5 C.J.S. Appeal and Error §1417, 545 (1958).

It has been held on several occasions and in several jurisdictions that a rehearing will not be ordered merely to allow additional argument on the issues originally presented to the court. In Rice v. Bennington County Savings Bank, 93 Vt. 493, 108 A. 708 (1920), it was stated:

> Moreover, it is a general rule that failure to present a case fully or to give sufficient attention to the argument on a former hearing does not, in a court of last resort, afford ground for granting a new trial. Id. 716.

In New Amsterdam Casualty Co. v. Luddeke, 72 S.W.2d 942 (Tex.Civ.App., 1934), the Texas court has explained quite concisely why a petitioner will not be allowed to cure the defects of his original brief through a rehearing.

> The defects in and omissions from Appellant's brief, and pointed out in the original opinion, are sought to be cured and supplied in the motion for rehearing. But that effort comes too late. Parties are bound by and restricted to presentation in their briefs. Any other rule would result in disorder, confusion, delays, the disruption of orderly procedure in this court. This is too obvious to require argument to support it. /Citations omitted/ Id. 944.

The question raised by Respondents has already been heard and adjudged by this court, and Respondents cannot now request a rehearing for the purpose of re-arguing that same question in slightly altered form.

POINT III

A REHEARING CANNOT BE GRANTED MERELY BECAUSE THE QUESTION IS IMPORTANT.

Respondents are mistaken when they point to the supposedly awesome ramifications of the court's decision in this case. Respondents state:

> But to characterize Clawsons' claim as defunct would unintentionally obliterate a fundamental right which has been established for many years in this state: the right to possession, use and the rents and profits of the mortgaged estate, during the period of redemption. (Res. Brief in Support of Rehearing, p.2.)

Simply stated, Respondents are wrong. It has previously been pointed out that no rights will be obliterated. The title to the property becomes divided upon judgment of foreclosure, with only the barest legal title remaining in the mortgagor. The equitable title to the property vests in

the court pending disposition of the property and finally comes to rest in the mortgagee, redemptioner or purchaser at sale. As stated in In Re Nelson, supra, no rights of the mortgagor or his grantees are "obliterated". The rights are created by statute and they remain viable.

However, even were this question to hold the unassailable significance which Respondents apparently attribute to it, such would not be grounds for rehearing. It is stated at 5 C.J.S. Appeal and Error, §1418 (1958):

> A rehearing ordinarily will not be granted because the question is of great importance, unless it appears to have been decided without due consideration.

The court's decision in the present case was proper, and it is obvious from the briefs, oral argument, and the opinion of this court that this question was given due consideration.

POINT IV

A REHEARING CANNOT BE GRANTED MERELY BECAUSE THE COURT'S DECISION APPEARS TO BE OUT OF HARMONY WITH PRIOR DECISIONS OF THE COURT.

It must first be stated that the opinion of this court is not out of harmony with prior decisions made by this court. Respondents are attempting to twist a few words of this court's decision into a total reversal of the Utah mortgage law. The court's decision will not alter the statutory right to possession during the redemption period, and Respondents' argument is simply a pretext for requesting a chance to re-argue the same issues.

Those cases cited by Respondents apply only to the statutory right of redemption and are only peripherally related to the question now before the court. It is clear that the present case can be easily distinguished from the cases on which Respondents rest. Consequently, a rehearing cannot be granted.

> A rehearing will not be granted on the ground that the decision of the appellate court is out of harmony with certain former decisions cited in the rehearing petition where such former decisions do not justify a ruling different from that rendered, or are substantially distinguishable. 5 C.J.S. Appeal and Error, §1424 (1958).

The court's decision in the present case is not out of harmony with its former decisions as cited by Respondents for the reason that this case is substantially distinguishable from the cases cited.

CONCLUSION

Respondents' concern that the court's decision in this matter will completely reverse the present Utah mortgage law is unwarranted. The mortgagor's right to the use and possession of the foreclosed property during the redemption period is a right created by statute (In Re Nelson, supra), and has not been affected by this decision. If Respondents were really so concerned about this particular aspect of the problem, they should have addressed the point either in their Brief or in oral argument. The court addressed itself to the

question at that time and has now made its decision. The fact that Respondents failed to address themselves to that question prior to this time does not justify a rehearing, nor can a rehearing be granted merely because Respondents feel the question is important -- not in view of the fact that the Supreme Court has already duly deliberated the question and has reached its decision.

It is not grounds for rehearing, either, that the court's decision may be out of harmony with certain former decisions, especially in light of the fact that this case is substantially distinguishable from the other cases cited by Respondents.

A rehearing is inappropriate in this case and the petition of the Respondents must be denied.

Respectfully submitted,

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I hereby certify that on the 19 day of June, 1975, I mailed two copies of the within and foregoing Brief in Opposition to Petition for Rehearing to Ken Chamberlain, Olsen & Chamberlain, 76 South Main Street, Richfield, Utah, postage prepaid.

KAY M. LEWIS