

1953

# Perry E. Burnham et al v. Albert E. Reid et al : Brief for Respondent

Utah Supreme Court

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LeGrand P. Backman; Backman, Backman and Clark; Attorneys for Respondents;

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IN THE

**SUPREME COURT**

OF THE

**STATE OF UTAH**

Perry E. Burnham and Bertha H.  
Burnham, his wife, and L. Earl  
Burnham and Gladys H. Burnham,  
his wife,

*Plaintiffs and Appellants,*

vs.

Albert E. Reid and Leah Reid, his  
wife, Clifton B. Layton and Jack  
B. Layton,

*Defendants and Respondents*

No. 7993

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**BRIEF FOR RESPONDENT**

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**FILED** LeGrand P. Backman  
JUL - 7 1953 for Backman, Backman and Clark,  
*Attorneys for Respondents*

**Clerk, Supreme Court, Utah**

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wife, Clifton B. Layton and Jack  
B. Layton,

*Defendants and Respondents*

No. 7993

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**BRIEF FOR RESPONDENT**

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**STATEMENT OF FACTS**

As all of the facts affecting this matter have not been set out in the brief of appellants, the respondent is compelled to make some repetition in the following statement.

On the 22nd day of November, 1946, an agreement was entered into by and between Cove Ranch Land and Livestock Company, a corporation as party of the first part, the Chipman Investment Company, a corporation, party of the second part, William Chipman, Alfonzo Chipman, Mae C. Cozzens and Royal Murdock, Executors and Trustees of the will and Estate of James Chipman, deceased, parties of the third part, and Clifton B. Layton, party of the fourth part, wherein the said Clifton B. Layton, party of the fourth part, purchased from the said parties of the first, second and third parts certain real property and personal property known as the Cove Ranch in Blaine County, State of Idaho for the sum of \$70,000.00 Said ranch consisted of 3,113.91 acres of land, all water and water rights of every nature and description appurtenant to said land and all improvements located thereon, and all shares of water in the By-Pass Water Association of Hailey, Idaho and the United States Taylor Grazing permits as described in said agreement, and also the Saw Tooth Association Grazing Stock consisting of 10 shares.

The purchase price of \$70,000.00 was to be paid as follows: \$20,000.00 cash on or before the 1st day of January, 1947; \$50,000.00 cash, together with 5 per cent interest per annum from August 1, 1946, within one year from January 21, 1947.

On July 29, 1946 which is prior to the date of the aforementioned agreement, a certain agreement entitled "Option to Purchase" by and between Ray Rosebraugh and A. E. Christensen as agents for the said First, Second and Third Parties in the above referred to agree-

ment and Clifton B. Layton for himself had been entered into to effect the said purchase and sale.

That on the 22nd day of November, 1946, the same date as the execution of the agreement for the purchase of the ranch, Clifton B. Layton and Lois Layton, his wife, made, executed and delivered to A. Edsel Christensen and Ray Rosebraugh, their certain promissory note in writing in the sum of \$10,000.00 and to secure the payment of said promissory note, also made, executed and delivered to A. Edsel Christensen and Ray Rosebraugh a certain mortgage on the real property known as the Cove Ranch, that said mortgage was recorded in the office of the County Recorder of Blaine County, Idaho in Book 155 of Mortgages, page 129. The note and the mortgage were intended to evidence an obligation on the part of the said Clifton B. Layton to pay compensation to the said A. Edsel Christensen and Ray Rosebraugh for the sale of the real estate as agents under the "Option to Purchase" above referred to.

To more fully explain this mortgage I refer to the Findings of Fact entered in the foreclosure suit by Judge D. H. Sutphen under date of October 17, 1949. (Tr. 45)

"At the time of the execution of said mortgage, the interest of the said Clifton Layton and Lois Layton in said property *was that of a purchaser thereof* evidenced by a written agreement executed and delivered on the 22 day of November, 1946, between the Cove Ranch Land & Livestock Company and others as vendors and the defendant Clifton B. Layton as purchaser, wherein the said Clifton B. Layton contracted to purchase said prop-



erty from said vendors and at said time *said contract was in good standing* and the said Clifton B. Layton and Lois Layton were in actual possession of said land. That at said time the said Clifton B. Layton and Lois Layton intended and had agreed to place a first mortgage on said land to pay the balance unpaid to the vendors in said agreement as is evidenced by a supplementary agreement to second mortgage, a copy of which marked Exhibit C is attached to the amended supplemental complaint and also attached to said mortgage in the case as an exhibit. That it was by reason of such supplementary agreement that said mortgage was designated a second mortgage. That the terms of said supplementary agreement to said second mortgage were, however, never carried out and the defendants Clifton B. Layton and Lois Layton did not execute the intended first mortgage on said premises."

At the instance and request of the Laytons, Perry E. Burnham advanced to the said Clifton B. Layton, as a temporary loan, the sum of \$10,000.00 with which to make the first payment on said contract and thereafter advanced the additional sum of \$7,000.00 with which to make the second payment thereon and advanced further sums of money from time to time in payment of taxes and other expenses; that approximately \$8,000.00 was paid on account of the purchase price by the sale and exchange of lands and on January 21, 1948, there remained unpaid the sum of \$46,500.00. That the said Perry E. Burnham and L. Earl Burnham at the request of Layton, paid to the vendors this sum and in order to secure the repayment of the moneys owed by the Laytons to the Burnhams, title to said Cove Ranch proper-

ties and to personal property located thereon, including livestock and machinery belonging to the Laytons, was placed in the names of the Burnhams as security holders, and not otherwise. The Laytons, however, continued in possession of said ranch properties and managed and operated the same. (Tr. 138)

On November 7, 1947, the said Clifton B. Layton executed and delivered to Jack Layton, his son, an assignment of his interest in said contract of purchase and the assignment was duly filed for record and recorded in the office of the County Recorder of Blaine County, Idaho in Book 149, page 233.

Thereafter, in May 1948, the Burnhams and Laytons negotiated the sale of the Cove Ranch properties, including livestock and equipment situated thereon, to Carl H. Randall, Edward Randall and Oriel Randall, for a total purchase price of \$140,000.00. The said Randalls entered into a written contract for the purchase of said "Cove Ranch" and personal property, from the said Perry E. Burnham and L. Earl Burnham, for said amount. Said contract was entered into by the said Burnhams as trustees for the Laytons and on their own behalf for the purpose of obtaining a repayment of all moneys due and owing Burnhams by the Laytons, in connection with the loans and advances made by them. At the time of the execution of said contract referred to with the said Randalls, the Burnhams accepted from the said Carl H. Randall, Edward Randall and Oriel Randall three promissory notes, each in the principal amount of \$25,000.00 to be secured by mortgages on certain real property, which said notes and the mort-

gages thereafter delivered were taken as a cash item in full payment of all obligations therefore and then owing by the Laytons to the Burnhams. (Tr. 138). Thereafter the Burnhams treated said notes and mortgages as their own personal property received as partial payment thereon cattle of the value of \$25,000.00, \$12,762.46 in cash from sale of crops produced in 1948 and upon their own initiative and without authority from the Laytons, compromised and settled the balance of said obligations prior to the time the same became due.

Notwithstanding the cancellation of the indebtedness owing by Laytons to the Burnhams by the acceptance of the notes and mortgages referred to in the preceding paragraph, the Burnhams thereafter exercised control over said Cove Ranch to the exclusion of the Laytons. However, Burnhams' right to the said property ceased at the time of the execution of said contract of sale with the Randalls. In connection with subsequent transactions, the Burnhams received from said ranch properties various sums of money which belonged to the Laytons, to-wit:

August 6, 1948—from sale of horses in 1948	\$ 266.60
April 6, 1949—James A. Baird (down payment on purchase of ranch)	5,000.00
October 31, 1949—From sale of crops produced in 1949.	3,874.86
September 12, 1950—From Albert E. Reid and others on final sale.	81,085.74
Total	\$89,277.20

On the 24th day of January, 1947, the said A. E. Christensen and Ray Rosebraugh instituted suit for judgment upon the said note from the said Clifton B. Layton and to foreclose the mortgage given to secure the said promissory note. After the institution of said suit, the said A. E. Christensen and Ray Rosebraugh assigned and transferred said note and mortgage to one, Walter Stewart and the said Walter Stewart filed an Amended and Supplemental Complaint for judgment upon said note and for the foreclosure of the mortgage and made the appellants in this action as well as Clifton B. Layton and his wife and Jack B. Layton and his wife, parties defendant to the suit.

Answers were made by the appellants herein to said Amended Complaint and by Clifton B. Layton and Jack Layton, the assignee of the interest of the said Clifton B. Layton. (Tr. 32-43)

On April 15, 1948 a purported notice of cancellation of agreement was executed by Perry E. Burnham and L. Earl Burnham addressed to Clifton B. Layton and his wife, Jack Layton and his wife, A. Edsel Christensen and Ray W. Rosebraugh purporting to cancel the agreement theretofore existing between Cove Ranch Land and Livestock Company, a corporation et al and the said Clifton B. Layton.

A trial of the issues made by the pleadings in the foreclosure suit was had in the District Court for Blaine County, Idaho and said Court made findings, drew conclusions and entered its Judgment and Decree in said matter. (Tr. 44-56)

The court found that "At the time of the execution of said mortgage the interest of the said Clifton Layton and Lois Layton in said property was that of a purchaser thereof."

"That the said Burnhams did not give the plaintiff in the foreclosure action or the said Christensen and Rosebraugh or any of them an opportunity to pay the balance unpaid on said contract of November 22, 1945, and did not give any of such persons advance notice of their intention to forfeit said contract and did not at any time tender to Christensen and Rosebraugh or the plaintiff or any of them a deed to the property described in said agreement of November 22, 1946, or any part or portion thereof." (Tr. 47)

The Honorable Judge of the District Court of the United States, for the District of Utah (Central Division) in his Findings of Fact and Conclusions of Law in the suit for accounting brought by the Laytons vs. Burnhams makes the following finding:

"The Plaintiff (Laytons) have at no time by an agreement with the Defendants (Burnhams) or otherwise, altered the fundamental security relationship which originally existed between the parties except that Plaintiffs, (Laytons) authorized the Defendants (Burnhams) to receive from the Randall Brothers \$75,000.00 in notes and mortgages as a cash item in payment of all obligations theretofore and then owing by Plaintiffs to Defendants, which agreement was fulfilled." (Tr. 140-141)

The Decree of Foreclosure gave judgment to Walter Stewart the plaintiff herein for the sum of \$10,000.00



and interest, attorneys' fees and costs decreed the judgment as a lien on the Cove Ranch property, which said lien was subject only to a prior claim in favor of Perry E. Burnham, etc. (Tr. 54-55)

Thereafter the District Court for Blaine County, Idaho, issued an order for the sale of the said Cove Ranch property pursuant to the Judgment and pursuant to said Order, said property was sold by Sheriff of Blaine County, Idaho at which sale the appellants, Perry E. Burnham and L. Earl Burnham became the purchasers and the said Sheriff issued to them a certificate of sale of said property. The certificate of sale being dated June 9, 1950. (Tr. 59-61)

The defendants Clifton B. Layton, Jack B. Layton and Grace Layton filed their motion for an Order fixing and determining the amounts necessary for redemption and pursuant to the said motion an Order was entered by the Court fixing the amount of redemption in the sum of \$80,542.90 with 6 per cent interest. (Tr. 63)

The Order of Sale signed by D. H. Sutphen, Judge, on May 3, 1950, reads as follows: "That the property therein described be sold by the Sheriff of Blaine County, Idaho, in one parcel and in the manner provided by law and the practice of this Court, subject to the statutory right of redemption which may exist in favor of the *defendants or either of them.*" (Tr. 58)

The respondents, Albert E. Reid and Leah Reid, his wife, are assignees of the rights of redemption claimed by Clifton B. Layton, Jack Layton and also hold Quit

Claims Deeds from the said Clifton B. Layton, Jack Layton and his wife of the property known as the Cove Ranch property.

On *September* 11, 1950 the respondents, Albert E. Reid and Leah Reid, his wife, paid to the appellants the sum of \$81,085.74 with an additional 6 per cent per annum interest on \$80,542.90 from September 9, 1950, which said sum included reimbursement to the appellants of the full amount of redemption fixed by the Court by the Order and also included reimbursement to the appellants for all water assessments, including water assessments paid by the appellants for the year 1950, and also included reimbursement for all taxes paid plus interest and reimbursement for the taxes of \$2,514.75 for the years 1948 and 1949 plus interest thereon. Therefore the appellants were made whole for every expenditure made by them and also received \$81,085.74 to which they were not entitled according to the Findings of Fact under the accounting action in the District Court of the United States, for the District of Utah. (Tr. 139)

Prior to making redemption as aforesaid, to-wit: on September 6, 1950 the appellants herein and the respondents Albert E. Reid and Leah Reid entered into a contract in writing in which among other things, it was agreed:

“(1) That of the landlord’s share of the crop upon the land being redeemed and which has been raised and will be harvested as, of and during the crop year of 1950 and being one-third of such landlord’s share shall be paid over to first parties,

the defendants herein (the Reids) free and clear of all claims by second parties; the remaining two thirds of such landlord's share of the 1950 crop shall be sold as the same is harvested and the proceeds placed in escrow with the Zion's Savings Bank and Trust Company of Salt Lake City, Utah, there to be held in escrow until declaratory judgment of other agreeable determination can be had as to the rights of first and second parties thereto; costs of the said escrow and of determination of the claims of the parties to the said two-thirds of the landlord's share of the 1950 crop to be apportioned to the parties and borne by them in the proportion that the parties may finally be determined to be entitled to the said crop; provided however, that it is agreed that between first and second parties two-thirds of all grain and one-half of all hay of the entire 1950 crop from the said Cove Ranch shall be considered the property of the 1950 tenants, Nek Stelma and family and provided further that the entire landlord's share of the crop from one hundred sixty acres of land upon the said Cove Ranch and described more particularly as:

The Northwest quarter of the Northwest quarter and a fraction of the Northeast quarter of the Northwest quarter; Tax Lot 146, Section 20, Township 1 North, Range 19 East, Boise Meridian.

Also, the North half of the Northwest quarter of Section 34, Township 1 North, Range 19 East, Boise Meridian, shall be the property of second parties free and clear from any claim of first parties and provided that in the event second parties ultimately receive the said two-third share of the crop, they will pay the full cost of alfalfa seed for the year 1950."



At the time of the sale of said property under the said judgment, one Nek Stelma was in possession of said property as a tenant upon a share crop basis under the terms of which one-third of all wheat grown upon the said property and one-half of the hay was to go to the landlord. At the time of the execution of the agreement hereinabove referred to between the appellants and the respondent, the wheat on the said property was either harvested or was matured and was being harvested and the hay was in stacks. Wheat was sold and one third of the landlord's share of the proceeds of the sale amounting to \$3,129.08 was paid to the respondents, and two-thirds of the landlord's share of said wheat sales was deposited in escrow with Zion's Savings Bank and Trust Company, Salt Lake City, Utah to await the determination of the ownership of the said money amounting to \$6,258.05.

The ownership of the 160 acres referred to in the agreement dated September 6, 1950 by and between the appellants and the respondents, is in dispute. The Findings of Fact of the District Court of the United States, for the District of Utah is to the effect that the appellants hold said 160 acres in trust for the Laytons, together with all water rights in connection therewith and that said property should be delivered by the Burnhams to the Laytons by appropriate instruments of transfers. (Tr. 140)

Eighty acres of the 160 acres was received in a trade for a portion of the original tract covered by the original agreement of November 22, 1946 between Cove Ranch Land and Livestock Company, a corporation at al as

Sellers and Clifton B. Layton, as Buyer and the other 80 acres has always been a part of the Cove Ranch property. For some unexplainable reason this 80 acre tract was not described under the mortgage given by Layton to Rosebraugh and Christensen and therefore the 160 acres in question was not covered under the foreclosure of the mortgage and was not described in the redemption certificate. The 160 acres, however, are contiguous to the Cove Ranch and have always been farmed with the remainder of the Cove Ranch property. During the 1951 season, 80 acres was leased by the respondents to R. D. Hess who had full possession of the same, planted, cultivated and harvested the crops grown on said tract and received the money for the sale of said crop. The other 80 acres was leased by the respondents with the balance of Cove Ranch to Nek Stelma, for the year 1951. The appellants in an amendment and supplement to their complaint prayed also for a declaratory judgment adjudging them to be owners and entitled to the wheat grown on the 160 acres during the year 1951.

The court concluded that the appellants were entitled to \$2,340.51 and the respondents Albert E. Reid and Leah Reid were entitled to \$3,917.54 of the escrowed funds with Zion's Savings Bank and Trust Company and further:

"That the court cannot terminate the controversy of the matter referred to in the supplemental to the Complaint and denied the motion for a declaratory judgment in reference to the facts set forth in the supplemental to the complaint."

## POINTS ARGUED BY RESPONDENTS

1. Full payment was made to appellants from other sources and therefore appellants are not entitled to any of the escrowed funds.

2. Upon redemption from the foreclosure of the mortgage the original rights of the Laytons which had been assigned to respondents Albert E. Reid and Leah Reid were restored freed of the lien for which the property was sold and as the indebtedness to the appellants had been completely discharged, the respondents are entitled to all title, right and interest in the property including the right in full to the landlord's share of the crops.

3. Laytons had the right to redemption and had assigned said right to respondents, Albert E. Reid and Leah Reid, his wife.

4. The purported notice of cancellation was of no effect.

5. Respondents Albert E. Reid and Leah Reid, his wife, were restored to the position of Clifton B. Layton at the time of the execution of his note and mortgage in favor of Rosebraugh and Christensen, with the indebtedness to the appellants paid in full and the Sellers under the contract paid in full and therefore respondents are entitled to the whole of said property and all benefits therefrom.

6. The action as filed was to obtain a declaratory judgment as to the ownership of the escrowed funds with Zion's Savings Bank and Trust Company and other matters extrinsic to the issues should not be introduced.

7. If the case is considered only as the ordinary foreclosure of mortgages, the appellants would be entitled only to the landlord's share of the crop for the period of time while they held the certificate of sale, that is from June 9, 1950 to September 11, 1950, the date that the respondents made payment and made redemption of the property.

8. As a dispute exists between the parties as to the ownership of the 160 acres of land upon which a 1951 crop was raised, as it involves the question of title to real property in the State of Idaho, this Court has no jurisdiction of the question raised in the supplemental to the complaint.

## ARGUMENT

### Point 1

**FULL PAYMENT WAS MADE TO APPELLANTS FROM OTHER SOURCES AND THEREFORE APPELLANTS ARE NOT ENTITLED TO ANY OF THE ESCROWED FUNDS.**

Subsequent to the Sheriff's Sale on June 2, 1950, the District Court for Blaine County, Idaho through D. H. Sutphen, Judge, pursuant to the motion of Clifton B. Layton, Jack B. Layton and Grace Layton made an Order fixing the amount required for the redemption of the property from the sale to the Burnhams as follows:

Purchase price at Sheriff's Sale .....	\$71,451.06
Interest at 6% from June 2, 1950 .....	563.77
Taxes paid August 9, 1948 .....	3,061.89
Interest at 6% from August 9, 1948.....	357.39

Taxes paid June 6, 1950 .....	2,514.75
Add interest at 6% from June 2, 1950.....	19.83
Water assessments paid April 20, 1950 .....	1,634.22
Add interest at 6% from April 20, 1950.....	24.43
Water assessments paid April 1, 1950.....	293.22
Interest at 6% from April 1, 1950 .....	5.33
Sawtooth grazing stock assessment paid June 6, 1950 .....	50.00
Interest at 6% from June 6, 1950.....	.36
Water assessment paid May 15, 1948.....	500.00
Interest at 6% from May 15, 1948 .....	66.65
<b>TOTAL .....</b>	<b>\$80,542.90</b>

This was the amount set to redeem as of September 9, 1950. (Tr. 6) The respondents Albert E. Reid and Leah Reid on September 11, 1950 paid to the appellants the sum of \$81,085.74 which was the amount determined plus 6% interest from September 9, 1950 to September 11, 1950.

Thus the appellants were made completely whole for every dollar which they had advanced including monies paid for taxes and water assessments, including the water assessments used in the raising of the crops for the year 1950.

The appellants in connection with the purchase of the Cove Ranch had loaned to Clifton B. Layton the purchaser the sum of \$63,102.25 and the said Clifton B. Layton had purchased from or through one of the appellants, Perry E. Burnham, certain cattle for which the said Clifton B. Layton became obligated to pay the sum of \$5,656.00 (Tr. 138) This indebtedness had been com-

pletely discharged by the appellants taking the three promissory notes of Carl H. Randall, Edward Randall and Oriel Randall, each in the principal amount of \$25,000.00 to be secured by mortgages on certain real property, which said notes and the mortgages thereafter delivered were taken as a cash item in full payment of all obligations theretofore and then owing by the said Layton to the said appellants. (Tr. 138) Notwithstanding the cancellation of the indebtedness owing by the said Layton to the appellants, the appellants also received from said ranch properties various other sums and then took the \$81,085.74 from the respondents, which in fact belonged to the Laytons. (Tr. 139)

Obviously, therefore, the appellants are in no way entitled to any portion of the escrowed funds.

## Point 2.

UPON REDEMPTION FROM THE FORECLOSURE OF THE MORTGAGE, THE ORIGINAL RIGHTS OF THE LAYTONS WHICH HAD BEEN ASSIGNED TO RESPONDENTS ALBERT E. REID AND LEAH REID WERE RESTORED FREED OF THE LIEN FOR WHICH THE PROPERTY WAS SOLD AND AS THE INDEBTEDNESS TO THE APPELLANTS HAD BEEN COMPLETELY DISCHARGED, THE RESPONDENTS ARE ENTITLED TO ALL TITLE, RIGHT AND INTEREST IN THE PROPERTY INCLUDING THE RIGHT IN FULL TO THE LANDLORD'S SHARE OF THE CROPS.

In *Evans vs. City of American Falls*, 11 Pac. 2nd, page 363, citing Idaho C. S. Sec. 6933.



“The judgment debtor redemptioner may redeem the property from the purchaser within one year after the sale on paying the purchaser the amount of his purchase with 10 per cent thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase and interest on such amount; and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.”

In this case the appellant having acquired title prior to the expiration of the period of redemption by making redemption from the original sale, took the land free and clear from the lien of the original judgment, under which it had been sold. (See *Evans vs. Humphrey*, 51 Idaho-5 P 2nd 545)

The language in the *Evans* case on this point is: “The title so arising from the redemption was not a new title. It was merely the original title of the judgment debtor restored of the lien from which the property was sold.”

That exact question has been passed upon by the Court of Appeals of California in construing a statute identical with Idaho C. S. Sec. 6933 and from which it was adopted:

“In case of 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. The lien attaches then because the effect

of the sale has been extinguished and the mortgagor or judgment debtor is the owner of the estate as though no sale had been made.”

Applying the said statute and the above theory to the case before the Court.

The title arising from the redemption was not a new title, it was the original title of the judgment debtor restored freed of the lien for which the property was sold. The mortgagor or judgment debtor or his assignee or grantee is the owner of the estate as though no sale had been made.

The respondents Albert E. Reid and Leah Reid therefore step into the shoes of the mortgagor and must be recognized as purchasers under the contract of purchase and thus have the right to complete the contract of purchase which they do in paying the appellants in full all that is owing to them, and the respondents are then entitled to receive all title, right and interest in the property purchased under the contract including all the right or interest of the appellants in the landlord's share of the crop.

Judge Sutphen, the trial judge, recognized this fact and made an attempt to adjust all equities involved.

This is specifically shown by the Decree of Foreclosure entered by Judge Sutphen wherein he enters judgment on the \$10,000 note secured by the mortgage executed by Clifton B. Layton with interest, costs and attorneys' fees and makes the judgment a lien on the property described in said mortgage and goes on to say:



“Which said lien is subject only to a prior claim in favor of the defendant Perry E. Burnham in the sum of \$17,000.00 together with interest on \$10,000.00 thereof with interest computed at 5 per cent per annum from December 7, 1946 together with interest on \$7,000.00 thereof from January 15, 1947 at 5 per cent per annum and subject to a prior claim in favor of the defendants Perry E. Burnham, and L. Earl Burnham, jointly in the sum of \$46,104.35 with interest on said latter sum from February 18, 1948 at 5 per cent per annum.” (Tr. 54)

You will note that the \$10,000.00 note in favor of Christensen and Rosebraugh which was secured by the mortgage which was the subject of the foreclosure was dated January 23, 1947 and you will also note that the advancement of the sum of \$46,104.35 made by the Burnhams was not until February 18, 1948 more than a year later, and therefore Judge Sutphen was attempting to adjust all equities in his adjudication of the case.

### Point 3.

LAYTONS HAD THE RIGHT TO REDEMPTION AND HAD ASSIGNED SAID RIGHT TO RESPONDENTS, ALBERT E. REID AND LEAH REID, HIS WIFE.

There is no question that Judge Sutphen recognized that the Laytons had the right of redemption as well as the other defendants. I refer to his letter under date of December 2, 1949 (Tr. 51) wherein he states:

“As I understand the law, the respective parties will each have their statutory redemption rights which this Court cannot modify.”

May it also be called to the Court's attention that in the Certificate of Redemption which was delivered by the appellants herein to the respondents upon payment of the \$81,085.74, the appellants made the following statement:

"That said redemption was made by the said Albert E. Reid and Leah Reid, his wife, upon the following claim of right:

By virtue of assignments of all the rights of Clifton B. Layton, Jack B. Layton and Mrs. Jack B. Layton, his wife, by Quit Claim Deeds to Albert E. Reid and Leah Reid, his wife, now of record in the office of the County Recorder of Blaine County, State of Idaho."

#### Point 4.

#### THE PURPORTED NOTICE OF CANCELLATION WAS OF NO EFFECT

If the purported Notice of Cancellation of Agreement was effective as the appellants allege, and the rights of the Laytons cancelled out, why then did the Court recognize that the Laytons had the right of redemption and why did the appellants acknowledge in the Certificate of Redemption that the respondents herein were making redemption by virtue of the assignments from the Laytons.

In reading the Notice of Cancellation (Tr. 30) it can be soon determined that the Notice is not in the alternative as required by law and it can readily be understood why Judge Sutphen made the statement in his Findings:

“That the said Burnhams did not give the plaintiff in the foreclosure action or the said Christensen and Rosebraugh or any of them an opportunity to pay the balance unpaid on the said contract of November 22, 1945 and did not give any of such persons advance notice of their intention to forfeit said contract and did not at any time tender to Christensen and Rosebraugh or the plaintiff or any of them a deed to the property described in said agreement of November 22, 1946 or any part or portion thereof.” (Tr. 47)

If the Notice of Cancellation was not effective as to Christensen and Rosebraugh, then it was not effective as to the Laytons, as the purported Notice was addressed to all of them. (Tr. 30)

Permit us to call attention also to the Findings of Fact and Conclusions of Law entered in the Accounting Action in the District Court of the United States, for the District of Utah, which states:

“Thereafter, in May 1948 (which is the month following the purported Notice of Cancellation), the parties herein negotiated the sale of the Cove Ranch properties, including livestock and equipment situated thereon, to Carl H. Randall, Edward Randall and Oriel Randall, for a total purchase price of \$140,000.00. The said Randalls entered into a written contract for the purchase of said “Cove Ranch” and personal property, from the Defendants, Perry E. Burnham and L. Earl Burnham, for said amount. Said contract was entered into by Defendants as *trustees* for the Plaintiffs, (Laytons) and on their own behalf for the purpose of obtaining a repayment of all moneys due and owing Defendants from Plaintiffs (Laytons) in connection

with the loans and advances made by them.” (Tr. 138) \* \* \* “The Plaintiffs have at no time by any agreement with the Defendants, or otherwise, altered the fundamental security relationship which originally existed between the parties except that Plaintiffs authorized the Defendants to receive from the Randall Brothers \$75,000.00 in notes and mortgages as a cash item in payment of all obligations theretofore and then owing by Plaintiffs to Defendants, which agreement was fulfilled.”

### Point 5.

RESPONDENTS ALBERT E. REID AND LEAH REID, HIS WIFE, WERE RESTORED TO THE POSITION OF CLIFTON B. LAYTON AT THE TIME OF THE EXECUTION OF HIS NOTE AND MORTGAGE IN FAVOR OF ROSEBRAUGH AND CHRISTENSEN, WITH THE INDEBTEDNESS TO THE APPELLANTS PAID IN FULL AND THE SELLER UNDER THE CONTRACT PAID IN FULL AND THEREFORE RESPONDENTS ARE ENTITLED TO THE WHOLE OF SAID PROPERTY AND ALL BENEFITS THEREFROM.

The respondents Albert E. Reid and Leah Reid, his wife, being the assignees and grantees of Clifton B. Layton, Jack Layton, the assignee of Clifton B. Layton, and the wife of the said Jack Layton were restored to the position of Clifton B. Layton at the time of the execution of his note to Christensen and Rosebraugh and upon payment of the sum of \$81,085.74 on September 11, 1950 were entitled to all of the right, title, estate and interest of the original Sellers under the Agreement to sell the Cove Ranch and of course all of the

right, title, estate and interest of the appellants herein as assignees and grantees of the original sellers, which right included all rights to the landlord's share of the crops or the proceeds therefrom. It would certainly be an unjust enrichment of the appellants to not only pay them all that they received under the Agreement of Sale and re-imbursement for taxes, water assessments, including the water assessments for the water used on the 1950 crop and then also allow them the landlord's share of the proceeds of the sale of the crops. Why should the respondents be charged, for instance, for the water assessments for the water used on the 1950 crops if they are not to receive the benefits from the payment of the water assessments.

#### Point 6.

THE ACTION AS FILED WAS TO OBTAIN A DECLARATORY JUDGMENT AS TO THE OWNERSHIP OF THE ESCROWED FUNDS WITH ZION'S SAVINGS BANK AND TRUST COMPANY AND OTHER MATTERS EXTRINSIC TO THE ISSUES SHOULD NOT BE INTRODUCED.

Prior to making redemption, to-wit: On September 6, 1950 the appellants and the respondents entered into a contract in writing in which among other things, it was agreed:

(1) "That of the landlord's share of the crop upon the land being redeemed and which has been raised and will be harvested as, of and during the crop year of 1950 and being one-third of such landlord's share shall be paid over to first party, the de-

fendants herein, (Reids, the respondents) free and clear of all claims by second parties; *the remaining two thirds of such landlord's share* of the 1950 crop shall be sold as the same is harvested and the proceeds placed in escrow with the Zion's Savings Bank & Trust Company of Salt Lake City, Utah, thereto *be held in escrow until declaratory judgment or other agreeable determination* can be had as to the rights of first and second parties thereto."

The original proceedings was brought for the purpose of obtaining this declaratory judgment, however the appellants have tried through the supplemental to the complaint to bring in extrinsic matters which have no bearing whatsoever on the issue.

#### Point 7.

IF THE CASE IS CONSIDERED ONLY AS THE ORDINARY FORECLOSURE OF MORTGAGE, THE APPELLANTS WOULD BE ENTITLED ONLY TO THE LANDLORD'S SHARE OF THE CROP FOR THE PERIOD OF TIME WHILE THEY HELD THE CERTIFICATE OF SALE, THAT IS FROM JUNE 9, 1950 TO SEPTEMBER 11, 1950, THE DATE THAT THE RESPONDENTS MADE PAYMENT AND MADE REDEMPTION OF THE PROPERTY.

If we completely ignore the theories as set forth in the above and foregoing arguments and look at the case as the ordinary foreclosure of a mortgage and the rights that exist between the purchaser under the foreclosure sale and the redemptioner, permit me to refer you to the following:



Ferguson vs. Sullivan, 74 P2nd 183. (An Idaho case)

“A purchaser of land at execution sale on mortgage foreclosure must pro-rate crop or cash rental for entire year in which sale was made and certificate issued with judgment debtor-mortgagor on basis of portion of year preceding and following date of sale.”

The facts in the Ferguson vs. Sullivan case are as follows:

“The appellant was the owner of a tract of farm land in Latah County, Idaho and executed a mortgage thereon in favor of respondent. Default was made in payment of the mortgage debt and foreclosure was had, and on execution sale which occurred May 26, 1936, respondent bid in the property. At the time of the sale, the land was in the possession of and being cultivated by one Virgil Hurlbert, who was a lessee of the property under which is known as a crop lease whereby he had contracted to deliver to the landlord (appellant) ‘one third of the crop delivered in the warehouse at Genessee, Idaho as annual rental of the place.’ When the crop matured it was harvested by Hurlbert and stored in the warehouse in accordance with the terms of the lease, and upon demand of the purchaser under the foreclosure, Hurlbert attorned to the defendant as landlord and delivered to him the entire one third of the crop. After the expiration of the cropping and leasehold year, plaintiff made demand on defendant for the proportionate share of the crop rent, which was the time elapsed from the first of the leasehold year to the date of the sale bears to the entire year, on the theory that all earned rental to the date of the execution sale belonging to the plaintiff and that defendant was entitled to collect only rentals accruing after that

date. Defendant refused the demand and this action was commenced for the collection of a proportionate share of the rents which it is claimed is 240/365 of 47,813 pounds of wheat.

The question: Is the purchaser at execution sale on foreclosure entitled to receive and retain all of the grain or crop rental from the entire year in which the sale is made and the certificate is issued, or must he prorate with the judgment debtor for the portion of the year which has expired prior to the time of sale?

Section 8-406 Idaho Code Annotated.

“Until the expiration of the time allowed for redemption, the Court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs or building thereon or to use wood or timber on the property therefore; or for the repair of fences; or for fuel in his family, while he occupies the property.”

Section 8-407 Idaho Code Annotated:

“The purchaser from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption is entitled to receive, from the tenant in possession, the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amount of



such rents and profits shall be a credit upon the redemption money to be paid.”

Same as Sections 706-707 of the California Code of Civil Procedure, considered in the California case of *Clarke vs. Cobb*, 121 Cal. 595, 54 P. 74 *Reynolds vs. Lathrop* 7 Calif. 43, wherein the Court comments as follows:

“It must be borne in mind that the whole matter of redemption is purely statutory, and the statute seems to contemplate a proportionate division of the rents. It was intended by this statute to give the purchaser at the sale the fruits of the land produced while he held the certificate of purchase; *only this and nothing more*. To support a construction which would give the purchaser at the sale (perchance, a purchaser for a single day) the rents of property under a lease for years, for the sole reason that rents for the entire period happen to become due and payable upon that day, would seem to wander far from the intention of the legislature in enacting the statute.”

*First National Bank of Yuma vs. Maxey*, 34 Ariz. 438, 272 P. 641, states that Arizona adopted the same statute; quoting:

“On examining the statute carefully, it appears the primary object thereof was to change the old rule that rent could not be apportioned and that it followed the legal title at the time it was due, to the principle that it was apportionable on the basis of the title at the time it was earned. That the legislature intended the earned rent to follow the complete title is shown by the remainder of the statute cited which provides that, in case of a re-

demption, the purchaser accounts to the redemptioner for the rents collected during the time the former held the certificate of sale. In other words, while the mortgagor holds both legal and equitable title, he is entitled to the rent earned; when he loses the equitable title, the earned rent goes to the one who has purchased it, and who presumably will eventually secure the legal title also. Should there be a redemption, however, and both legal and equitable title pass to someone else, that person receives the rent, dating back to the time when the mortgagor no longer held both titles, the rent thus belongs eventually to the ultimate holder of both the legal and equitable title, according to the time it was earned."

Under *Ferguson vs. Sullivan*, 74 P2nd 183, the Court holds:

"Under this statute the purchaser was only entitled to receive, the value of the use and occupation of the premises from the date of sale, May 25 and not from the beginning of the year. For the same reason the original owner was entitled to the value for the use and occupation of the premises up to the time she lost the title."

Applying the statute and the rulings in the above cited cases and relying upon the foreclosure only, all that the appellants could hope to recover would be the landlord's share of the crop for the period of time while they held the certificate of sale, that is from June 9, 1950 to September 11, 1950, the date that the defendants made payment and made redemption of the property.

And we do not concede this, in view of our theory that the appellants as assignees of the original contract

were paid in full and that the respondents as assignees of the original purchaser were placed in the shoes of the original purchaser and entitled to all the rights, privileges, claims and title that the original purchaser bargained for.

#### Point 8.

AS A DISPUTE EXISTS BETWEEN THE PARTIES AS TO THE OWNERSHIP OF THE 160 ACRES OF LAND UPON WHICH A 1951 CROP WAS RAISED, AS IT INVOLVES THE QUESTION OF TITLE TO REAL PROPERTY IN THE STATE OF IDAHO, THIS COURT HAS NO JURISDICTION OF THE QUESTION RAISED IN THE SUPPLEMENTAL TO THE COMPLAINT.

As this question raises the jurisdictional question as to who is the owner of the 160 acres in dispute, upon which a 1951 crop was raised and which is referred to by the appellants in the amendment and supplement to the complaint, we are of the opinion that this matter can only be settled by the Idaho court where the property is located. There are many questions involved in this dispute over the 160 acres of land, such as the question of a trade of 80 acres of the described land under the original agreement for the sale of the Cove Ranch for 80 acres of the disputed land; the fact that the other 80 acres of the disputed land was not included under the original agreement but nevertheless was always recognized as part of the Cove Ranch and cultivated with the balance of the 3,113.91 acres of land. There are also questions of the rights of the parties to

the 1951 crop in view of the fact that 80 acres of the disputed land was leased to one, R. D. Hess and that he had possession, planted, cultivated and harvested the crops and received the money for the sale of the same; and that the other 80 acres was leased to Nek Stelma by the respondents herein with the balance of the Cove Ranch for the year 1951.

### CROSS APPEAL

(1) The Court erred in awarding appellants \$2,340.51 of the funds escrowed with Zion's Savings Bank and Trust Company.

(2) The Court erred in allowing respondents \$3,917.54 *only* of the funds escrowed with Zion's Savings Bank and Trust Company.

### ARGUMENT:

The respondents Albert E. Reid and Leah Reid, his wife, on September 11, 1950 paid to the appellants the sum of \$81,085.74 which was the amount determined by the District Court of Blaine County, State of Idaho, plus interest at 6% per annum from September 9, 1950 to September 11, 1950, as being the amount required for the redemption.

This amount included all taxes, water assessments and grazing right assessments, including the water assessments used in the raising of the crops for the year 1950.

The appellants had prior to this time received \$75,000.00 in notes secured by mortgages as a cash item in full payment of all obligations therefore owing by

the Laytons to the appellants, therefore the money paid by the respondents for the redemption did not belong to the appellants.

Therefore the appellants are in no way entitled to any portion of the escrowed funds.

The respondents Albert E. Reid and Leah Reid, his wife, being the assignees of the right of redemption and also grantees under deeds from Clifton B. Layton, Jack Layton, the assignee of Clifton B. Layton, and the wife of the said Jack B. Layton, were restored to the position of Clifton B. Layton and are entitled to all of the right, title estate and interest of the said Clifton B. Layton, who as purchaser of the said Cove Ranch, had made full settlement with the vendors of the Cove Ranch and with the appellants by repayment of all moneys due and owing to the appellants in connection with the loans and advances made by them to him; which said right included all rights to the landlord's share of the crops or proceeds therefrom, the total amount of the escrowed funds, \$6,258.05.

WHEREFORE, respondents respectfully submit:

That a mandate be issued from this Court ordering the trial court to modify the declaratory judgment by awarding to the respondents Albert E. Reid, and Leah Reid, the total amount of the escrowed funds in the sum of \$6,258.05.

Respectfully submitted,

Le Grand P. Backman  
of Backman, Backman and Clark,  
*Attorneys for Respondents.*