

2001

James G. Clawson and Joan M. Clawson, his wife;
Tex R. Olsen and Moona Lee Olsen, his wife; and
Ken Chamberlain and Jeannine W. Chamberlain,
his wife v. Bruce L. Moesser and Ruth Anne
Moesser, husband and wife : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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M. CLAWSON, his wife; TEX R.
OLSEN and MONNA LEE OLSEN,
his wife; and KEN CHAMBER-
LAIN and JEANNINE W. CHAM-
BERLAIN, his wife,

Plaintiffs and Respondents,

—vs.—

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

Defendants and Appellants.

DEC 9 1975

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School
Case No. 13653

RESPONDENTS' BRIEF

Appeal from the Judgment of the District Court
of Sanpete County, State of Utah,
Honorable Don V. Tibbs, *Judge*

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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 CHAMBER-
LAIN and JEANNINE W. CHAM-
BERLAIN, his wife,

Plaintiffs and Respondents,

—vs.—

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

Defendants and Appellants.

Case No. 13653

RESPONDENTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

James G. and Joan M. Clawson and others, the Plaintiffs and Respondents (hereinafter referred to as "CLAWSON") acquired record ownership of the lands in dispute which were at that time subject to a trust deed granted by their predecessors. The trust deed was thereafter foreclosed as a mortgage, the property sold and lawfully redeemed from the sale. The mortgagee instituted a second sale on its deficiency. Bruce L. and Ruth Anne Moesser, the Defendants and Appellants (hereinafter referred to as "MOESSERS") purchased

at the second sale. Clawson obtained a decree quieting title against Moesser on the Trial Court's determination that the mortgage lien could not be foreclosed twice under those facts.

DISPOSITION IN LOWER COURT

Both sides acknowledged that the facts are not in dispute and each moved for a summary judgment (R. 9-33 and R. 74). The Trial Court granted Clawson's motion, denied Moessers' motion and ordered Clawson to reimburse Moessers for the 1973 property taxes (R. 99-105).

RELIEF SOUGHT ON APPEAL

Clawson seeks to have the Trial Court affirmed.

STATEMENT OF FACTS

The facts are not in dispute:

In 1965 Mid-Continent Construction Company acquired the real property (R. 44). In 1966 Mid-Continent and C. H. Spaulding granted to Walker Bank and Trust Company ("Walker Bank") a Trust Deed securing promissory notes of both trustors with the property (R. 46-48).

On November 19, 1968 Clawson obtained a judgment against both Mid-Continent and Spaulding which he docketed in Sanpete County (R. 50).

Clawson pursued his judgment by execution sale held April 10, 1969 at which he purchased the property (R. 50, 51).

Upon expiration of six months and no redemption following the sale, Clawson obtained a Sheriff's Deed dated October 20, 1969 (R. 54, 55).

On August 1, 1969 Walker Bank commenced foreclosure of its trust deed as a mortgage¹ (R. 52).

The parties agree and the Court found (R. 101) that Clawson then held fee simple title to the land subject only to the Trust Deed, and the parties stipulated to this priority in time (R. 56).

Neither Clawson nor any other Plaintiff was a party to or bound by Walker Bank's Trust Deed or the notes it secured (R. 48).

On November 6, 1969 Walker Bank obtained a Decree of Foreclosure (R. 15-18) which did not purport to determine any title other than to adjudicate that the Trust Deed was a paramount *lien* on the real property (R. 17). It did not hold, and could not have held, Clawson liable on the underlying obligation (R. 48) nor did it attack Clawson's title in any way (R. 15-18). Walker Bank's Decree of Foreclosure was an express order to sell the premises and to assess a deficiency, if any, against only Spaulding and Mid-Continent (R.17). The sale was held November 6, 1969 and the premises were sold to Keith G. McArthur (R. 20).

¹An election permitted under Section 57-1-23, Utah Code Annotated, 1953.

Spaulding, one of the deficiency judgment debtors, redeemed the Walker Bank sale (R. 24), although he had not done so from the previous Clawson sale (R. 54, 55). This left Clawson with unencumbered fee title as our legal argument will develop.

Spaulding, upon redeeming from Walker Bank's sale on June 30, 1970 (R. 24), immediately attempted to sell whatever he thought he may have taken from that redemption to Cameo Minerals, apparently a corporation (R. 65) from which nothing further is heard.

Walker Bank filed a deficiency judgment against Mid-Continent and Spaulding on January 22, 1970 (R. 21, 22).

Then three years later, on February 12, 1973, Walker Bank procured a Writ of Execution — not an order of sale or further proceedings in its mortgage foreclosure — on its deficiency judgment against Mid-Continent and Spaulding (R. 25, 26). And it is *significant* that Walker Bank did not seek or obtain a supplemental decree of foreclosure or order of sale (or “special execution” as is provided in Section 78-37-1, UCA 1953 affecting foreclosure of real estate mortgages) but obtained all Walker Bank was entitled to: a writ directed against any assets of Mid-Continent and Spaulding or either of them (R. 25, 26). The sheriff executed on Clawson's property.

At the Execution Sale of March 21, 1973 Moesser paid \$4,100.00 for Mid-Continent's and Spaulding's interest, if any, in the property (R. 27, 28) and recorded a Sheriff's Deed six months thereafter (R. 32, 33).

Clawson paid taxes for the years 1969, 1970, 1971 and 1972 and offered to pay those taxes for 1973 but Moesser, claiming under the Sheriff's Deed, paid 1973 taxes (R. 12) which one year's taxes the Trial Court ordered Clawson to reimburse to Moesser (R. 105).

The chronology of events is critical to a disposition of the case, and since those facts are also complicated, we have sub-joined a columnar statement of events in the order of their occurrence:

Chain of Events Under Which Moessers Claim	Date of Event or Proceeding	Chain of Title and Events Under Which Clawsons Claim
MID-CONTINENT & SPAULDING OBTAIN TITLE (R44)	Oct. 1, '65	MID-CONTINENT & SPAULDING OBTAIN TITLE (R44)
MID-CONTINENT & SPAULDING GRANT TRUST DEED TO WALKER BANK (R46)	Sep. 8, '66	
	Nov. 19, '69	CLAWSON TAKES JUDGMENT AGAINST MID-CONTINENT & SPAULDING (R50) See Note 1
	Apr. 10, '69	CLAWSON PURCHASES AT EXECUTION SALE (R50)
WALKER BANK COMMENCES FORECLOSURE OF ITS TRUST DEED AS A MORTGAGE (R52)	Aug. 1, '69	
	Oct. 20, '69	CLAWSON RECEIVES SHERIFF'S DEED FOLLOWING NO REDEMPTION DURING 6 MOS. PERIOD (R54)
WALKER BANK FORECLOSURE ORDER ENTERED (R 15-18)	Nov. 6, '69	
FORECLOSURE SALE ON WALKER BANK MORTGAGE-KEITH McARTHUR PURCHASES (R20)	Dec. 30, '69	
WALKER BANK TAKES DEFICIENCY JUDGMENT (R21,22)	Jan. 22, '70	
SPAULDING REDEEMS FROM McARTHUR (R23,24)	Jun. 28, '70	SPAULDING REDEEMS FROM McARTHUR (R23)
	Jul. 28, '70	CLAWSON CONVEYS TO HIMSELF AND THE OTHER PLAINTIFFS (R66)
WALKER BANK CAUSES ISSUANCE OF GENERAL EXECUTION ON ITS DEFICIENCY [Not an order of sale or further proceedings in its foreclosure action] (R25,26)	Feb. 12, '73	
EXECUTION SALE ON WALKER BANK GENERAL EXECUTION-MOESSERS PURCHASE (R27,28)	Mar. 21, '73	
SHERIFF'S DEED TO MOESSERS (R32,33)	Sep. 24, '73	

Note 1. One critical statement of fact in Appellants' brief requires correction. The last paragraph on p. 3 contains a statement that, "On April 10, 1969, the Clawsons had executed on a judgment against C. H. Spaulding." The record is clear that Clawson's judgment was against C. H. Spaulding and Mid-Continent Construction Company (R. 50, 100).

ARGUMENT

We do not necessarily address Appellants' arguments in the order presented in their brief because, as we will demonstrate, the considerations in Point I following treat the exclusive point of significance. These considerations are only discussed fleetingly near the end of Appellants' brief.

POINT I.

ONCE THE PROPERTY HAS BEEN SOLD ON A MORTGAGE FORECLOSURE AND REDEEMED FROM THAT SALE, THE MORTGAGEE CANNOT COMPEL A SECOND SALE FOR A DEFICIENCY WHERE THE PROPERTY HAS PASSED FROM THE MORTGAGOR TO A PERSON NOT LIABLE ON THE MORTGAGE DEBT.

This case involves a single issue of law. If the Court adopts our statement of Point I then nothing elsewhere in this or in Appellants' brief requires consideration. Every jurisdiction treating this issue in the western United States (where the equivalent of Utah's statutes on foreclosure, execution and redemption has been extensively borrowed from California's early civil code) agrees with the proposition we have stated at the heading of this point.

REVENUE

Utah's first code, the Revised Statutes of 1898, reflects in Sections 3261 and 3262 that they were borrowed from California's Code of Civil Procedure, Sections 701 and 702. These sections of Utah's Revised Statutes of 1898, materially and effectively unchanged, are carried into Rule 69(f)(1) through (4) Utah Rules of Civil Procedure.

The Supreme Court of the State of California in the 1878 case of *Simpson vs. Castle*, 52 Cal. 644 (prior to P2d), interpreting its Code of Civil Procedure, Sections 701 and 702, held that a successor in interest of a judgment debtor takes free and clear of the mortgage lien where the property has been sold and then redeemed from sale. Cited and followed extensively, that rule has never been modified (*Salsbery vs. Ritter*, 48 Cal. 2d 1, 306 P2d 897) [1957].

The State of Utah, having borrowed those statutes after *Simpson vs. Castle* was decided, should be presumed to have adopted also the construction placed upon it by the Court of the author state. *Donahue vs. Warner Bros.*, 2 U2d 256, 272 P2d 177. See also 82 CJS p. 860, *Statutes*, Sec. 372.

But aside from that rule of statutory construction, there are compelling, logical and persuasive considerations of public policy which galvanize soundness of the *Castle* rule.

The Montana Supreme Court in *McQueeney vs. Toomey*, 36 Mont. 282, 92 P 561, adopted the *Simpson vs. Castle* rule saying:

Our code provisions are, in substance, and almost word for word, like those of California which had been construed there before their adoption here, and we took them with the interpretation placed upon them by the Supreme Court of California.

The Nevada Supreme Court has been the last to speak on this subject and held in *Kaye vs. United Mortgage Co.*, 466 P2d 848, 86 Nev. 183 (1970):

Since Nevada statutory provisions governing redemption are identical in all material respects to California Code provisions, we are persuaded, as was Montana, to follow relevant case authority. For almost a century it has been the law of California that when the right to redeem has been exercised by a successor in interest to the judgment debtor, title is vested in such successor free of the lien created by the judgment. [Citing California cases from 1878 to 1967].

This rule serves to promote one of the primary purposes of statutory redemption in forcing the purchaser at execution sale to bid in the property at a price approximating its fair value. [Citing *Salsbery vs. Ritter*, 48 Cal. 2d 1, 306 P2d 897 (1957)].

In *Damascus Milk Co. vs. Morriss*, 463 P2d 212, 1 Wash. App. 501, the Appellate Division of Washington adopted the same reasoning and the same result.

Oregon has developed the same conclusion in a series of widely cited decisions beginning with *Flanders vs. Aumack*, 32 Ore. 19, 51 P 447, holding that once a mortgage has operated to produce a sale of the premises it (the mortgage) has fully spent its force, and coming down to the celebrated case of *Ulrich vs. Lincoln Realty Co.*, 175 P2d 149, 180 Ore. 380, which holds:

It has long been the rule of this state that in a mortgage foreclosure suit, when the decree is had and the property sold to satisfy it, the mortgagee has obtained all he contracted for. As this Court said in *Flanders vs. Aumack*, 32 Ore. 19, 51 P 447, "A redemption will not reinstate a specific mortgage lien".

The *Ulrich* case offers the legally distinguishing statement that if the real property is still in the hands of the mortgagor when a deficiency judgment is entered then the lien of that deficiency would attach to the property once more, with which we cannot but agree. However, the Court adds:

* * * but if the lien of the personal judgment has never attached by reason of the mortgagor not having the fee of the property at the time it was rendered, there never existed any lien to be re-instated against the successor in interest who purchased prior to the decree (175 P2d at p. 150).

Neither Clawson nor his successors in interest signed the Walker Bank Trust Deed; none was obligated on the indebtedness secured thereby (R. 46-48).

To examine the history of Utah's redemption statute will disclose that in the Revised Statutes of Utah, 1898, by Sections 3261 through 3263, Utah borrowed word for word California Code of Civil Procedure, Sections 701 through 703. Those Utah sections were carried into Title 104-37-30 of the Utah Codes of 1933 and 1943 from Sections 6941-6943 of the 1917 Revised Statutes, and have not been in any material way altered through adoption of the 1951 Judicial Code and promulgation of the Utah Rules of Civil Procedure where those provisions were then substantially and without any change in meaning or effect embodied in Rule 69(e) of the Utah Rules of Civil Procedure. Thus Utah still has the old California Code of Civil Procedure, Sections 701 *et seq.*

The landmark and consistently followed California case of *Simpson vs. Castle* (supra) draws this conclusion:

[*Discussing California Code of Civil Procedure Sections 701-703*]

In case of a redemption by the judgment-debtor or mortgagor, the effect of the sale is extinguished and the statute declares he is restored to his estate in the land, which then, *for the first time*, becomes subject to the lien of the unsatisfied portion of the judgment. This lien attaches then because the effect of the sale has been extinguished, and the mortgagor or the judgment-debtor is the owner of the estate as though no sale had been made. But if he had conveyed his interest in the land before redemption and his grantee had redeemed, no interest remained in the mortgagor or judgment-debtor on which the lien could operate unless it be on the theory that the unsatisfied portion of the judgment was a lien on the land before the redemption and the grantee of the mortgagor or judgment-debtor took his conveyance subject to that lien—a theory which finds no support in the statute. [emphasis added]

Clawson's case is even stronger. He had acquired fee title *before* the foreclosure proceedings were ever commenced by Walker Bank.

Michigan Law Review, Volume XXIII, No. 8, June 1925, contains a learned treatise by a professor and a graduate entitled "Redemption from Foreclosure Sale and the Uniform Mortgage Act". At page 851 the authors observe:

We have seen that the principal purpose of the redemption statute, and the only purpose which it serves in a superior way, is the encouragement

of adequate bidding at the sale. Obviously this purpose is defeated by holding that liens are revived, or that a deficiency decree will effectively charge the land. Putting ourselves again in the position of the senior lienor on the eve of his sale, we see that he might reason that a purchase by him at a bargain price would be advantageous if no redemption took place, and that it would do him no harm if redemption were made by the owner. Furthermore, the revival of liens must tend to discourage redemption by the owner, thus diminishing the threat from this preferred bidder. Clearly a better psychological effect upon lienors would be produced by a rule that redemption by the owner does not revive liens but contrariwise, unless the redemptioner be personally liable, will put the land wholly beyond their reach. Nor would this be unfair to lienors, for they cannot reasonably have expected, unless the statute has promised it to them, any more than the proceeds of a single sale of the property* * * *

[The senior lienor] is the likeliest bidder and he should be subjected to pressure to bid the property up to its value, at least to the amount of his lien. *Hence, his lien should be extinguished.*

In *Chicago-Kent Law Review*, Volume 121, beginning at page 202, there is a discussion of the law of Illinois, specifically the decision in *Johnson vs. Zahn*, 380 Ill. 320, 44 NE2d 15. That case holds that the purchaser of a mortgagor's interest (even in a purchase made after foreclosure sale and deficiency decree) takes, upon redemption, the property free from any encumbrance by reason of the deficiency decree.

The note observes that the result is not unexpected and is desirable from the standpoint of settled law and

from fairness in protecting the rights of debtor as well as junior lienholders and, above all, purchasers from the mortgagor.

In Volume 27 (1948) of the *Oregon Law Review*, beginning at page 139, there is an extensive note and comment on the effect of redemption, tracing the history of Oregon Supreme Court decisions. The conclusion reached is that even though Oregon has a *statute* which provides that in an execution sale, as opposed to a mortgage foreclosure sale, the judgment will subsist as a lien to the extent of any deficiency, nevertheless a mortgage is a voluntarily contracted obligation and when the mortgagee has compelled one sale he has obtained all he contracted to receive. The note concludes (page 148):

The effect of foreclosure and sale is to extinguish the mortgage lien; therefore, when the mortgagor redeems, the redeemed lands will not be subject to that particular lien.

In *Lightcap vs. Bradley* (1900, 186 Ill. 510, 58 NE 221, the Court said:

It is true that if the premises are redeemed by the mortgagor they become like any other property owned by him and may be subject to execution for sale on a deficiency; but that is because they belong to the debtor and not on account of any lien by virtue of the mortgage. A redemption by any person not liable for the debt would free them absolutely, so that they could not even be levied upon by execution for a deficiency.

In *Makibben vs. Arndt*, 88 Ky. 180, 10 SW 642, the Court said:

Petitioner (a mortgagee holding a deficiency judgment) contends that redemption from the sale left the unsatisfied portion of his judgment in full force against the property. This contention is based upon the fact that the statute declares the sale "null and void" from the time of redemption. We cannot assent to it. His lien was of *contract*. The legal title to the property was merely in pledge to him for payment of his debt and in pledge for what it might bring, merely, when sold. * * * he cannot sell, resell, and sell again * * *. The redemption is the recovery of the legal title. The mortgage lien ceases to exist whenever the sale is made enforcing it. * * * The parties to the mortgage contract understand at its inception that the property is liable to be sold once by virtue of it; and it is not for a court to make a contract for them of greater continuing force. Its right and power to sell is based upon the mortgage lien alone and one exercise of that power is an exhaustion of it.

Using almost the same language is *Fields vs. Danenhower*, 65 Ark. 392, 46 SW 938, 43 LRA 519, which makes the pertinent observation that if the mortgage lien survived (as Defendants here claim it should) then how would it be consistent for the mortgagee to have a general execution on *all* of the mortgagor's property for his deficiency judgment, because the mortgage foreclosure would never be complete and there is never a right to a deficiency judgment until it has been determined how much the property will bring at foreclosure sale.

This (the Arkansas) rule falls precisely within Utah's specific mortgage foreclosure procedure statute, 78-27-2 UCA 1953, and the cases annotated thereunder. One such case is the *Haymond* decision which we now discuss.

The Utah Supreme Court has never been precisely confronted with the entire issue presented in this case, but on various ingredients of it which have come before it, this Court has been uniformly in accord with the view expressed by California, Oregon, Washington, Montana, Nevada, Illinois, Kentucky, and Arkansas. For example, in *First National Bank vs. Haymond*, 89 U. 158, 57 P2d 1401 (1936) this Court not only held that the mortgaged property must be sold and the proceeds derived from the sale thereof applied to the payment of the obligation before a deficiency judgment may be entered against any of those liable for payment of the debt, but also held:

If the property does not sell for enough to discharge the debt secured, deficiency judgment must be docketed by the clerk for such deficiency against the persons liable for the payment of the obligation if personally served with summons, and execution may issue for such deficiency as in the case of other judgments.

Thus, *the trial court has finished its duties with respect to foreclosure proceedings when the decree of foreclosure and the order of sale are entered.* (Emphasis added)

* * * *

To require the mortgagee to accept the mortgaged property in lieu of the money which the mortgagors have agreed to pay would be to make a contract for the parties contrary to their agreement. This the courts may not do. (Cf. *Ulrich vs. Lincoln Realty*, 175 P2d 199, in which it is held that when a mortgagee has had the property sold for the amount of the mortgage debt and has been willing to accept the amount thus bid, even though

it might be less than the total indebtedness, the mortgagee has received all he contracted for in the mortgage.)

The Haymond case goes on to say that provisions of the Utah Law are calculated to protect from injury the mortgagor and others who may have an interest in the property:

If the mortgagee or other purchaser bids in the property for less than its value, such mortgagee or purchaser may be *deprived of all anticipated profit by redemption.*

Walker Bank, when it caused the clerk to issue an Execution on February 12, 1973, was well aware that its mortgage (or Trust Deed) had spent its force. If Walker Bank had been proceeding, or had intended to proceed, in the continuation of its specific mortgage lien, it would have obtained from the Court an "Order of Sale" or a "Special Execution" as required by Section 78-37-1 UCA 1953, which provides, in the last sentence:

* * * and a Special Execution or Order of Sale shall be issued for that purpose.

And a "Special Execution" is an Order of Sale directed to specifically described property (*Words and Phrases*, Vol. 39A, p. 211).

Walker Bank was cautious to avoid any attempt to revive or resurrect its mortgage (R. 25, 26).

The Federal Circuit Court case of *Barry vs. Harnesberger* (CCA 7th 148 F. 346) held in a mortgage foreclosure case under a statute of Illinois that the lien of a

deficiency could not attach until the property was sold, that the redemption having "destroyed the lien of the mortgage" the lien of the *deficiency judgment* "could only attach to the property of the original mortgagors, whose interest in the land was terminated, of course, with their conveyance to the appellants".

As all these authorities declare, the lien must attach to property in the name of the judgment debtor at a time when he holds title to the subject property. This condition never did obtain in the Walker Bank deficiency judgment proceedings under which Moessers claim to have acquired their interests.

POINT II

THE TRIAL COURT CORRECTLY RULED THAT NEITHER SPAULDING'S REDEMPTION NOR THE THEORY OF CONTINUATION OF WALKER BANK'S LIEN GAVE THE SHERIFF ANYTHING TO SELL TO MOESSER.

Since the several points stated by Appellant are all effectively disposed of if this Court follows the rule well established by the foregoing decisions, we have elected to treat all four of those points subordinately within this Point II, and as sub-headings (A) through (D).

(A) THE FORECLOSURE PROCEEDINGS OF WALKER BANK DID NOT DISCHARGE ANY RIGHTS OF CLAWSON IN THE PROPERTY.

This misapprehension pervasive throughout Defendants' brief is that Clawson was a "junior lienholder" or in some way a lien claimant having an encumbrance or

claim on the title subordinate to Walker Bank. This is simply contrary to the facts: Clawson was the owner of the land; subject only to the lien of Walker Bank's Trust Deed. (See table at page 6).

That lien was subject to satisfaction by Clawson, Spaulding, Mid-Continent, or by anyone else who may have had an interest in the land — and in any way that mortgages, trust deeds, or other liens may be discharged. One way is for the mortgage to be foreclosed and the property sold and thereafter redeemed from sale (*Flanders vs. Aumack*, 32 Ore. 19, 51 P 447). When a party has foreclosed a mortgage and had the property once sold to satisfy it, he has obtained all he contracted for (*Ulrich vs. Lincoln Realty Co.*, 175 P2d 149). A redemption will never reinstate a specific mortgage lien (*Flanders vs. Aumack*, *supra*). Clawson and Walker Bank were never competing interests. One had title, the other had a mortgage.

Walker Bank could only have a general execution after the mortgage was totally expired. Under any other rule it could have no right to pursue personal property, supplemental proceedings, or anything else, until the second, or third, or fourth mortgage foreclosure sales were held. We submit Walker Bank had this well in mind and elected, correctly and inevitably, to claim by general execution rather than by another Order of Sale.

(B) THE REDEMPTION BY C. H. SPAULDING, ALTHOUGH VALID, COULD NOT REVIVE ANY INTEREST IN HIMSELF SINCE HE HAD NO INTEREST IN THE PROPERTY.

When Spaulding redeemed he did so as one permitted by law to do so. Rule 69(f)(1) says the judgment debtor may redeem. One can only speculate how he intended to eliminate Clawson's interests; but it is certain that Clawson held the title and that was a problem Spaulding did not solve.

However — and this is particularly significant from the standpoint not only of this case but also as a general precedent — the Spaulding redemption made it *impossible*, as well as unnecessary, for anyone else to redeem. What Defendants are saying is that by Spaulding's redemption Clawson was precluded from protecting his title. That is equivalent to saying that a person who wished to pay his taxes to obtain the benefit of protecting himself against adverse possession could not do so even though he tendered the payment well in advance of the delinquency date if someone else had paid those taxes.

Spaulding's redemption made it impossible *and* unnecessary that Clawson redeem.

A redemption by one (Spaulding in this case) is a redemption for all who may be interested in the title.

The case cited on pages 12 and 13 of Appellants' brief further illustrates the necessity to follow local statutes on foreclosure and redemption and local decisions which interpret those statutes. The revealing language in the McLean case is this:

* * * It thus appears that the *statute* and decision law of Iowa recognizes an equity in the mortgagor (who has lost title).

Undoubtedly Iowa has a statute which justifies such a conclusion. Utah, as we have pointed out hereinabove, clearly does not. In fact, Utah's statute compels a result directly to the contrary.

(C) WALKER BANK WAS NOT A JUNIOR LIEN-HOLDER — NO LIEN COULD ATTACH BECAUSE THIS DEFICIENCY JUDGMENT WAS NOT AGAINST CLAWSON.

To the extent Defendants acknowledge that Walker Bank had a deficiency judgment which took effect January 22, 1970 we are in agreement. But this judgment did not, and could not, operate as a lien on this property.

As all the records show, and as the Defendants admit, Clawson was not personally bound by the judgment (R. 46-48); in fact, the judgment does not even recite that his interest is subordinate to the Walker Bank foreclosure (R. 15-18). Although we recognize that Clawson was subject to a sale of the property one time, and one time only, that sale was held and the mortgage (or trust deed) was extinguished as a lien on the land.

On October 25, 1968, Clawson, who was then the owner of the property (his Sheriff's Deed was recorded October 20, 1968) stipulated with Walker Bank that the Trust Deed had the higher priority. The stipulation in full verbatim, reads:

Come now the Defendants James G. Clawson and Joan M. Clawson and by and through their attorney, Tex R. Olsen, and hereby stipulate that the Plaintiffs' Trust Deed has priority over any right,

title, or interest of said Defendants in said property and the interest of the Defendants was acquired subsequent to the filing of said interest by the Plaintiff.

Beyond saying that the Walker Bank Trust Deed was of record when Clawson received title, this stipulation says and does absolutely nothing. It permits Walker Bank to proceed to sell the property — but once and only once, as the cases unanimously hold, and if it can be redeemed from sale then the trust deed (mortgage) is exhausted.

In fact, under all those cases cited above and even those cited by the Defendants, even if Clawson had acquired title from Spaulding *after* the decree of foreclosure and *after* the sale, the title would have stayed with Clawson and a redemption would have extricated it from the trust deed.

The stipulation does not have the effect of enlarging the rights of Walker Bank under its trust deed, nor of writing a new contract between the parties. It does no more than acknowledge existing, undisputed facts and permit the foreclosure action to proceed without controversy concerning dates.

In short, the stipulation does not repeal existing law.

(D) CLAWSON'S INTERESTS WERE NOT FORECLOSED BY ANY WALKER BANK PROCEEDINGS.

The cases (and text authority) cited by Moessers at pages 14 through 17 of their brief to the effect that a redemption revives the mortgage are not under statutes

like ours. New York is the only jurisdiction cited, and the principal holding begins with the language "by the very terms of *this enactment* * * *" meaning that a New York statute permits survival. The same is true of the *Osborn on Mortgages* citation, which begins "the cases holding * * *" and ending with the New York citation.

Defendants' Points III and IV may be dispositively answered by the fact that Clawson was not a "junior lienholder". Clawson owned title. He had purchased it four months before Walker Bank began foreclosure proceedings and took a deed from the Sheriff before the stipulation was entered into.

It would be repetitious to cite the many holdings which say a redemption removes the effect of a sale and title stays where it was or would have been had the sale not taken place.

A mortgage foreclosure could defeat the title, if unredeemed from a sale, but a redemption occurred so it is unproductive to discuss alteration of the chain of title when a sale is vitiated by redemption by anyone.

CONCLUSION

We respectfully conclude this brief with the summary that Utah's Statutes, like Montana's, Washington's, Nevada's, and other states', destroy the lien of a mortgage once the mortgage has operated to sell the property.

Utah, as well as her sister states, borrowed the controlling statute from California which had so ruled in

1878. All other states have accepted California's rule not only because the legislature is presumed to have borrowed California Law impressed with judicial interpretation upon it, but also because those judicial interpretations are sound, provide just economic results and, equally important, observe the law of contracts between parties.

For those reasons the Trial Court should be affirmed.

Respectfully submitted,

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