1974

James G. Clawson And Joan M. Clawson, Tex R. Olsen And Monna Lee Olsen and Ken Chamberlain and Jeannine W. Chamberlain v. Bruce L. Moesser And Ruth Anne Moesser : Brief In Support Of Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - - - - - - - - - - - - -

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

- - - - - - - - - - - - - - - -

BRIEF IN SUPPORT OF
PETITION FOR REHEARING

- - - - - - - - - - - - - - - -

P O I N T I

THE MAJORITY OPINION, WITHOUT BEING REVISED, WILL INADVERTENTLY REPEAL A RULE OF LONG STANDING IN THIS STATE: THAT UNDER A MORTGAGE FORECLOSURE OR EXECUTION SALE, TITLE AND THE RIGHT TO POSSESSION, USE AND BENEFIT OF THE PROPERTY WILL NOT PASS UNTIL THE SHERIFF's DEED IS EXECUTED [1]

Both Mr. Justice Ellett for the majority and Mr. Justice Crockett in his dissent have correctly resolved and applied four of the rules fundamental to mortgage foreclosure and execution sales. Without arguing them we restate them herewith:

(1) Sale thereunder entirely exhausts the lien of a mortgage; (2) Any deficiency judgment attaches only after the sale proceeds have been credited against the amount due; (3) The

---

[1] Local Realty vs. Lindquist, 96 Utah 297, 85 P2d 770 (1938)

lien can attach only to the property in the name of the mortgagor (judgment debtor) as of the date of the deficiency judgment achieves the dignity of a lien; and (4) The judgment debtor has the absolute right, by statute, to redeem.

But in order to reach the further result - amounting to the disposition of this case - that Spaulding's redemption took title back to himself, the majority opinion makes this ruling, although incorrect, which is essential to the ultimate holding:

> * * * When Spaulding redeemed * * * he gave no vitality to Clawsons' *defunct* claim.

If Clawsons' claim (which was the legal title to the land) were defunct at the time of Spaulding's redemption we could not dispute the Justices' statement. But to characterize Clawsons' claim as defunct would unintentionally obliterate a fundamental right which has been established for many years in this state: The right to possession, use, and the rents and profits of the mortgaged estate during the period of redemption.

The case of *Local Realty vs. Lindquist, 96 Utah 297, 85 P2d 770 (1938)* is a landmark decision in which the present Chief Justice was prevailing counsel.

The issue in that case was the entitlement to the value of use and possession of the mortgaged premises during the redemption period. The Lindquist case holds:

> * * * title does not pass to the purchaser until execution and delivery of the [sheriff's] deed and such is the recognized rule now in practically all states. If the legal title had already passed there would be no necessity for a conveyance [*85 P2d at 773*]

This holding is not *dicta* but is essential to the result, otherwise, how could the mortgagor have been awarded the usufruct of the land during the redemption period.

Going back one step in the chain of title to this property, the redemption period incident to the sale at which Clawson purchased Spaulding's interest had expired and Clawson obtained his sheriff's deed on October 16, 1969, many months before Spaulding redeemed.

Under Rule 69(e)(6) Clawson took all right, title, interest, and claim which Spaulding had in the property.

The cases cited in the majority opinion correctly hold that a mortgagor has a right to redeem but not because he has a claim in or title to the land or in fact any interest in the land but because the statute *says* he has that right. All those cases reflect situations where the mortgagor or debtor had parted with all his title; otherwise they would never have arisen or needed deciding. Also, those cases say there may be a variety of reasons why a mortgagor or debtor should be able to redeem.

But none of those cases says that the redemption takes title back to the mortgagor or debtor.

It now becomes important to see what the Utah cases say about the question. In order to reach the result in *Local Realty vs. Lindquist* the Court said:

> [*85 P2d at 772*] A redemption is *not* a *re-sale* or a *re-purchase*.
>
> * * * It is generally consummated without the knowledge of the purchaser at the time, and without his consent and perhaps often as against his will. The money is generally paid to the sheriff who *voids or annuls* as it were the sale and cancels the certificate.
>
> * * *
>
> In a very general way and speaking loosely, the interest of the purchaser on execution sale and during the redemption period may be called a lien, as it signifies an interest in the property which may be cancelled, lost or voided upon payment of a certain sum of money. * * * The purchaser has bought the land from the sheriff and paid for it, upon a sale, which may be voided or in effect rejected by the debtor by the simple expedient of him repaying to the purchaser the amount paid with interest within a limited time.
>
> * * *
>
> In such sale the purchaser is not subrogated to and does not acquire all the right, title, estate, interest or claim of the judgment debtor until the expiration of the redemption period.

The holding of the *Lindquist* case to the effect that the judgment debtor is, in contemplation of law, the owner of property sold under execution during the redemption period and has the right to its use and occupation was not given consideration in the majority opinion when it characterizes Clawson's claim as *defunct* by the statement:

> [Redemption] gave no vitality to Clawson's *defunct* claim.

The holding that a redemption is not a re-sale or a re-purchase is likewise essential to the holding that the use, possession, and entitlement to benefits of the land during the redemption do not pass to the purchaser until the sheriff's deed because if the redemption did start a new title the necessary implication would be that the holder of the certificate of sale had the title and the benefits that flow from it all the time. The *Lindquist* case says as much at *85 P2d p. 773:*

> * * * If the legal title had already passed, there would be no necessity for a conveyance (citing cases).

And *Local Realty vs. Lindquist* is not a case lightly regarded. It drew upon *Carlquist vs. Colthorp, 67 Utah 514, 248 P 481 (1926)* which became the subject of an annotation in 47 ALR 1st Series (p. 765) for the proposition that even the appointment of a receiver does not transfer the benefits of possession during the redemption period to the execution sale purchaser.

Local Realty vs. Lindquist was cited in this Court's unanimous decision by then District Judge Ellett in *Layton vs. Layton, 105 Utah 1, 140 P2d 759 (1943)* for its holding that:

> In a very general way and speaking loosely, the interest of a purchaser on execution sale and during redemption period may be called a lien as it signifies an interest in the property

> which may be cancelled, lost, or voided upon payment of a certain sum of money * * * It is a right which may be defeated by payment of such sum. The purchaser has bought the land from the sheriff and paid for it, upon a sale, which may be voided or in effect rejected by the debtor by the simple expedient of him repaying to the purchaser the amount paid with interest within a limited time.

That a redemption is not a re-sale or re-purchase (*85 P2d at 772*) is galvanized by the unqualified statement in Volume 55 Am.Jur2d, p.781, Mortgages,§ 901.

> Effect of Redemption:
>
> * * * It [redemption] does not give to the mortgagor a new title, however, but merely restores to him the title freed of the encumbrance of the lien foreclosed [Emphasis added]

In Volume 59, CJS, p.1705, Mortgages, § 875(e) the universal rule is stated:

> * * * redemption by the mortgagor or his grantee *does not give him a new title*, but merely restores him to his former title of ownership of the property free of the encumbrance.

The majority opinion, in the face of that universally-accepted rule, *has* given Spaulding an entirely new title because he (Spaulding) parted with all right, title, interest, and claim to the property on October 16, 1969 under a valid sheriff's deed and almost nine months before he redeemed from the second sale. To give Spaulding anything on that second redemption is to create an entirely new, separate and distinct title unrelated to the old one.

P O I N T II

REDEMPTION BY ONE WHO HAS PARTED WITH TITLE SUSTAINS TITLE WHERE IT IS THEN VESTED - NOT BACK TO THE MORTGAGOR WHO HAS CONVEYED

The majority opinion is correct in that (1) A sale thereunder exhausts the lien of a mortgage; (2) A deficiency judgment attaches only after the sale proceeds have been credited against the amount due;[2] and (3) The lien can attach only to property in the name of the mortgagor (judgment debtor) as of the date the deficiency judgment achieves the dignity and effect of a lien[3] and (4) that the judgment debtor (mortgagor) had the absolute right to redeem.[4]

Although, however, the three cases cited in the majority opinion do clearly hold, as that opinion recites, that a mortgagor having parted with his title may nevertheless redeem, those cases *do not* hold that such redemption gives the title back to the mortgagor who has conveyed.

Most notable is the Iowa case of *Harvey vs. Spaulding, 16 Iowa 397, 85 Am.Dec. 526 (1864)* which was an action or a proceeding where the foreclosing mortgagor and Plaintiff advanced the contention that a judgment debtor had no right to redeem from the sheriff's sale because he had, before the sale,

---

[2] 78-37-2 Utah Code Annotated, 1953. First National Bank of Salt Lake City vs. Hammond, 89 Utah 151, 59 P2d 1401.

[3] Ulrich vs. LIncoln Realty Co., 197 P2d 149, 180 Ore 380; Barry vs. Harnesberger (CCA 7th) 148 F.346.

[4] Rule 69(f)(1) U.R.C.P.

parted with all of his interest in the land and that at the time he sought to redeem he had no interest whatever in the real estate. The Supreme Court of Iowa stated:

> The question gives us no trouble. The statute expressly provides that the judgment debtor may redeem.

The effect of *Harvey vs. Spaulding* was to validate the mortgagor's redemption and to establish title in the redeeming mortgagor's grantee.

Likewise in *Yoakum vs. Bower, 51 Cal. 539 (1876)* the facts are almost exactly identical to those here. Margaret J. Burdete sold property subject to a pending action in December 1874. In April 1875 the Plaintiff in that action recovered a judgment and an order of execution which was delivered to the sheriff (Bower) and Defendant in the action. Even though she had sold the property Burdete redeemed the Hirschfield sale in November of 1975. Hirschfield in December 1875 assigned his certificate of sale to the Plaintiff.

The California Supreme Court did not even speculate upon the reasons why Mrs. Burdete may have redeemed. They only said:

> The successor in interest may redeem, but the judgment debtor may also do so. The statute provides that the judgment debtor, as such, may redeem * * * There is no good reason why the statute, which is remedial in its character, should receive a narrow construction, in order to defeat the right of redemption which it intended to give.

The Court is not interested in the reasons why the judgment debtor did redeem but only states:

> It might be that the judgment debtor has covenanted with his successor in interest to effect redemption from the sale, and a variety of other cases might readily be imagined in which the judgment debtor even though he had sold the property and would still have an interest in effecting a redemption from the execution sale.

The third case relied upon by the majority opinion, *Chataque County Bank vs. Risley, 19 N.Y. 373 (1859)* holds that another creditor, who was not a party to the underlying indebtedness, could sell the same real estate upon his own execution and the grantee in the sheriff's deed acquired a title superior to that of the individual who contended the redemption was ineffective. In the *Chataque* case there was no showing of any entitlement of the redeeming debtor to the land and no showing why he had a reason to redeem. The full citation to the *Chataque* case is, relating to the right of a debtor to redeem:

> The right is secured to him as the judgment debtor by the terms of the statute, notwithstanding he may have parted with all his interest in the land by a prior fraudulent or subsequent honest conveyance.

The *Chataque County Bank* case held that this right of redemption was exercised to give validity to claims of individuals coming into existence prior to the sale.

These three cases do not, and no case we have been able to find through exhaustive and thorough research has been found to hold that a mortgagor (or execution debtor) who has parted with

his title, even though he has the right to redeem, takes title back into his own name as against his lawful successor in interest.

The facts are undisputed that Clawson was the lawful successor in interest to all right, title, interest, and claim[5] of Spaulding in the subject property. The redemption did not operate as a circuit of title first from the mortgagor to the purchaser at mortgage foreclosure sale and then on redemption back to the mortgagor omitting Clawson who held all incidents of title which Spaulding could ever assert.

[5] Rule 6 (e)(6), U.R.C.P.

P O I N T III

THE MAJORITY OPINION ERRS IN ITS HOLDING THAT SPAULDING RETAINED SOME TYPE OF INTEREST IN THE PROPERTY

The majority opinion, in the 7th paragraph of Page 2, seems to create some residual property interest in grantors if they have mortgaged the property before-hand simply because they retained the bare statutory right to redeem. The statement says:

> There can be no difference in the interest of one who loses his land to a judgment creditor on execution and one who voluntarily parts with his title by deed. It is certainly true that judgment debtors without title to the land sole on execution have an equitable interest in the land in that they are entitled to have the land sold and the proceeds thereof applied to reduce their indebtedness.

We respectfully call the Court's attention to Rule 69(e)(6) which states.

> Real Property. Upon the sale of real property the officer shall give to the purchaser a certificate of sale containing: (1) a particular description of of the real property sold; (2) the price paid by him for each lot or parcel if sold separately; (3) the whole price paid; (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; provided that where such sale is subject to redemption that fact shall be stated also. * * * [Emphasis added]

On April 10, 1969 Clawson obtained a Certificate of Sale precisely giving him what Rule 69(e)(6) says:

> All right, title, interest and claim of the judgment debtor (Spaulding).

On October 16, 1969, a sheriff's deed was issued to Clawson as the majority opinion recites and about which there can be no dispute. That cut off every right which Spaulding has in the property.

P O I N T III

THE MAJORITY OPINION ERRS IN ITS HOLDING THAT SPAULDING RETAINED SOME TYPE OF INTEREST IN THE PROPERTY

The majority opinion, in the 7th paragraph of Page 2, seems to create some residual property interest in grantors if they have mortgaged the property before-hand simply because they retained the bare statutory right to redeem. The statement says:

> There can be no difference in the interest of one who loses his land to a judgment creditor on execution and one who voluntarily parts with his title by deed. It is certainly true that judgment debtors without title to the land sole on execution have an equitable interest in the land in that they are entitled to have the land sold and the proceeds thereof applied to reduce their indebtedness.

We respectfully call the Court's attention to Rule 69(e)(6) which states.

> Real Property. Upon the sale of real property the officer shall give to the purchaser a certificate of sale containing: (1) a particular description of of the real property sold; (2) the price paid by him for each lot or parcel if sold separately; (3) the whole price paid; (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; provided that where such sale is subject to redemption that fact shall be stated also. * * * [Emphasis added]

On April 10, 1969 Clawson obtained a Certificate of Sale precisely giving him what Rule 69(e)(6) says:

> All right, title, interest and claim of the judgment debtor (Spaulding).

On October 16, 1969, a sheriff's deed was issued to Clawson as the majority opinion recites and about which there can be no dispute. That cut off every right which Spaulding has in the property.

We respectfully submit that statutory language cannot be more inclusive or comprehensive, when dealing with the incidents, interests, or property in or title to the real estate, than by enumerating "all right, title, interest and claim" to that property.

The cases cited by the majority opinion hold that the mortgagor (debtor) may have some reasons why he is entitled to redeem. One of those reasons expressed in the majority opinion's citation to *Yoakum vs. Bower* on *p.540* of *51 Cal* is:

> * * * It might be that the judgment debtor has covenanted with his successor in interest to effect a redemption from the sale, and a variety of other cases might readily be imagined, in which the judgment debtor, even though he had sold theproperty, would still have an interest in effecting a redemption from the execution sale.

It is notable that one of those reasons is not the ability to reclaim title.

The majority opinion would discriminate between those cases where the mortgage or judgment debtor had conveyed by warranty deed and those cases where he had not. Would the Court give an individual who had received a quitclaim deed from the judgment debtor a "conditional" title that could be defeated by his grantor redeeming whereas the recipient of a warranty deed would not be so limited? Furthermore, how would equity justify a discrimination between those situations where a redeeming former owner had voluntarily parted with his title (by warranty

deed or quitclaim deed, assignment or other transfer of interests) and where he had involuntarily been required to part with his title because of a lawful, legitimate, honest debt which he owed, and by levy upon his property to satisfy it?

Going back to *Local Realty vs. Lindquist*, a redemption is not a re-sale or a re-purchase. It only voids or annuls the sale and cancels the certificate.

This is precisely what happened when Spaulding redeemed. He did not re-purchase the property and certainly McArthur did not re-sell it to him (*85 P2d at 772*). His redemption voided and annulled the sale and cancelled the certificate (*85 P2d 773*). This left title unencumbered in Clawson.

The Court is faced with the reality of Clawson's title obtained at a valid unredeemed sale and a consequent sheriff's deed. If that title is taken away from Clawson that divestiture must be accomplished by the expedient of regarding Clawson's title as extinguished by the *Certificate of Sale* to McArthur when Walker Bank sold under its mortgage foreclosure. The Court cannot conclude that Clawson's title was extinguished by any sheriff's deed because there was none.

If that pretext - extinction of title upon issuance of a *Certificate of Sale* - is adopted as a judicial rule of mortgage foreclosures and execution sales, then there can be no way

to support the right of possession to execution-sold premises during the redemption period in any one other than the holder of the Certificate of Sale - a result diametrically contrary in reasoning and result to *Local Realty vs. Lindquist, 96 Utah 293, 85 P2d 770 (1938).*

The dissenting opinion of Mr. Chief Justice Crockett sheds great light on this circumstance where it states:

> When Spaulding redeemed, the result was to remove the Walker Bank mortgage and the judgment of foreclosure, that had been entered against the property * * *
>
> There are sound reasons why the foreclosure or mortgage should exhaust the interest the mortgagee can claim in the pledged property by reason of the mortgage. In the first place, the mortgagee has obtained all the contract calls for with respect to that property * * * when he has received that value * * * that is all he is entitled to from the security. The difficulty with the opposite result *is that it allows the mortgagee to have, in effect two mortgages on the property.*
>
> * * *
>
> I cannot see how the effect of that redemption and wiping out of the mortgage and judgment can properly be regarded as having the effect either of initiating a new title in Spaulding or quieting title in him by removing other prior and valid claims, i.e: the Clawson's.

C O N C L U S I O N

The majority opinion adopts principles which are sound but, we submit in all respect to the author and those concurring, has moved from those underlying principles to a *non sequitur*, by erecting a fictional title bridge which does not exist but which has been expressly rejected in the law.

The majority opinion concedes that before the Walker Bank lien could attach a second time it must find title, or an interest of some kind, to land in Spaulding. Title, including all *right, title, interest,* and *claim*, went from Spaulding to Clawson in the sale which was *unredeemed.* The majority opinion proposes to supply the vacuum of title existing in that circumstance by putting title in McArthur, characterizing Clawson's title as *defunct* by reason of the sale at which McArthur purchased, and then re-conveying from McArthur to Spaulding by the latter's redemption.

The well-established law of this state is that Clawson's title was not in any sense defunct (*Local Realty vs. Lindquist*) and that it persisted because before the redemption period expired a valid redemption had occurred (*Layton vs. Layton, 105 Utah 1, 140 P2d 753 (1943)* per Justice Ellett, District Judge, for a unanimous Court).

Clawson was the holder of all right, title, interest, and claim that Spaulding had ever had when that redemption took place.

Spaulding's redemption was not and could not be characterized as a re-sale or a re-purchase (*Local Realty vs. Lindquist, 85 P2d at 772*).

Clawson, not Spaulding, was entitled to possession.

When the redemption took place, it was lawful because the statute says it was [69(f)(1) URCP]. The sale was voided and cancelled upon payment of the "certain sum of money" (*Layton vs. Layton, 140 P2d 759*).

Therefore, the circuit of title postulated by the majority, i.e: Spaulding to Clawson to McArthur to Spaulding to Moesser was never completed. The evolution of title stopped at Clawson who was the owner of the legal and the equitable title and entitled to possession at the moment of valid redemption.

We respectfully conclude that the majority opinion establishes an untenable and what in the future will be an exceedingly troublesome precedent.

EQUITABLE CONSIDERATIONS

We concur with the observations of Mr. Justice Crockett in his dissenting opinion that it would not be inconsistent with equity and justice that the Court recognize the superiority of the claim of the Plaintiffs Clawson but that they should be

required to make reimbursement for the paying off and the removal of the Walker Bank mortgage lien by Spaulding which became the burden of Moesser at a sale which could only be characterized as void.

Inasmuch as the Plaintiffs, as Mr. Justice Crockett observed, acknowledged their own claim to be inferior to the bank trust deed which expired by reason of its foreclosure sale, the Plaintiffs represent that they are willing to make reimbursement for the paying off and removal of the Walker Bank lien if the Court believes, in equity and good conscience, they should do so as a condition to a reversal of the holding in the majority opinion.

Respectfully submitted

Ken Chamberlain
OLSEN AND CHAMBERLAIN
76 South Main Street
Richfield, Utah

Attorney for Plaintiffs
and Respondents

CERTIFICATE OF SERVICE

I, hereby certify that on the 30th day of May , 1975, two copies of the within and foregoing Petition for Rehearing and Brief in Support thereof were served upon the following by U. S. Mail, Postage Prepaid:

Mr. Kay M. Lewis, Jensen and Lewis, 320 South 300 East, Suite #1, Salt Lake City, Utah (84111)

Attorney for Respondents