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Clyde Harvey v. Owen L. Sanders, Kenneth E. Coombs, Lunn H. Coombs, Grow West No. 2, Huntington Park, Inc. v. Albert W. Horman, A. Horman & CO. : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CLYDE E. HARVEY,
Plaintiff,

vs.

OWEN L. SANDERS, et al.,
Defendants,

KENNETH E. COOMBS, LYNN H. COOMBS, GROW WEST NO. 2, and HUNTINGTON PARK, INC.,
Third-Party Plaintiffs-Appellants,

vs.

ALBERT W. HORMAN, d/b/a A. HORMAN & CO.,
Third-Party Defendant-Respondent.

Case No.
13731

APPELLANTS' BRIEF

Appeal from the Third Judicial District Court of Salt Lake County, Honorable G. Hal Taylor, Judge

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NATURE OF THE CASE

Plaintiff sued to foreclose a Uniform Real Estate Contract as a note and mortgage. One of the defendant "mortgagors" purchased the property at Sheriff's sale and later deeded the property to respondent. Appellant joined respondent in a third-party action to have his deed

declared null and void because of the prior recorded interests of appellant in the property.

DISPOSITION IN THE LOWER COURT

Upon resondent's motion to dismiss the third-party complaint, prior to the filing of any answer or other pleading or the taking of any evidence, the lower court considered the motion as one for summary judgment and granted summary judgment dismissing the third-party complaint with prejudice.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the summary judgment dismissing their third-party complaint reversed requiring respondent to file an answer thus bringing the case to issue on the merits or, in the alternative, allowing appellants to file an amended third-party complaint alleging actual notice to respondent of appellants' interest in the property.

STATEMENT OF FACTS

On May 1, 1959, Harold S. Armstrong and his wife executed a Uniform Real Etate Contract (hereinafter Contract "A") to sell certain property in Salt Lake County to Owen L. Sanders (R. 10-11). This contract was recorded in the Salt Lake County Recorder's Office on February 7, 1964. Title to the property and the sellers' interest in Contract "A" was conveyed and assigned to Fred A. Newberger and his wife on January 31, 1968,

and further conveyed and assigned by the Newbergers to Clyde E. Harvey and his wife, the plaintiffs in this action, on March 4, 1968. The buyer's interest in Contract "A" was assigned by Sanders to Beehive Investment Company on June 30, 1959. Beehive then entered into a separate Uniform Real Estate Contract (hereinafter Contract "B") to sell the same property, on different terms, to Kenneth E. Coombs and Lynn H. Coombs, the third-party plaintiffs and appellants in this action, on February 28, 1962. Contract "B" was also recorded in the Salt Lake County Recorder's Office on February 7, 1964 (R. 47). Subsequently, on June 29, 1967, the buyer's interest in Contract "A" and the seller's interest in Contract "B" were assigned by Beehive to Intermountain Capital Corporation (R. 45-48, 65-68).

There were other assignments and transactions concerning this property not relevant to this appeal. The results of all of the above transactions left Harveys holding title to the property subject to Contract "A", by which Harveys were selling the property to Intermountain Capital Corporation, and further subject to Contract "B", by which Intermountain Capital Corporation was reselling the property to the Coombs.

Intermountain failed to make the payments due under Contract "A" and Harveys declared the balance owing to be due and payable, elected to treat the contract as a note and mortgage and sued to foreclose (R. 1-15). Intermountain and the Coombs, as well as others, were named as defendants. Intermountain filed a cross-com

plaint against the Coombs alleging a default under Contract "B" and praying for the court to adjudge Intermountain "released from all obligations in law and equity to convey said property" to the Coombs, that all payments made by the Coombs be forfeited as liquidated damages for non-performance of the contract, and that, "if and upon plaintiffs herein being satisfied," Intermountain "be permitted to re-enter and take possession of said premises" (R. 32). The Coombs filed an answer to the cross-complaint denying any default under Contract "B", raising some affirmative defenses and claiming that Intermountain was "obligated to provide good title to the property to these defendants," had defaulted in its payments under Contract "A", which was therefore being foreclosed, and was therefore unable to provide good title to the property to these defendants (R. 34-36).

On July 3, 1968, pursuant to plaintiff's motion for summary judgment, a Decree of Foreclosure was entered by which judgment for the balance due was entered against Intermountain and in favor of Harveys, Contract "A" was foreclosed as a mortgage, and the property ordered sold at Sheriff's sale to satisfy the judgment (R. 59-63). The cross-complaint of Intermountain against the Coombs was not disposed of because it involved issues of fact which were in dispute. The decree provided, however, that the interest of the defendants, including the Coombs, not be barred and foreclosed until "after the expiration of the period of redemption as provided by law" (R. 61).

The Sheriff's sale was held on August 6, 1968, and the property was sold by the Sheriff to Intermountain, the defendant against whom the judgment was entered (R. 83). Since that time Intermountain has not taken any further action to have the court consider its claims set forth in its cross-complaint against the Coombs and those claims remain undisposed of by the court. In July of 1969 the Coombs were informed that Intermountain did not recognize any obligation to the Coombs under Contract "B". Fearing that Intermountain might attempt to dispose of the property without recognizing their interests, the Coombs caused a Notice of Lis Pendens to be filed with the Salt Lake County Recorder, on July 30, 1969, giving notice of the pending cross-claims between Intermountain and the Coombs and of the interest of the Coombs in the property (R. 98, 100). In spite of the recorded Notice of Lis Pendens, and in spite of the recorded Contract "B" between Intermountain and the Coombs (R. 47), Intermountain cnnveyed the property to A. Horman and Company, the third-party defendant herein, by a warranty deed bearing the date of July 14, 1969, but not recorded until August 7, 1969 (R. 98, 101).

Thereafter, on February 22, 1974, the Coombs, after motion and order by the court, filed a third-party complaint against Albert W. Horman, d/b/a A. Horman and Company, alleging the above facts and that the cross-claims between Intermountain and the Coombs had not been determined, and praying that Intermountain be

ordered to convey title to the property to the Coombs, upon determination and payment of the balance due under Contract "B", and that the warranty deed to Horman be declared null and void (R. 97-102). Horman filed a motion to dismiss the third-party complaint claiming only that it "fails to state a claim on which relief can be granted." At the hearing on the motion to dismiss the lower court, on its own initiative, considered the motion as a motion for summary judgment and continued the hearing for two weeks, at which time the Coombs would be allowed to present additional matter pertinent to a motion for summary judgment (R. 121, 122). The Coombs' attorney strenuously objected to this procedure but filed an affidavit indicating that Intermountain had received and accepted substantial payments under Contract "B" after the Sheriff's sale in August, 1968 and both prior and subsequent to the deed to Horman in 1969 (R. 123). The court, nevertheless, entered summary judgment dismissing the third-party complaint with prejudice (R. 139).

ARGUMENT

Appellants contend that the lower court erred procedurally in dismissing the third-party complaint, in treating respondents' motion to dismiss as a motion for summary judgment, and in failing to allow appellants to amend their third-party complaint. Appellants further contend that the lower court ignored the substantive law as to the effect of prior recorded interests and the effect of purchase at a Sheriff's sale by the "mortgagor".

POINT I.

THE LOWER COURT'S TREATMENT OF RESPONDENT'S MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT WAS CONTRARY TO THE RULES OF CIVIL PROCEDURE BECAUSE NO INFORMATION OUTSIDE THE PLEADINGS WAS PRESENTED AND GENUINE ISSUES OF MATERIAL FACT REMAIN UNRESOLVED.

Horman's motion to dismiss was grounded upon the sole contention that the third-party complaint "fails to state a claim on which relief can be granted." This motion assumes the truth of all allegations of fact in the third-party complaint and calls only for an examination of the complaint to determine if it states a cause of action. The motion should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. *Christensen* v. *Lelis Automatic Transmission Service, Inc.*, 24 U. 2d 165, 467 P. 2d 605 (1970).

Rule 12 (b) of the Utah Rules of Civil Procedure does provide that on a motion to dismiss for failure to state a claim upon which relief can be granted, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to pre-

sent all material made pertinent to such a motion by Rule 56." However, neither party presented any matters outside the pleading to the court. Yet, the court, on its own, told the third-party plaintiff to present its evidence within two weeks or a summary judgment would be granted! This was prior to the filing of an answer, prior to the raising of any issues and prior to any opportunity for discovery. This procedure would require a party to be completely ready for trial at the time he files his complaint!

This court has recently held this procedure to be reversible error. In *Hill* v. *Grand Central, Inc.*, 25 U. 2d 121, 477 P. 2d 150 (1970), the plaintiff filed a complaint for libel alleging malice on the part of defendant. The defendant, without answering, moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The court denied the motion but gave the plaintiff thirty days to produce evidence of malice and stated that, upon plaintiff's failure to do so, summary judgment would be granted. The plaintiff filed an affidavit and served interrogatories and the defendant filed a motion for summary judgment, which was granted by the court. On appeal this court reversed stating:

> ". . . we do not think it is proper for a court to require a plaintiff to state what proof he will produce on an issue which has not even been raised.
>
> "True it is that when a motion to dismiss is accompanied by affidavits it may be treated

as a motion for summary judgment, *yet the court should not on his own initiative* try to convert a motion for dismissal into one for summary judgment. He has no more right to ask the plaintiff how he will establish his claim than he has to require the defendant to state what its defense will be. It would have been highly improper for the court, on the motion to dismiss, to have given the defendant 30 days to present proof as to the truth of the alleged statement or as to the lack of malice. (Emphasis supplied.)

. . . .

"Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. If there be any such disputed issues of fact, they cannot be resolved by summary judgment even when the *parties* properly bring the motion before the court." (Emphasis in original.)

The holding in *Hill* should dispose of the case now before the court without further argument. It could hardly be more in point. Based upon the facts alleged in appellants' third-party complaint, which must be accepted as true at this stage of the proceedings, the legal sufficiency of appellants' cause of action will be established in Points II and III.

POINT II.

THE PURCHASE AT THE SHERIFF'S SALE BY INTERMOUNTAIN CAPITAL CORPO-

RATION TERMINATED THE FORECLOSURE ACTION AND LEFT ALL PARTIES, EXCEPT THE "MORTGAGEE," WHERE THEY WERE PRIOR TO THE FORECLOSURE ACTION. THE CONTRACT OF INTERMOUNTAIN TO CONVEY TITLE TO THE PROPERTY TO THE COOMBS IS THEREFORE STILL IN FORCE.

When the Harveys sued to foreclose Contract "A" as a note and mortgage, the law with respect to foreclosure of mortgages became applicable. The Harveys became the "mortgagees" and Intermountain became the "mortgagor" and the judgment debtor in the terms of the applicable statutes and rules. The Coombs, not being personally liable to the Harveys under Contract "A", but having a recorded interest and being a necessary party to the action, stood in the position of a second mortgagee or a judgment creditor. Section 78-37-1, U. C. A., provides that ". . . judgment shall be given . . . directing the sheriff to proceed and sell the (mortgaged property) according to the provisions of law relating to sales on execution . . ." Section 78-37-6, U. C. A., provides that "sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in cases of sales under executions generally." The provisions of Rule 69(e) and (f), Utah Rules of Civil Procedure, are therefore applicable to the Sheriff's sale of the property involved in this proceeding.

There is no provision in the rule which directly states

the effect of the purchase at the Sheriff's sale by the mortgagor. However, the only relevant provisions of the rule are as follows:

> Rule 69(e)(6)
>
> "Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: . . . (4) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser . . . . The real property sold shall be subject to redemption . . . ."
>
> Rule 69(f)(5)
>
> ". . . . If the judgment debtor redeems, the effect of the sale is terminated and he is restored to his estate . . . ."

Appellants have searched unsuccessfully for a case in the State of Utah dealing with the effect of a mortgagor's purchase at a Sheriff's sale. However, the case of *Tanner* v. *Lawler*, 6 U. 2d 84, 305 P. 2d 882 (1957), *aff'd on rehearing*, 6 U. 2d 268, 311 P. 2d 791 (1957), clearly states the effect of a redemption by a mortgagor. The court on rehearing stated:

> "Under the above provisions of Rule 69(f)(5) had Reichert redeemed from the Sheriff's sale as a judgment debtor and as a successor of the interest of the Lawlers, the effect of the foreclosure sale would have terminated. In that case he would have been the owner of the prop-

> erty free from the mortgage which had been foreclosed and paid off by the sale and redemption, *but the subsequent liens and other interests in the property,* including the Clowes judgment lien, *would have been restored the same as if no foreclosure sale had occurred, and the rights of subsequent redemptioners would have been terminated."* (Emphasis supplied.)

In the *Tanner* case the mortgagee was the purchaser at the Sheriff's sale and the mortgagor deliberately did not redeem by paying his money to the Sheriff, as required by Rule 69 (f) (2), U. R. C. P. Instead he took an assignment of the certificate of sale from the mortgagee and paid a negotiated price therefor directly to the mortgagee.

It should be remembered that the "mortgagor," Intermountain, did not redeem the property from the purchaser at the Sheriff's sale. It submitted the highest bid at the sale and therefore was the purchaser. No redemption, as such was involved. What then is the effect upon the foreclosure action and upon all other parties to the action claiming liens or interests in the property? Logic and fairness suggest that the effect should be the same as when the mortgagor or judgment debtor redeems, that is, "the sale is terminated and he is restored to his estate," along with "the subsequent liens and other interests in the property . . . the same as if no foreclosure sale had occurred." Rule 69(f)(5) and *Tanner* v. *Lawler*, supra. Otherwise, a judgment debtor could bar the claims of all his creditors holding junior liens against his prop-

erty by allowing the first mortgage-holder to foreclose and purchase the property at the Sheriff's sale.

One searches almost in vain for cases which deal directly with this question — perhaps because the answer is so obvious and is rarely questioned. However, if one goes back far enough, the cases state the law to be elementary that the purchase at a mortgage foreclosure sale by the mortgagor or judgment debtor terminates the effect of the foreclosure and reinstates all subsequent liens and other interests in the property. One of the most recent cases dealing with the question is *Gerken* v. *Davidson Grocery Co.*, 50 Idaho 315, 296 Pac. 192 (1931). In that case Gerken took title to property and assumed three mortgages thereon. Later the second mortgage foreclosed and Gerken, the mortgagor, purchased the property at the foreclosure sale. Still later the third mortgage foreclosed and purchased the property at the sale. Gerken's wife sued to quiet title against the third mortgagee claiming that since the third mortgagee failed to redeem in the first foreclosure action, its rights were barred. The court held otherwise, stating:

> "After a foreclosure sale, subsequent equities are binding on the purchaser's title where the mortgagor himself becomes the purchaser and the equities were placed there by himself. 42 C.J. 256 Par. 1905; Jones on Mortgages (8th Ed.) vol. 3, Par. 2429. Having constructive notice of appellants' mortgage at the time he took the quitclaim deed, and not having contested the Davidson Grocery Com-

> pany's mortgage in its foreclosure, to which proceeding he was a party, Gerken could no more have evaded that subsequent equity than could his grantors; he could not keep the land and at the same time gainsay the burden. In effect, all he had done was to clear the land of the Heiss mortgage; appellants' mortgage remained unaffected."

The *Gerken* case cited *Landau* v. *Cottrill*, 159 Mo. 308, 60 S. W. 64 (1900), in which Cottrill took title subject to a trust deed and then purchased the property at a Sheriff's sale upon foreclosure of a mechanics lien. The court held the mechanics lien to be junior to the trust deed but stated that even if the mechanics lien had priority, purchase at the sale by Cottrill would not bar the trust deed. In *Beitel* v. *Dobbin*, 44 S. W. 299 (Tex. Civ. App. 1898), one Hoefling took title to property subject to two mortgages. He purchased the property at the Sheriff's sale upon foreclosure of the first mortgage. The sale was held to be invalid because it was held in the wrong county but the court stated:

> "It is elementary that a purchaser of property, who agrees, as a part of the consideration, to pay off two mortgages upon it, cannot suffer a sale to take place under the prior one, and, without discharging the junior mortgage, claim title against it. Jones, Mortg. § 740; *Buke v. Abbott*, (Ind. Sup.) 1 N.E. 485; *Conner v. How*, (Minn.) 29 N.W. 316; *Allison v. Armstrong*, 9 N.W. 806; *Maxfield v. Willey*, (Mich.) 9 N.W. 271. Under this prin-

> ciple, Hoefling could not, were the sale under the deed of trust valid, avoid his agreement to discharge appellants' mortgage."

There are numerous cases which hold that the reacquisition of title by a mortgagor, after foreclosure of a first mortgage, inures to the benefit of junior mortgageholders whether the property is purchased by the mortgagor at the foreclosure sale or later acquired by the mortgagor from the purchaser at the sale. See Annotation, *Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under a second mortgage to which the property was subject before the foreclosure*, 111 A. L. R. 1285. Some of these cases are based upon estoppel, some are based upon covenants in the mortgage against encumbrances, and some are based upon statutes providing that title acquired after the execution of the mortgage inures to the benefit of the mortgagee.

All three of these grounds exist in the instant case. Fairness and equity require that a mortgagor not be allowed to avoid his obligation to junior lien-holders by purchasing at the foreclosure sale. Contract "B" contains covenants by Intermountain against encumbrances and guarantees the delivery of good title. By the terms of Contract "B" Intermountain was obligated to buy at the Sheriff's sale, or redeem, to protect the title which it had agreed to convey to the Coombs (R. 12-13, Par. 19). And Utah has an after-acquired title statute, § 57-1-10, U. C. A.,

which applies to "every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered, or assigned . . ." § 57-1-1, U. C. A. This language certainly covers Contract "B" and therefore, by statute, the acquisition of title to the property by Intermountain at the foreclosure sale inures to the benefit of the Coombs.

One further reason exists for appellants' contention. If the interests of the Coombs were not reinstated by Intermountain's purchase at the Sheriff's sale, they would be barred absolutely except for redemption rights. In order to redeem from Intermountain the Coombs would have been required to pay the amount owed by Intermountain to the Harveys, plus interest, costs and attorneys fees, plus the entire amount due from the Coombs to Intermountain under Contract "B", Rule 69(f)(3), U. R. C. P., even though it was not yet payable under the terms of Contract "B" and even though the amount payable is in dispute since it is the subject of the cross-complaint filed by Intermountain (R. 31). The Coombs would thereby be forced to give up their claims, which are properly in litigation, and forego the payment schedule in Contract "B", and immediately pay any amount demanded by Intermountain. That is why the law provides for termination of the foreclosure upon redemption, or direct purchase, by the debtor, thereby terminating the redemption rights of others. Redemption by the mortgagor, or purchase at the sale directly by the mortgagor, places all of these parties back where they were.

The only change is that the foreclosed senior mortgage has been satisfied by payment at the sale.

POINT III.

HORMAN TOOK TITLE TO THE PROPERTY SUBJECT TO THE RIGHTS OF ALL PARTIES WITH RECORDED INTERESTS. THE RECORDED CONTRACT "B" AND THE RECORDED LIS PENDENS BOTH GAVE NOTICE TO HORMAN OF THE INTEREST OF THE COOMBS.

The contract between Intermountain and the Coombs, Contract "B", was recorded in the Salt Lake County Recorder's Office on February 7, 1964 (R. 47). The deed from Intermountain to Horman was not recorded until August 7, 1969 (R. 98, 101). The law as to priority of recorded documents is therefore applicable here. Section 57-1-6, U. C. A., provides:

> "Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be . . . recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such . . . record, and as to all other persons who have had actual notice . . . ."

Section 57-3-2, U. C. A., provides:

> "Every conveyance, or instrument in writing affecting real estate . . . shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice."

And Section 57-3-3, U. C. A., provides:

> "Every conveyance of real estate hereafter made, which shall not be recorded as provided in this title, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

That a recorded notice of contract (the contract itself was not recorded) takes priority over a subsequently recorded deed is the holding of the recent case of *Wilson* v. *Schneiter's Riverside Golf Course*, ... U. 2d ....., 523 P. 2d 1226 (1974). There, two contracts contained overlapping descriptions. The first contract was not recorded but a notice of the later contract was recorded prior to the deed given pursuant to the first contract. The court stated:

> "Plaintiffs having recorded their notice of purchase prior to the recording of the defendant's deed the defendant becomes the subsequent purchaser and is deemed to take with notice of the plaintiffs' interest."

Under these authorities Horman, in the instant case, clearly had notice of the Coombs' interest in the property and took his deed subject to their interest. Furthermore, the notice of lis pendens was recorded on July 30, 1969, eight days prior to the recording of Horman's deed. The notice of lis pendens was recorded, not because it was required to be recorded under the statutes, but because it was feared that someone might overlook the recorded Contract "B" because of the foreclosure of Contract "A" and not understand the effect of the purchase at the Sheriff's sale by Intermountain, as set forth in Point II above. That notice of lis pendens expressly referred to the pending cross-claims between Intermountain and the Coombs and stated that the interest of the Coombs "in said property were reinstated by the purchase of said property at Sheriff's sale by Intermountain Capital Corporation of Utah" (R. 100).

Such a notice cannot be ignored by Horman, or any other party dealing with the property. In *Crompton* v. *Jenson*, 78 Utah 55, 1 P. 2d 242 (1931), it is stated that:

> "One who deals with real property is charged with notice of what is shown by the records of the county recorder of the county in which the property is situated."

The doctrine of lis pendens is a common law concept providing that ". . . whoever purchases or acquires an interest in property that is involved in pending litigation stands in the same position as his vendor, is charged with

notice of the rights of his vendor's antagonist, and takes the property subject to whatever judgment may be rendered in the litigation. In other words, a person who deals with property while it is in litigation does so at his peril." 51 Am. Jur. 2d Lis Pendens § 1. Most states, including Utah, have enacted statutes providing for the filing of a notice of pendency of an action, since at common law the filing of a notice was not required. The Utah statute is found in § 78-40-2, U. C. A.:

> "If (sic) any action affecting the title to, or the right of possession of real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, *or at any time afterward,* may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names." (Emphasis supplied)

This doctrine, as it prevails in the State of Utah, has been further explained in *Dupee* v. *Salt Lake Valley Ioan & Trust Co.*, 20 Utah 103, 57 Pac. 845, 847 (1899), which

holds that a purchaser at a foreclosure sale must take notice of the terms of the decree pursuant to which the sale occurs. The court stated:

> "When the foreclosure suit was commenced a lis pendens was filed. The defendants and their attorneys knew of and had actual notice of the pendency of the action, and the subsequent rendition of the decree, and that the mortgage lien was still upon the land. The object of lis pendens is to keep the subject of the suit, or res, within the power and control of the court until the judgment or decree shall be entered so that courts can give effect to their judgments, and that the public shall have notice of the pendency of the action. Lis pendens may be defined to be the jurisditcion, power, or control which courts acquire over property involved in a suit pending the continuance of the action, and until its final judgment therein. This constructive notice of filing the complaint as required by the statute is equivalent to actual notice."

These authorities should make it clear that Horman took his deed subject to the interest of the Coombs, notice of which was on file in the County Recorder's office prior to the recording of his deed. The fact that Horman's deed bears the date of July 14, 1969, a date prior to the recording of the lis pendens, does not change the situation. The recording statutes quoted above are designed to give priority to the party who first records his document and make a prior unrecorded conveyance void as

to innocent third parties who first record their own document. See § 57-3-3, U. C. A., supra, and *Wilson* v. *Schneiter's Riversidle Golf Course*, supra, where the earlier unrecorded contract was void as to the buyer under a later contract, notice of which was recorded prior to the recording of the deed given pursuant to the earlier contract. There is also substantial other authority for the rule that deeds and instruments made prior to a notice of lis pendens, but not recorded until after the notice of lis pendens, are subject to the notice of lis pendens. *Jones* v. *Jones*, 249 Miss. 322, 161 So. 2d 640 (1964); *Munger* v. *Beard*, 79 Neb. 764, 113 N. W. 214 (1907), upholding constitutionality of a statute imposing effects of lis pendens on persons holding unrecorded interests; *Collingwood* v. *Brown*, 106 N. C. 362, 10 S. E. 868 (1890), which holds an unrecorded interest subject to a suit even though no notice of lis pendens was filed as required by statute because "all persons are supposed to be attentive to what passes in courts of justice" in the county where the property is situated. That court further stated that if "owners will omit to record their deeds, and will keep their titles concealed, hoping thereby to bring others into difficulty and peril, it is time they were made to understand that the blow intended for the title of another may recoil upon, and break and destroy, their own."

The recorded Contract "B" and the recorded lis pendens both adequately notified Horman of the interest and claims of the Coombs. True, those claims are in litigation, having been placed in litigation by Horman's

grantor, Intermountain. But the Coombs deserve to have those claims adjudicated before their interest in the property is defeated. Their third-party complaint seeks only to join Horman as a party and make his deed to the property subject to the decree of the court as to the merits of the claims between Intermountain and the Coombs.

POINT IV.

THE LOWER COURT ERRED IN DISMISSING THE THIRD-PARTY COMPLAINT WITH PREJUDICE. APPELLANTS SHOULD HAVE BEEN ALLOWED TO AMEND THEIR COMPLAINT TO ALLEGE ACTUAL NOTICE TO HORMAN OF THE INTEREST AND CLAIMS OF THE COOMBS.

No opportunity was afforded to appellants to amend the third-party complaint, as is the usual practice. The lower court dismissed the complaint with prejudice. Appellants contend that the complaint was sufficient as it stands, and rely fully upon their contentions under Points I, II & III, above, but, at the very least, an amendment should have been permitted to allege the actual knowledge of Horman of the interest and claims of the Coombs. The statutes and cases cited above make the constructive notice of the recorded Contract "B" and the recorded lis pendens sufficient to subject Horman's deed to the Coombs' interest. However, there is additional authority

which requires a party with actual notice of an adverse claim to take subject to that claim.

Section 57-1-6, U. C. A., supra, expressly makes an instrument affecting real estate binding upon "persons who have had actual notice," and § 57-3-3, U. C. A., supra, invalidates prior unrecorded interests only as against subsequent purchasers "in good faith." In *Whittaker* v. *Greenwood*, 17 Utah 33, 53 Pac. 736 (1898), the plaintiff contended that he was not bound by a decree in a previous action because no notice of lis pendens was filed. The court held otherwise and stated that under the lis pendens statute:

> ". . . notice of lis pendens may be filed with the county recorder. The object of this statute was to provide a mode for giving constructive notice which was formerly given by the commencement of the action itself. It does not in any way change the rule of law relating to actual notice of the pendency of the action, nor the effect of such actual notice upon parties dealing with or obtaining possession or title to the land in litigation. In this case it appears that . . . plaintiff . . . had actual notice, and was not in a position to object if the statutory notice had not been filed, the filing of which was intended only to give him the notice which he had already or afterwards acquired before purchase."

The position of this court in the *Whittaker* case was reaffirmed in *Meagher* v. *Equity Oil Company*, 5 U. 2d

196, 299 P. 2d 827 (1956). That a purchaser of land takes title subject to the claims of others of which he has notice was also the holding of *National Realty Sales* v. *Ewing*, 55 Utah 438, 186 Pac. 1103 (1920), where the court stated:

> ". . . a subsequent purchaser cannot be protected as a bona fide purchaser if he had actual or constructive notice of an unrecorded title, ownership, or interest in the property at any time before payment of the purchase price."

In addition the case of *Dupee* v. *Salt Lake Valley Loan & Trust Co.*, supra, relied upon the actual knowledge of the defendants as well as the constructive notice of a lis pendens in holding the defendants' title subject to the plaintiff's claim.

While the constructive notice of the recorded documents should be sufficient to subject Horman's deed to the interest of the Coombs, the Coombs should be allowed to plead and prove the actual knowledge of Horman which deprives him of "good faith" purchaser status. The law is clear that he is subject to all claims of which he has actual notice.

CONCLUSION

It should be clear from the statutes, cases and other authorities cited above that the lower court erred in entering summary judgment against the Coombs. The court's demand for proof, "or else," before an answer is filed and any issues raised was improper procedure under

the Utah Rules of Civil Procedure. The lower court further overlooked the law which provides that the purchase at Sheriff's sale by the mortgagor reinstates the claims and interests of all junior lien-holders. The lower court further overlooked the statutes and cases granting priority to recorded interests over those whose interests are later recorded and subjecting property purchasers to the interests of those whose claims are in litigation when notice thereof, either constructive or actual, has been given.

Therefore, this court should reverse the summary judgment entered below and order that the deed to Horman be subjected to the outcome of the pending litigation between Intermountain and the Coombs.

Respectfully submitted,

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