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FORECLOSURE SURPLUS IN MISSOURI: A RULE IN SEARCH OF A THEORY

I. INTRODUCTION

The hornbook rule on disposition of a surplus from foreclosure of a mortgage or deed of trust is fairly straight-forward: "the surplus stands in the place of the foreclosed real estate and the liens and interests that previously attached to that real estate now attach to the surplus."¹ In itself, this rule appears rather uninteresting. However, an examination of the Missouri cases yields several significant departures from the rule. Missouri precedents would allow holdings that: a surplus will be paid according to the literal terms of the mortgage;² a mortgagee senior to the foreclosing mortgagee may be entitled to a surplus over junior lienors in certain circumstances;³ and a judgment lien does not attach to the proceeds of a foreclosure.⁴ Attempting to reconcile the Missouri cases provides both an interesting explication of the nature of a mortgage⁵ in general and, in particular, of the concept of "equity of redemption." It also leads to practical conclusions for the handling of a foreclosure surplus in Missouri.

II. BACKGROUND — HISTORICAL PERSPECTIVE

The theoretical underpinnings of foreclosure surplus treatment are derived from the response to changing views of mortgages and from the relation-

1. G. NELSON & D. WHITMAN, REAL ESTATE FINANCE § 7.31 (2d ed. 1985).

2. Trenton Motor Co. v. Watkins, 291 S.W.2d 659 (Mo. Ct. App. 1956); *see infra* notes 71-109 and accompanying text.

3. Willis Lucas Lumber Co. v. Neal, 222 Mo. App. 728, 4 S.W. 1098 (1928); *see infra* notes 110-17 and accompanying text.

4. Warner v. Veitch, 2 Mo. App. 460 (1876); *see infra* notes 120-34 and accompanying text.

5. Throughout this Comment, the terms applicable to a mortgage — "mortgage", "mortgagee", and "mortgagor" — will be used to refer to both mortgages and deeds of trust unless the distinction is of particular relevance to the discussion, such as when a particular dispute involves the duty or conduct of the trustee under a deed of trust. Even though a casual inspection of the cases indicates that deeds of trust are much more prevalent than mortgages in Missouri, the convention of the commentators appears to be the use of mortgage terminology. An explanation for the prevalence of the deed of trust over a mortgage may be the old authority that the purchase by the mortgagee at a power of sale foreclosure under a mortgage would not terminate the mortgagor's equity of redemption. *See* Gaines v. Allen, 58 Mo. 537, 544 (1875).

It is also assumed herein that "foreclosure" refers to both a judicial foreclosure under MO. REV. STAT. § 443.190 (1986) and a power of sale foreclosure under MO. REV. STAT. § 443.410 (1986) unless specifically stated otherwise.

ship between mortgagors and mortgagees.⁶ Therefore, analysis of the Missouri cases must begin with a brief history of mortgages.⁷

At an early stage of mortgage law in England, a mortgage served as a conveyance from the mortgagor to the mortgagee of the land intended as security.⁸ In substance, this conveyance to the mortgagee was a fee subject to a condition subsequent — if the mortgagor paid his debt within the time limit of the condition, title to the property reverted to him.⁹ As a result of the conveyance to the mortgagee, the lender was the “owner” of the land and was entitled to all legal incidents of the estate.¹⁰

A mortgage, therefore, thus began as an absolute conveyance, subject to condition subsequent, of title to a mortgagee. Yet the legal concept was clearly an attempt by the courts, and parties themselves, merely to develop a means to secure a debt with real property.¹¹ As a result of the conveyance, the mortgage at law frequently had harsh and unintended results (at least to the mortgagor) because the mortgagor would lose his land on a default in payment regardless of whether he had an excuse for his late payment.¹² In addition, the mortgagor was still liable for the entire debt regardless of the value of the property forfeited.¹³

This type of harshness set the stage for the intervention of equity courts and resulted, in time, in the development of two key concepts in mortgage law: the mortgagor’s right to redeem or the “equity of redemption”¹⁴ and the mortgagee’s right to foreclosure.¹⁵ The concept of “equity of redemption” evolved as the right of the mortgagor to tender payment “within a reasonable time of forfeiture” and thereby obtain title to his land even though the date set in the deed for re-entry had passed.¹⁶ Thereafter, foreclosure developed as the concomitant right of the mortgagee to have the “reasonable time” for redemption set by the equity courts, after which time the mortgagor’s right to redeem was cutoff.¹⁷

6. See *infra* Section III of text.

7. The history of mortgages has been dealt with in much greater detail. See 1 L. JONES, *LAW OF MORTGAGES* §§ 1-17 (8th ed. 1928); G. OSBORNE, *LAW OF MORTGAGES* §§ 1-15 (2d ed. 1970); 1 C. WILTSIE, *MORTGAGE FORECLOSURE* § 23 (4th ed. 1927); see also *Benton Land Co. v. Zeitner*, 182 Mo. 251, 271-77, 81 S.W. 193, 199-200 (1904) (en banc).

8. G. OSBORNE, *supra* note 7, § 5, at 9.

9. *Id.*; 1 L. JONES, *supra* note 7, § 5.

10. G. OSBORNE, *supra* note 7, § 5, at 9-10.

11. *Id.* § 7, at 15.

12. *Id.* § 6, at 12; 1 L. JONES, *supra* note 7, § 5.

13. G. OSBORNE, *supra* note 7, § 6, at 14.

14. *Id.* at 13.

15. *Id.* § 10, at 20.

16. *Id.* § 6, at 12-13; 1 L. JONES, *supra* note 7, §§ 7-8.

17. G. OSBORNE, *supra* note 7, § 10, at 20. Thus, the equity of redemption is a right that exists only prior to foreclosure. It must be clearly distinguished from “statutory redemption” — the right of the mortgagor or his assigns to redeem the property within one year *after* foreclosure pursuant to the requirements of MO. REV. STAT. §

Two contributions to mortgage law that were made in the United States are important to analyzing the application of foreclosure surplus. These contributions were the development of the lien theory of mortgages and the demise of strict foreclosure. The lien theory placed the legal, as well as equitable, title for the mortgaged land in the mortgagor.¹⁸ However, once the legal as well as the equitable title was placed with the mortgagor, strict foreclosure was "unfair" to the mortgagor.¹⁹ Solving this inequity through the use of foreclosure by sale led, in turn, to the problem of what to do with the surplus that might then be generated by a foreclosure sale.

Under English law the "equity of redemption" was considered to be the mortgagor's equitable estate in the land, while legal title was vested in the mortgagee.²⁰ In the United States, however, the legal incidents of the mortgagee's title were gradually whittled away. As American courts began to find virtually all of the legal incidents of ownership to be part of the mortgagor's interest in the land, it became logical to find the mortgagee's interest in the property was really only a "lien."²¹ This was particularly appropriate in that it had always been acknowledged that the conveyance to the mortgagee was intended as security for a debt rather than a true conveyance.²²

In an attempt to arrive at a theoretically elegant description of the lien theory, one commentator argued that a mortgage still served to convey a legal interest in the mortgaged property to the mortgagee. But, the only incident of title conveyed by the mortgage is the owner's power of sale.²³

The Missouri Supreme Court arguably has supported this position:

"In law, a mortgage is considered, as between the mortgagor and mortgagee,

443.410 (1986). The right of statutory redemption does not accrue until equitable redemption has been terminated by foreclosure and hence the rights are not co-extensive. *Euclid Terrace Corp. v. Golterman Enters., Inc.*, 327 S.W.2d 542, 545 (Mo. Ct. App. 1959); see G. OSBORNE, *supra* note 7, § 8; see also MO. REV. STAT. § 443.410 (1986) ("[A]ll real estate which may be sold under any such power of sale in a mortgage deed of trust . . . shall be subject to redemption by the [mortgagor].").

Furthering the confusion, a recent case found a statutory basis for the equitable right of redemption in MO. REV. STAT. § 443.400 (1986). See *Tipton v. Holt*, 610 S.W.2d 659, 663 (Mo. Ct. App. 1981). The Missouri Supreme Court subsequently referred to the pre-foreclosure right discussed in *Tipton* as "a statutory right of redemption." *Belote v. McLaughlin*, 673 S.W.2d 27, 29 (Mo. 1984) (en banc); cf. *White v. Smith*, 174 Mo. 186, 199-200, 73 S.W. 610, 612 (1903); *Pollock v. Pesapane*, 732 S.W.2d 253, 254 (Mo. Ct. App. 1987). However, the applicability of § 443.400 to equitable redemption from power of sale foreclosure has been sharply contested. See Note, *Redemption Before Foreclosure Under Power of Sale*, 47 MO. L. REV. 354, 357-60 (1982).

18. 4 J. POMEROY, EQUITY JURISPRUDENCE § 1190 (5th ed. 1941).

19. *Id.*

20. G. OSBORNE, *supra* note 7, § 7, at 16; cf. 1 L. JONES, *supra* note 7, §§ 12-14.

21. G. OSBORNE, *supra* note 7, § 16; 4 J. POMEROY, *supra* note 18, § 1190.

22. G. OSBORNE, *supra* note 7, § 16.

23. See Gavit, *Under The Lien Theory of Mortgages Is The Mortgage Only a Power of Sale?*, 15 MINN. L. REV. 147, 152 (1931).

and so far as it is necessary to give full effect to the mortgage as a security for the performance of the condition, as a conveyance in fee But for all other purposes it is considered . . . as a mere charge or incumbrance (sic), which does not divest the estate of the mortgagor."²⁴

Thus, "the mortgagor continues [as] the real owner of the fee."²⁵

As the lien theory became prevalent, the mortgagee's remedy became limited to debt from the security only.²⁶ Under strict foreclosure, the mortgagee's original remedy to cut off the right of redemption, a mortgagor was given a fixed period within which to pay off the debt. In essence, the foreclosure reformed the deed from the mortgagor to the mortgagee, eliminating the conditional right to re-enter on payment of the debt. If the mortgagor did not pay within the time set by the equity court, the title to the land was made absolute in the mortgagee even if the value of the land exceeded the debt.²⁷ Strict foreclosure therefore was inequitable in many cases,²⁸ but nonetheless was considered appropriate in that the mortgagee had legal title and the right to possess the land.²⁹ Because under the lien theory "a breach of the condition for payment merely [gave] to the mortgagee a right to proceed against the security, the natural remedy for such breach was to sell the property and apply the proceeds thereof to the payment of the mortgage debt."³⁰

Missouri apparently has never accepted strict foreclosure.³¹ As a consequence, this transition from strict foreclosure to foreclosure by sale cannot be directly examined in Missouri case law. However, discussion of the transition in other states illustrates courts' concern for the inequity inherent in strict foreclosure.

Illinois, at least implicitly, connected the concepts of the mortgagor as owner of the mortgaged land and the perceived inequity of strict foreclosure when its courts limited strict foreclosure to only those cases in which no surplus would be produced by a sale.³² Moreover, when strict foreclosure was

24. *Benton Land Co. v. Zeitner*, 182 Mo. 251, 273, 81 S.W. 193, 199 (1904) (en banc) (quoting 2 J. PERRY, TRUSTS § 602(j) (5th ed. 1899)); see also *City of Springfield ex rel. S. Mo. Trust Co.*, 305 Mo. 43, 51-52, 264 S.W. 771, 773 (1924).

25. *Zeitner*, 182 Mo. at 274, 81 S.W. at 200.

26. 4 J. POMEROY, *supra* note 18, § 1227.

27. G. OSBORNE, *supra* note 7, § 10; 1 C. WILTSIE, *supra* note 7, § 24.

28. G. OSBORNE, *supra* note 7, § 10.

29. 4 J. POMEROY, *supra* note 18, § 12272; 2 C. WILTSIE, *supra* note 7, § 901.

30. 2 C. WILTSIE, *supra* note 7, § 901.

31. See *O'Fallon v. Clopton*, 89 Mo. 284, 290, 1 S.W. 302, 303 (1886); *Davis v. Holmes*, 55 Mo. 349, 351 (1874); *Kreyling v. O'Reilly*, 97 Mo. App. 384, 389, 71 S.W. 372, 373 (1902).

32. See *Boyer v. Boyer*, 89 Ill. 447 (1878). The Illinois courts only permitted strict foreclosure in limited circumstances:

in [the] rare cases, when it appears the property is of less value than the debt for which it was mortgaged and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of his debt. But it is not proper when there are other incumbrances upon the property, or creditors or purchasers of the equity of redemption.

used in Illinois, the mortgagee could not obtain a deficiency judgment. He was limited to satisfaction of the mortgage from the land.³³ Nor was strict foreclosure permitted when the mortgagor had additional creditors — whether secured or unsecured.³⁴ These restrictions resulted in strict foreclosure being allowed only when the foreclosing mortgagee was willing to suffer an economic loss from use of the remedy, and no economic loss from the choice of remedy was allowed to be suffered by any other person interested in the land.

Of greater interest is the interrelationship between a mortgage as a lien, the shift to foreclosure by sale, and the mortgagor's interest in the surplus. This relationship was explicitly recognized by the Minnesota Supreme Court in *Wilder v. Haughey*.³⁵ In *Wilder*, the mortgagor was in default due to his own neglect; nevertheless, the court refused to order strict foreclosure because the mortgagee was unable to show any harm would result from foreclosure by sale.³⁶ In so deciding the court argued for the preference for foreclosure by sale as opposed to strict foreclosure in foreclosing a "mere" lien:

"Where the estate is pledged . . . merely[] for the payment of the debt, a strict foreclosure would often be unjust and inequitable, disappoint the intentions of the parties, defeat the object of the security . . . and sometimes produce most serious injury to the mortgagor A public sale is the truest test of the value of the estate as a resource for the payment of the demand; and to such a sale upon sufficient notice . . . neither party can justly object: it is the best mode of disposing of the property for the interest of both. If the estate is worth more than the debt, the mortgagor will have the benefit of the surplus; and if it produces, by a fair sale of it, less than the amount due . . . the debtor ought to make up the deficiency."³⁷

Developing case law found that strict foreclosure was inequitable in several respects. Strict foreclosure allowed the mortgagee to retain an excess benefit; that is, the amount by which the fair market value of the land exceeded the mortgage debt. Further, strict foreclosure did not recognize the economic

Id. at 449 (quoting *Farrell v. Parlier*, 50 Ill. 274, 275-76 (1869)).

33. *Id.*; see *Miller v. Davis*, 5 Ill. App. 474, 475-76 (1879) (decree awarding a judgment for deficiency in addition to a decree of strict foreclosure improper even though the facts of the case "might support a decree of strict foreclosure" alone).

34. In *Boyer*, the mortgagor had died and left an insolvent estate. The court held that strict foreclosure was inappropriate even though the mortgage debt exceeded the value of the land. Apparently, the existence of other creditors of the estate was sufficient to invoke the rule of limiting strict foreclosure even though there was no indication that such creditors would be entitled to any proceeds — the mortgage debt exceeded the value of the land and presumably all of the proceeds would have gone to the mortgagee. *Boyer*, 89 Ill. at 449-50. Therefore, the court appears to have relegated strict foreclosure to the most limited of circumstances. See also *Rourke v. Coulton*, 4 Ill. App. 257, 261-62 (1879) (improper to order a strict foreclosure of a first deed of trust where there was a second deed of trust on the land).

35. 21 Minn. 101 (1874).

36. *Id.* at 104.

37. *Id.* at 103-04 (emphasis added) (quoting *Lansing v. Goelet*, 9 Cow. 346, 356 (N.Y. 1827)).

expectations of the parties because it did not recognize a mortgage as what it had always been intended to be — a pledge of land as security for a debt.³⁸ Thus, strict foreclosure gradually was supplanted by foreclosure by sale.

This increasing prevalence of foreclosure by sale gives rise to the issue of who is entitled to the surplus from a foreclosure sale. Foreclosure sales generate a cash fund from which the mortgagee's claim is satisfied. Because one purpose of foreclosure by sale is to realize the full value of the land, the cash fund very possibly can exceed the foreclosing mortgagee's claim. Similarly, the foreclosing mortgagee is no longer allowed to retain what had been the excess benefit obtained from strict foreclosure. Under foreclosure by sale, this excess benefit is considered the surplus of the sale. The question thus becomes the priority of junior interests in this surplus.

III. THE THEORY OF SURPLUS APPLICATION

The general rule of surplus application was set out in the Introduction (above). In equity the surplus is applied to junior interests in order of priority because "the surplus stands in the place of the foreclosed real estate . . ."³⁹ However, a more complete explanation of the theory underlying this rule is necessary to analyze the shortcomings of Missouri case law.

This theory is found by comparing the economic concerns which caused the shift from strict foreclosure to foreclosure by sale⁴⁰ with the various parties' interests in the surplus.⁴¹ In a historical context, courts have treated foreclosure surplus as the remainder of the mortgagor's equitable estate, *i.e.*, his equity of redemption, with priority in the surplus based on the notion that a junior lienor is an assignee of that equity of redemption.⁴² Thus, it is possible

38. See *supra* text accompanying note 22.

39. See *supra* text accompanying note 1.

40. See *supra* text accompanying notes 31-38.

41. This analysis is broadly outlined in Pomeroy's discussion of the equitable maxim: "Equity regards and treats that as done which in good conscience ought to be done." See 2 J. POMEROY, *supra* note 18, §§ 364-65, 376. The discussion of the parties' expectations with regard to foreclosure surplus is particularly suggested by this material.

The focus in this section on the economic expectations of the parties is not intended to suggest that it is the *only* relevant factor, merely that it will tend to predominate in a discussion of the expectations surrounding a security interest. An alternative view is suggested in the textual discussion of *Trenton Motor Co.* See *infra* notes 100-109 and accompanying text.

42. *Jones v. Shepard*, 145 Mo. App. 470, 479, 122 S.W. 764, 767 (1909). As stated in *Jones*:

Junior incumbrancers will take precedence over the mortgagor as regards the right to have their demand paid out of the surplus, because the execution of a junior mortgage amounts to an assignment of the mortgagor's equity of redemption to the junior mortgagee and of the assignor's right in equity to the surplus in case of a sale of the prior incumbrance.

Id.; see also *In re Reid*, 73 Bankr. 88, 90 (E.D. Mo. 1987).

to explain the nature of foreclosure surplus by an analogy to the concept of the equity of redemption.

The first consideration is the meaning of the term "equity of redemption." The term is arguably obsolete. It referred to the mortgagor's equitable estate in his mortgaged land.⁴³ But under the lien theory, the mortgagor owns the entire estate, not just the equity of redemption.⁴⁴ Nevertheless, the concept of the mortgagor's "equity of redemption" remains important in analyzing the disposition of foreclosure surplus. It is used to refer to both the mortgagor's right to redeem after default⁴⁵ as well as the estate of the mortgagor.⁴⁶ In Missouri, the "equity of redemption" is clearly considered real property capable of conveyance⁴⁷ or inheritance,⁴⁸ and subject to execution.⁴⁹ Further, to give effect to the intentions of the various parties, the surplus after foreclosure is considered as retaining the "real" character of the land.⁵⁰

If the equity of redemption is the right of the mortgagor, prior to foreclosure, to pay off the arrearages and receive the land,⁵¹ how is the value of that right measured? The value of the right will be the mortgagor's net receipts upon exercising the right — the fair market value of the land less the cost of exercising that right. That "cost" will be the balance of the remaining debt.⁵² This can be depicted numerically:

43. See *supra* text accompanying notes 8-10.

44. See *supra* text accompanying note 23; 4 J. POMEROY, *supra* note 18, § 1190; 1 L. JONES, *supra* note 7, § 14; Bowmar, *Mortgage Foreclosure in New York: Omitted Lienors*, 22 REAL PROP. PROB. & TRUST J. 509, 526 (1987).

45. See *supra* text accompanying note 17.

46. *Benton Land Co. v. Zeitner*, 182 Mo. 251, 274-75, 81 S.W. 193, 200 (1904).

47. See *Reid v. Mullins*, 43 Mo. 306, 308 (1869).

48. *Benton Land Co.*, 182 Mo. at 274, 81 S.W. at 200; see 1 L. JONES, *supra* note 7, § 16.

49. See *Munday v. Austin*, 358 Mo. 959, 969, 218 S.W.2d 624, 630 (1949); *Holloway v. Holloway*, 103 Mo. 274, 283, 15 S.W. 536, 538 (1891); *Hubble v. Vaughn*, 42 Mo. 138, 142 (1868).

50. *Kreyling v. O'Reilly*, 97 Mo. App. 385, 389, 71 S.W. 372, 373 (1902).

51. See *supra* text accompanying note 16. Only with an acceleration clause does the amount necessary to redeem become the full amount of the debt. See *Mills v. First Nat'l Bank*, 661 S.W.2d 808, 811-12 (Mo. Ct. App. 1983).

52. This ignores the incidental costs of foreclosure that the mortgagor may or may not be required to pay in order to redeem prior to foreclosure. See *Tipton v. Holt*, 610 S.W.2d 659, 662 (Mo. Ct. App. 1981) (where the deed of trust specified an attorney's fee only on foreclosure or suit on the note, such fee could not be required for valid tender prior to sale).

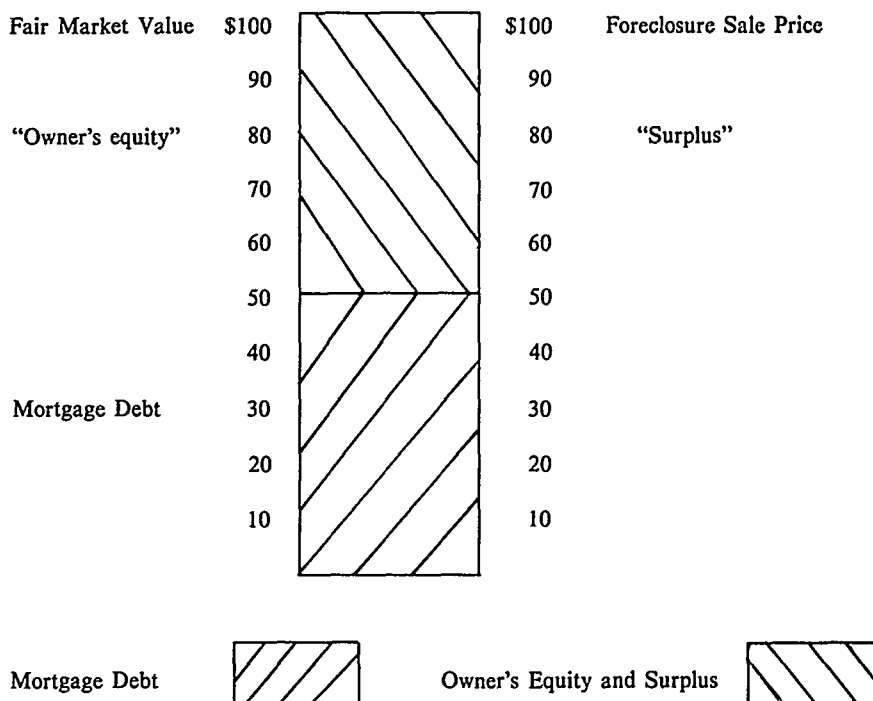


Figure 1

This is not a new description. It merely illustrates the concept of the measure "owner's equity" in land. However, this depiction is interesting in that it shows that owner's equity is the same amount as the surplus remaining after foreclosure sale. The surplus is simply the sale price less the debt and less the cost and expenses of the sale. As long as the sale price is equal to the fair market value of the land,⁵³ the two values — equity of redemption and foreclosure surplus — will be the same. Therefore, the foreclosure surplus is equivalent to the cash value of the owner's equity of redemption. This principle clearly serves as the foundation for considering foreclosure surplus as the remainder of the equity of redemption.⁵⁴ And it is this equivalence between

53. This assumption is, perhaps, wishful thinking. See Weschler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure — An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850 (1985).

54. "Where the foreclosure sale produces a surplus, the rules governing who participates in the surplus and the priority of that participation are generally clear. The major underlying principle is that the surplus represents the remnant of the equity of

the parties' interest in the land — a real property interest — and their expectations as to the surplus which serves as a basis for concluding that an equitable conversion has occurred, that is, the foreclosure surplus is properly considered real property even though it is cash.⁵⁵

Similarly, we can illustrate the value of a second mortgage or lien:

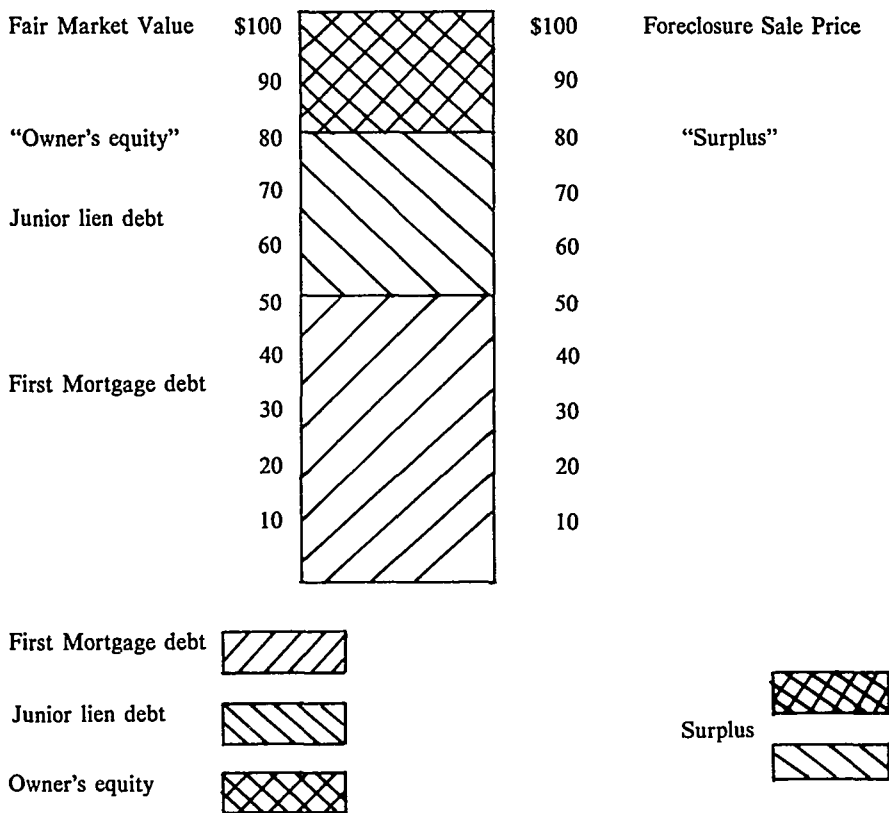


Figure 2—Two Secured Debts, First Mortgage Foreclosed

This illustrates, when compared to Figure 1, the concept of a second mortgage as an “assignment of the equity of redemption.”⁵⁶ It gives rise to the

redemption and security wiped out by the foreclosure.” G. NELSON & D. WHITMAN, *supra* note 1, § 7.31.

55. See *infra* text accompanying notes 61-64.

56. See *supra* note 42; *cf. infra* note 116.

concept of a second mortgagee's right and interest in the surplus as the equivalent of the second mortgagee foreclosing on the surplus.⁵⁷

Once again, the importance lies in focusing on maintaining the parties in the same relative position with respect to the surplus as they occupied with respect to the original real property, rather than concentrating upon the specific descriptive phrases themselves. Thus, the mortgagor's "equity" after giving a second mortgage is measured by the fair market value of the land less the cost of exercising the right of redemption (that cost being the payment of the balance remaining on both the first and second mortgage debts). A mortgagor taking out a second mortgage contemplates securing the debt essentially by the value of the land equivalent to the new debt. He has, in essence, assigned a portion of the value of his right to exercise his "equity of redemption." In Figure 2, this assignment is valued at \$30.⁵⁸ If the second mortgagee foreclosed his claim and the sale was for the fair market value, he would anticipate receiving the value of this assigned portion; in the example, the full \$30. Any surplus over this claim is the remainder of the mortgagor's interest in the land and thus goes to the mortgagor. Similarly, if the first mortgage was foreclosed instead of the second, the second mortgagee would still anticipate receiving the value of his secured claim, however, this time from the surplus, \$50 in the figure, rather than by a direct foreclosure sale. The fact that the first mortgage is foreclosed, rather than the second, does not change the relationship between the *second* mortgagee and the mortgagor. As long as the parties intended that the land serve as security for the second mortgage debt *at the time the second mortgage was executed*, then both the second mortgagee and the mortgagor are held to this intent when their respective interests in the land are converted to money by foreclosure of the senior mortgage.⁵⁹

Thus, a junior lienor's interest in the surplus derives from his expectation that the land will serve as a means of satisfying the obligation he is owed. The surplus cash remaining after foreclosure of a senior lien includes the junior lienor's interest in the land. Similarly, the mortgagor's interest in the surplus derives from his expectation that the value of the unencumbered portion of the land "belongs" to him.⁶⁰ The equivalence of these two interests in the real property and the surplus leads to placement of the surplus in the proper hands. There is, however, a conceptual problem in such placement which arises from the nature of foreclosure itself.

57. *Cheek v. Savannah Valley Prod. Credit Assoc.*, 244 Ga. 768, 770, 262 S.E.2d 90, 92-93 (1979); *cf. Kreyling v. O'Reilly*, 97 Mo. App. 384, 388-90, 71 S.W. 372, 373 (1902) (where the statute of limitations barred the second mortgagee from enforcing the debt secured by his mortgage, the second mortgagee could not enforce a claim to the surplus remaining after foreclosure of the first deed of trust).

58. *See supra* note 42.

59. *See J. POMEROY, supra* note 18, § 365.

60. Compare the economic expectations of the debtor/creditor relationship seen as a justification for abandoning strict foreclosure, *supra* text accompanying notes 37-38, with the mechanistic justification of an "assignment of the equity of redemption," *supra* note 42.

While there is an identity of a party's interest in the land with his interest in the surplus, an essential purpose of foreclosure is to extinguish all interests junior to the lien being foreclosed.⁶¹ Even so, the parties interest in the real estate is transferred to the surplus by a two step process. First, the surplus is treated *as if* it were still realty to which the junior interests attached. It is the subject of an equitable conversion:

[T]he surplus money realized by the sale of land under a mortgage or deed of trust is treated as realty and not as personalty in respect to the rules of law governing its disposition. It remains real estate in the hands of the mortgagee or trustee to be disposed of according to the law of real property.⁶²

With such an equitable conversion, the interests of the parties in the land remain in the surplus. This is true both because the surplus is considered, in equity, as realty and because equity will continue to recognize the liens in the surplus as if it were realty; notwithstanding the fact that such junior liens are extinguished by foreclosure.⁶³ This rule is not peculiar to foreclosure; a compa-

61. See, e.g., *City Bank & Trust Co. v. Thomas*, 735 S.W.2d 121, 122 (Mo. Ct. App. 1987) (junior lease); *Brask v. Bank of St. Louis*, 553 S.W.2d 223, 227 (Mo. Ct. App. 1976) (condominium common expense lien); *Sipes v. Kansas City Title Ins. Co.*, 372 S.W.2d 478, 479 (Mo. Ct. App. 1963) (deed of trust); *Estes v. Richard*, 166 Mo. App. 585, 588-89, 149 S.W. 1165, 1166 (1912) (judgment lien). The result is particularly clear for a judicial foreclosure. According to MO. REV. STAT. § 443.280 (1986): A purchaser under a sale by virtue of an execution on a judgment rendered in pursuance of the provision of sections 443.010 to 443.440 [judicial foreclosure] shall take a title as against the parties to the suit, but he shall not be permitted to set it up against the subsisting equities of those who are not parties thereto.

Mo. REV. STAT. § 443.280 (1986).

62. *Kreyling v. O'Reilly*, 97 Mo. App. 384, 389, 71 S.W. 372, 373 (1902); cf. *Huffard v. Gottberg*, 54 Mo. 271 (1873). In *Huffard*, a deed of trust secured the payment of ten promissory notes. Where only the first note was in default and foreclosed and sale of only part of the land occurred, the court held the surplus was subject to the lien of the junior notes. The surplus was to be applied to "the notes in the order as they became due." *Id.* at 273.

63. See 4 J. POMEROY, *supra* note 18, 1167 n.15. Similarly, a New Jersey court has described the application of foreclosure proceeds as an equitable partition:

The theory upon which such surplus proceeds are held to be land is that the surplus usually arises because more land is sold than is necessary, in one case to pay the debts of decedent; in another (foreclosure), than is necessary to satisfy the mortgage debt; and in partition, because the land is impossible of division and for practical purposes it has been converted into money. But in each case the money stands for the land, and the rights therein are determined as though the court were dealing with the land itself. Upon an application for distribution of such surplus moneys, the division amongst those entitled is, in effect, an equitable partition of the land for which the money stands. The excess, though in the form of money, remains, as before, impressed with the character of the land.

Morris v. Glaser, 106 N.J. Eq. 585, 592-93, 151 A. 766, 771 (1930).

The process of placing a surplus in the hands of junior interest has also been denominated as a trust. See *Foster v. Potter*, 37 Mo. 525 (1866). *Foster* involved a chattel mortgage in the form of a deed of trust with a number of shares of stock as the

able rule of equitable conversion can be found in condemnation cases.⁶⁴

Thus, courts have employed equitable conversion and equitable liens to fulfill expectations that arise from ownership and assignment of the "equity of redemption."⁶⁵ This, in turn, yields the simple rule that the surplus should be paid out in the order of priority of junior interests.⁶⁶ But, the temptation to deviate from this apparently simple rule calls for consideration of its underlying principles. Strict foreclosure was abandoned in favor of foreclosure by sale both to treat the mortgagor fairly and to ensure that the economic expectations of the parties were fulfilled.⁶⁷ The economic expectations of the parties are that the surplus will replace the interest in the land. In the case of a junior lienor, the expectation is that the surplus will replace his security interest in the land, or equivalently, the amount he would have realized if he had foreclosed first.⁶⁸ For the mortgagor, his expectation is that the surplus will replace the value of the unencumbered portion of his land.⁶⁹

IV. PROBLEM CASES

A. *Trenton Motor Co. v. Watkins*⁷⁰

Trenton purports to follow a rule for distributing surplus proceeds to the party designated in the deed of trust⁷¹ as opposed to the general rule outlined above. In *Trenton*, a first deed of trust was executed by the trustor which provided that on foreclosure, after payment of the note and expenses of the

security. A foreclosure of the chattel mortgage resulted in a surplus and a dispute over this surplus arose between a purchaser of the equity of redemption under a junior execution sale and a judgment creditor whose lien arose subsequent to the foreclosure of the chattel mortgage. *Id.* at 527-28. The court found that "[w]hen the property was sold under the deed of trust for the payment of the notes secured, the surplus remaining over became subject in [the trustee's] hands to a trust for the benefit of the [purchaser under the junior execution sale]." *Id.* at 534.

Pomeroy argues that such events are correctly denominated an equitable lien and are merely "analogous to trusts." 4 J. POMEROY, *supra* note 18, § 1234 (emphasis in original).

64. See *Ross v. Kendall*, 183 Mo. 338, 347-48, 81 S.W. 1107, 1108 (1904) (the condemnation award "represented and stood in place of the land condemned, and the claimants had the same right to and interest in the money that they had had in the land. . . . The change in form of the res did not change the rights of the owner and lienor, respectively.").

65. See discussion of *Foster v. Potter*, *supra* note 63; see also *supra* note 42.

66. See *supra* text accompanying note 1.

67. See *supra* text accompanying note 37.

68. See *supra* text accompanying notes 56-61.

69. See *supra* text accompanying notes 52-54.

70. 291 S.W.2d 659 (Mo. Ct. App. 1956).

71. 291 S.W.2d 659 (Mo. Ct. App. 1956); see also *Hilfiker v. Preyer*, 690 S.W.2d 451, 452 (Mo. Ct. App. 1985) (dictum). *But cf. In re Reid*, 73 Bankr. 88, 90 (E.D. Mo. 1987) (note holder under a junior deed of trust was entitled to the surplus from the foreclosure of the first deed of trust notwithstanding language in the first deed of trust "that the remainder, if any, [was] to be paid to the grantor.").

sale, the surplus "shall be paid to the [trustor] or her legal representative."⁷² The trustor subsequently died intestate and her son took possession of the property as her sole heir. The son, defendant, then executed a note secured by a second deed of trust on the same piece of property to the plaintiffs, Trenton Motor Co.. After default on the first deed of trust, the trustee foreclosed, the note and expenses were paid, and the trustee was left with a surplus. Trenton asserted a right to the surplus as a junior lienor⁷³ and the intestate's legal administrator intervened claiming a right to the surplus under the terms of the first deed of trust.⁷⁴

On appeal the court held that the proceeds must be paid to the administrator under the terms of the first deed. Although the administrator had not followed the proper statutory procedure for claiming the proceeds as part of a probate proceeding, the first deed gave the proceeds to the "trustor or her legal representative." Thus, the administrator, as "legal representative" of the intestate, was entitled to the surplus.⁷⁵ To state the holding another way, the court specifically held the administrator was not entitled to the surplus under probate law; he could not acquire the surplus by his statutory authority. Instead, the basis for his receiving was his supposed mortgage law right stated in the terms of the deed.⁷⁶

Under the probate statutes, the ownership of real property is conveyed by operation of law to a decedent's heirs upon the decedent's death.⁷⁷ This conveyance to an heir is subject only to the right of the administrator *acting under order of a probate court* to take possession of the real estate to satisfy debts of the decedent.⁷⁸ Thus, there is a distinct practical consequence in determining whether the surplus from foreclosure of a mortgage executed by the decedent is personal property or real property. While an heir can immediately possess the real estate, the debts of the decedent's estate act as a contingent "lien" against the decedent's real estate that is superior to any liens created by the heir. The debts are a lien in the sense that the proceeds from the sale of the real estate are only used to pay the debts of the decedent. Any surplus remaining after payment of the decedent's debts is applied to satisfy any junior liens created by the heir or is returned to the heir himself rather than

72. *Trenton*, 291 S.W.2d at 660.

73. *Id.* at 661.

74. *Id.* at 661, 664.

75. *Id.* at 664.

76. *Id.*

77. *Id.* at 663. See also MO. REV. STAT. § 473.260 (1986):

When a person dies, his real and personal property, except exempt property, passes to the persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it is subject to the possession of the executor or administrator . . . and is chargeable with the expenses of administering the estate

Id.

78. *Trenton*, 291 S.W.2d at 663; MO. REV. STAT. § 473.263(2) (1986); see *infra* text accompanying notes 79-83.

becoming part of the residual estate.⁷⁹ This "decendent's debts" lien is a superior contingent lien in the sense that the decedent's debts take precedence over any liens created by the heir⁸⁰ *only* if the proper probate order is obtained.⁸¹ By contrast, personal property is subject to immediate possession by the legal administrator of the estate without an order of the probate court.⁸²

Therefore, if the surplus is personalty, then the administrator is entitled to the surplus proceeds in his statutory capacity as the administrator of the estate notwithstanding any liens created by the heir. However, if such surplus is realty, then the administrator has only a "contingent lien" against the surplus and is not entitled to the surplus unless he has an order of the probate court to take possession of the decedent's real estate. Not surprisingly then, courts consistently have held that foreclosure surplus retains its real property character in probate and passes to the heirs, not the administrator, absent an order of the probate court for the administrator to take possession of the real estate of decedent.⁸³

79. *State ex rel. Enyart v. Doud*, 216 Mo. App. 480, 487, 269 S.W. 923, 924 (1925) (where a devisee had mortgaged her interest in the devised real estate after a court order authorizing a sale of the land to pay the decedent's debts and the land was subsequently sold, any surplus remaining in the executor's hands "goes to the person in whom the title to real estate was vested when it was converted.").

80. *Lemmon v. Lincoln*, 68 Mo. App. 76, 79 (1896) (where decedent's heir mortgaged real estate he inherited before the estate had been probated and subsequently the administrator obtained a court order to sell the land to pay decedent's debts, the heir's mortgagee was held to be junior to the decedent's creditors.).

81. MO. REV. STAT. § 473.263 (1986) states:

1. Every executor or administrator has a right to and *shall* take possession of all the personal property of the decedent
2. The court . . . *may* order the executor or administrator to take possession of the real estate of the decedent when necessary for the payment of claims or for the preservation thereof.

Id. (emphasis added); *cf. Crigler v. Frame*, 632 S.W.2d 94 (Mo. Ct. App. 1982) (the administrator of an estate had no standing to maintain a suit for partition of decedent's real estate absent a prior order of the probate court instructing the administrator to take possession of the real estate for the purpose of paying the debts of the decedent).

The *Crigler* court held that the phrase "[t]he court . . . may order" in § 473.263(2) meant an order of "the probate division of the circuit court." *Crigler*, 632 S.W.2d at 96 (quoting § 472.010(6)). Earlier versions of § 472.010 were not as clear-cut in restricting this to an order of the probate court, but the cases have assumed that they were so limited. *See Trenton Motor Co. v. Watkins*, 291 S.W.2d 659, 663 (Mo. Ct. App. 1956); *see also In re Beauchamp's Estate*, 184 S.W.2d 729, 733 (Mo. Ct. App. 1945); *Field v. French's Estate*, 106 S.W.2d 925, 929 (Mo. Ct. App. 1937).

The purposes for which the executor or administrator may take possession of real estate are set out in §§ 473.460 and 473.490. *See McIntosh v. Connecticut Gen. Life Ins. Co.*, 366 S.W.2d 409 (Mo. 1963).

82. MO. REV. STAT. § 473.263(1) (1986) (text of statute *supra* note 81). The difference in statutory treatment between personal and real property is apparently quite intentional and departs from the treatment in the corresponding section of the Uniform Probate Code. *See Clapper v. Chandler*, 406 S.W.2d 114, 119-20 (Mo. Ct. App. 1966) (distinguishing UNIF. PROBATE CODE § 124).

83. *Trenton Motor Co. v. Watkins*, 291 S.W.2d 659, 663-64 (Mo. Ct. App.

In *Trenton* the administrator did not obtain such an order, and the court specifically held the administrator was not entitled to the surplus in his statutory capacity. Instead, the court held the administrator was entitled to the surplus as the named recipient in the foreclosed deed of trust.⁸⁴ Yet there is no authority in Missouri to make such a distribution.⁸⁵

1956); *Arrowood v. Delaney's Estate*, 295 S.W. 522, 524 (Mo. Ct. App. 1927); *State ex rel. Enyart v. Doud*, 216 Mo. App. 480, 487, 269 S.W. 923, 924 (1925); *Kreyling v. O'Reilly*, 97 Mo. App. 384, 389, 71 S.W. 372, 373 (1902). In all these cases, the foreclosure occurred after the death of the mortgagor (the same result would apply if it was the death of mortgagor's grantee). Although there is some authority for a different result if the foreclosure occurred prior to the mortgagor's death, there is no indication it has been followed in Missouri. See 2 C. WILTSIE, *supra* note 7, § 981.

The only statutory limitation on foreclosure in the probate context serves merely as a postponement rather than a bar. Under § 443.410, the foreclosure is stayed for six months after the mortgagor's death, but no other action is required of the mortgagee other than the normal statutory requirements to commence foreclosure after this date. "If any person shall die owning real estate on which there is an outstanding deed of trust or mortgage of real estate . . . no sale shall take place under the deed of trust or mortgage conveying real estate within six months after the death of such person . . ." MO. REV. STAT. § 443.410 (1986). See also *Lass v. Sternberg*, 50 Mo. 124 (1872).

84. *Trenton Motor Co. v. Watkins*, 291 S.W.2d 659, 663-64 (Mo. Ct. App. 1956).

85. In *Hilfiker v. Preyer*, 690 S.W.2d 451 (Mo. Ct. App. 1985), the court cited *Trenton Motor Co.* as standing for the proposition that "ordinarily disposition of the proceeds of a foreclosure sale are ascertained from the directions of the deed of trust." See *Hilfiker v. Preyer*, 690 S.W.2d 451, 452 (Mo. Ct. App. 1985). However, this "rule" was not necessary to the court's decision of the case. The surplus clause did not cover the issue the court was confronted with — a dispute over a surplus by co-makers of a note who had secured the note by separate deeds of trust covering their separately owned property. *Id.*

If nothing else, *Trenton Motor Co.* is an interesting lesson in creative case citation. To support the proposition that surplus proceeds should be paid out according to the terms of the foreclosed deed of trust, the *Trenton* court cited *Jones v. Shepard*, 145 Mo. App. 470, 122 S.W.2d 754 (1909), and *Lolardo v. Lacy*, 337 Mo. 1097, 88 S.W.2d 353 (1935), and *In re Lacy*, 234 Mo. App. 71, 112 S.W.2d 594 (1937). See *Trenton*, 291 S.W.2d at 662-63. However, the results of these cases are considerably different than the *Trenton* court suggested.

Jones v. Shepard was quoted by the *Trenton* court for the proposition that "[o]rdinarily how a trustee who sells property under a deed of trust shall dispose of the proceeds, must be ascertained from the directions of the instrument, provided these are not in conflict with the law." *Trenton*, 291 S.W.2d at 662 (quoting *Jones*, 145 Mo. App. at 479, 122 S.W. at 767). This is a correct statement as far as it goes. However, the next sentence of the *Jones* court makes it quite clear this rule is only applicable when there are no encumbrances junior to the deed of trust being foreclosed; that in fact, a junior lienor is entitled to the surplus over the mortgagor. *Jones*, 145 Mo. App. at 479, 122 S.W. at 767. *Jones* is inapposite on the facts as well — it was trying to resolve the truly unusual problem of who was entitled to surplus proceeds from foreclosure of a second deed of trust that occurred *after* the first deed of trust had already been foreclosed. *Id.*

Equally creative was the *Trenton* court's use of *Lolardo v. Lacy*, 337 Mo. 1097, 88 S.W.2d 353 (1935) and *In re Lacy*, 234 Mo. App. 71, 112 S.W.2d 594 (1937). Both cases dealt with the trustee of the foreclosed first deed of trust (*Lacy*) attempting to

In the case, decedent's son had fee simple title to the land because of the intestate succession statutes coupled with the administrator's failure to obtain an order to take possession of the real estate.⁸⁶ This placed the son in the identical position as he would have been as a grantee of his mother. Moreover, since the early case of *Reid v. Mullins*,⁸⁷ it has been clear that a grantee is entitled to any surplus from a foreclosure over his grantor.⁸⁸ Notwithstanding any language in the foreclosed deed specifying that the surplus be paid to the original grantor or his legal representative, "[the grantor has] conveyed his equity of redemption to the [grantee, who] . . . became substituted thereby to the place and right of the original grantor, and, as such, [is] entitled to receive the surplus in his stead."⁸⁹

A similar departure from the literal terms of a surplus provision can be found in *Kimmer v. Walsh*.⁹⁰ A husband and wife executed a deed of trust to secure an individual debt of the husband with the wife's separate real estate.⁹¹ When the deed of trust was foreclosed after the wife's death, the surplus was held payable to the wife's heirs, not to the husband for the benefit of his creditors.⁹² The court reached this result notwithstanding a surplus clause that specified the surplus "be paid to the grantors of the deed or their legal representatives."⁹³ In equity the surplus belonged "to the party of whose property it was the proceeds . . .," *i.e.*, the wife's heirs.⁹⁴

The *Trenton* holding, standing alone, indicates the surplus should be paid to the recipient named in the deed. Yet these other cases make it clear that the surplus clause cannot be read literally in many situations. If the grantor/mortgagor no longer owns (or never owned, as in *Kimmer v. Walsh*) an interest in the land, he or she is not entitled to the surplus even if the foreclosed

keep the surplus for his own benefit. *Lolardo*, 337 Mo. at 1102, 88 S.W.2d at 355-56; *In re Lacy*, 234 Mo. App. at 83-84, 112 S.W.2d at 601. While Lacy was disbarred for retaining the surplus for his own benefit, the amount in dispute was the remainder after Lacy had paid off the junior deed of trust. *Lolardo*, 337 Mo. at 1108, 88 S.W.2d at 359; *In re Lacy*, 234 Mo. App. at 81-83, 112 S.W.2d at 600-601. As such, the *Trenton* court's implication that an attorney/trustee will be disbarred if he fails to follow the literal trust deed terms on the disbursement of any foreclosure surplus are hardly worth crediting. This is not to suggest that a trustee does not have a duty to properly apply the proceeds; *In re Lacy* holds the trustee to just such a duty. However, the *Lacy* cases do not stand for the rule that the surplus must be applied only according to the *literal* terms of the deed of trust.

86. See *Trenton Motor Co. v. Watkins*, 291 S.W.2d 659, 663-64 (Mo. Ct. App. 1956); MO. REV. STAT. § 473.260 (1986).

87. 43 Mo. 306 (1869).

88. *Id.* at 308; *Johnson v. Wilson*, 74 Mo. 639, 640-41 (1883).

89. *Reid*, 43 Mo. at 308.

90. 44 Mo. 65 (1869).

91. *Id.* at 67-68.

92. *Id.* at 68-69.

93. *Id.* at 69.

94. *Id.*

deed specifies that such surplus be paid to him or her.⁹⁵ The reasoning underlying this is straight forward: if the original mortgagor has conveyed the land to a subsequent grantee, then the original mortgagor no longer has an interest in the land. It should make no difference whether the conveyance was made by deed or operation of law. In either event, there is no reason for the surplus, which is in essence the remainder of the land,⁹⁶ to go to a party who no longer owns an interest in the land. As a consequence, the general concept of a surplus clause providing notice to subsequent parties of how a surplus will be distributed cannot be derived from the *Trenton* case.

But arguably the *Trenton* rule of paying the surplus to the party named in the surplus clause will still be valid in a situation where the original trustor named as recipient of the surplus remains the owner of the foreclosed property. The argument is that where the owners of the property at the time of the foreclosure are also the "trustors" specified in the deed to receive the surplus, then any junior lienors have notice of this provision in the first deed and therefore cannot complain if the surplus is paid in accordance with the deed terms. However, this completely ignores the commercial setting in which mortgages arise.

The purpose of a mortgage, in the first instance, is to provide security for the mortgagor's debt.⁹⁷ Where the lender is a junior mortgagee, he will be as interested in protecting his security interest as if he were the senior mortgagee. However, the foreclosure of the senior mortgage wipes out the junior mortgagee's security interest.⁹⁸ Under the generally accepted rule, the junior mortgagee's interest will attach to the surplus and have priority over the mortgagor.⁹⁹ But, under the *Trenton* rule, the junior mortgagee faces the prospect of having his mortgage converted into an unsecured loan anytime a senior lien forecloses first. The junior mortgagee already runs the risk of "losing" his security if a senior lien forecloses first and the property has declined in value after the date the second mortgage was given, though this is a common commercial risk. If the junior mortgagee also faces having *no* security for his loan anytime a senior lien is foreclosed first, he has only two economically rational choices. First, he can never accept a second mortgage when a senior mortgage as a *Trenton*-type clause except where the mortgagor is sufficiently creditworthy to ensure that the loan will be repaid without any need for security. Second, the junior lender can file a request for notice of sale of senior liens¹⁰⁰ and then petition

95. *Reid v. Mullins*, 43 Mo. 306, 306, 308 (1869).

96. *See supra* Section III of text.

97. *See supra* text accompanying note 22.

98. *See supra* note 61.

99. *See supra* note 42.

100. In the case of a power of sale foreclosure, the statutes require that notice be given by publication, MO. REV. STAT. § 443.320 (1986) but the only personal notice required is by mail and then it need *only* be given to persons requesting a notice of sale, as well as the original mortgagor and the owner of the property at the time of the sale pursuant to MO. REV. STAT. § 443.325(3) (1986). This request for notice must be filed with the recorder of deeds of the county where the mortgaged land is located. MO.

for a judicial foreclosure upon receiving such notice.¹⁰¹ The former would be a commercially undesirable result, while the latter would not only be undesirable from the perspective of judicial economy but also defeat the purpose of power of sale foreclosure.

One solution is to change the language used in the first deed of trust. While this does little for the parties attempting to structure a second mortgage after a first deed of trust with the offending clause has been recorded, it is available as a change for all future deed of trust forms. Yet such uncertainty should never have been necessary. Reasonable interpretation under existing law is available that would prevent the contortions of the law created by the *Trenton* court.

The *Trenton* court's problems, from a mortgage law standpoint, began when it insisted on treating surplus as real property. Its apparent chain of logic was:

1. Surplus is real property;¹⁰²

2. Real property passes to the mortgagor's heirs unless the legal administrator obtains an order of the probate court to take possession of the land for the payment of the debts of decedent;¹⁰³

3. The legal administrator had not obtained such an order; therefore, the legal administrator could not have the surplus under the probate statutes.¹⁰⁴

This syllogistic progression evidences the court's determination to grant the surplus to the legal administrator rather than its application of rational legal principles. Such determination led to the concoction of literal interpretation theory of "equitable conversion." While the court should not necessarily be condemned for this attempt to give the surplus to the legal administrator, it should be for the method used.

In *Trenton*, the grantor/heir was named the original legal administrator, then skipped town without attending to the estate.¹⁰⁵ Arguably, therefore, the son was aware of the status of the estate. Trenton Motor Co., the junior mortgagee, at the very least had constructive notice of the problem. Because the

REV. STAT. § 443.325(1) (1986). Thus, if a junior lienor does not file a request for notice of sale or does not scan the newspaper every day, he is apt to lose the benefit of his lien. This is not a problem, however, in the case of a judicial foreclosure. See *supra* note 61.

101. The junior mortgagee would have standing to maintain a foreclosure suit. *City of Springfield ex rel. S. Mo. Trust Co.*, 305 Mo. 43, 52, 264 S.W. 771, 773 (1924). Similarly, the beneficiary of a deed of trust (the lender/secured party) is the proper plaintiff in a judicial foreclosure of a deed of trust. *Sanders v. Kastner*, 222 S.W. 133, 134-35 (Mo. 1920). Arguably, therefore, the junior mortgagee would be entitled to a simultaneous foreclosure in a judicial proceeding and thereby get the benefit of his lien. See statutes discussed *infra* note 174.

102. *Trenton Motor Co. v. Watkins*, 291 S.W.2d 659, 663 (Mo. Ct. App. 1956).

103. *Id.*

104. *Id.* at 663-64.

105. *Id.* at 661.

land had not passed through probate, title would have been in the decedent's name, not in the son's. Additionally, there was evidence that Trenton had actual notice of the prior deed of trust.¹⁰⁶ Finally, if the legal administrator in this case *had* gone to the probate court first, he would have been entitled to an order to take charge of the surplus as realty.¹⁰⁷ Under these facts the court could not have awarded the surplus to the legal administrator on general equitable principles. There would be no failure of parties' expectations because Trenton was aware of the prior claim. If the first step in the court's reasoning had been that no equitable conversion occurred, then the surplus would have been simply treated as cash. Therefore, with the surplus considered personalty, the legal administrator would have been entitled to the proceeds without an order of the probate court.¹⁰⁸

The *Trenton* analysis invites courts to meddle with what had been, prior to *Trenton*, a bright line rule. Such uncertainty is not desirable in a commercial setting absent a showing of actual deceit.¹⁰⁹ In addition, it invites a conflict with what appears to be well settled principles of Missouri probate law. As a consequence, the best conclusion is that the holding in *Trenton* be strictly limited to the facts of that case.

B. "Notice" Cases

The problems in *Trenton* must be distinguished from cases holding that, where a second deed of trust which contains a surplus clause specifying that any surplus will be applied to the first deed of trust is foreclosed, the clause is controlling notwithstanding the general priority rule. This type of clause is illustrated in Missouri by *Willis Lucas Lumber Co. v. Neal*.¹¹⁰ In *Willis*, there were three outstanding deeds of trust secured by the same piece of property. The second deed of trust was foreclosed, resulting in a surplus.¹¹¹ The language of the foreclosed deed of trust specifying application of any surplus to

106. *Id.*

107. *Id.* at 663; *see also* *Lemmon v. Lincoln*, 68 Mo. App. 76, 79 (1896) (where decedent's heir mortgaged real estate he inherited before the estate had been probated and subsequently the administrator obtained a court order to sell the land to pay decedent's debts, the heir's mortgagee was held to be junior to the decedent's creditors).

108. *See supra* note 81.

109. *See, e.g., Campbell v. Miller*, 226 S.W. 597 (Mo. Ct. App. 1920). In *Campbell*, a property subject to three deeds of trust had the second deed foreclosed. The holder of the second note intentionally concealed this foreclosure (though apparently the notice given was legally sufficient) and purchased the property at the sale for his own benefit at a small fraction of its value. *Id.* at 597. As a result of this conduct, the court held that the holder of the third note was entitled to the surplus resulting from the subsequent foreclosure of the first deed of trust even though the third deed had been terminated as a junior lien by the earlier foreclosure of the second deed. *Id.* at 598.

110. 222 Mo. App. 728, 4 S.W. 1098 (1928).

111. *Id.* at 729, 4 S.W.2d at 1099.

the first deed of trust was held to govern the distribution of the proceeds.¹¹² The court stated that "the surplus arising from a sale under a second deed of trust, in equity, goes to the payment of the third deed of trust . . . in the absence of qualifying circumstances."¹¹³ But the court went on to hold that a term in the second deed of trust specifying that a surplus should be paid on the first note before being applied to the junior interests was such a "qualifying circumstance."¹¹⁴

Willis is, however, the only type of factual context outside of *Trenton* where this "notice" rule has been applied, and further *Willis* deals with an unambiguous clause.¹¹⁵ In a context where the surplus clause is ambiguous, there is little excuse for following its literal terms. As seen above, in a *Trenton* fact situation, the surplus clause directing payment to "the mortgagor or her legal representative" cannot be read literally. As such, it cannot serve as notice to junior lienors. Additionally, a surplus distribution clause with the language "to trustors, their heirs, successors or assigns" may be reasonably interpreted to include junior lienors within the meaning of "assigns." There are no Missouri cases directly ruling that the term "assigns" in a surplus clause includes a junior mortgagee, but other states have so held.¹¹⁶ However, Missouri

112. *Id.*

113. *Id.* at 730, 4 S.W.2d at 1099. The general rule for application of the surplus from foreclosure of a junior deed of trust can be found in *Helweg v. Heitcamp*, 20 Mo. 569 (1854), where a tract of land subject to three deeds of trust had the second deed foreclosed. The case considered the rights of the first and third note holders to the surplus and, in finding for the third note holder, the court explained the general rule:

This court is of the opinion that the surplus money in the hands of the trustee must be paid over to the plaintiff on the debt secured by the third deed. The sale of the property, under and by virtue of the second deed of trust, did not exonerate the property from the lien heretofore on it by virtue of the first or oldest deed of trust; it was sold liable to that debt, and the parties interested can still pursue it for that debt

The surplus therefore, must be applied, after payment of the debt and cost of sale by trustee under the second deed of trust, towards the payment of the debt mentioned and secured by the last deed of trust, the creditor in the first being left to his remedy.

Helweg, 20 Mo. at 570.

114. *Willis*, 222 Mo. App. at 730-31, 4 S.W.2d at 1099-100.

115. A result similar to *Willis* can be found in *Field v. Brown*, 207 Mo. App. 55, 229 S.W. 445 (1921) where the court held that surplus from foreclosure of a second deed of trust could be applied to a first deed of trust regardless of deed language when: all parties that could be affected by this change were present at the sale; all affected parties had agreed to the change; and, the new terms were announced at the sale so that bidders were aware of the interest they would be purchasing. *Id.* at 59, 61-62, 229 S.W. at 447-48.

116. See G. NELSON & D. WHITMAN, *supra* note 1, § 7.31, at note 6; see also *Nichols v. Tingstad*, 10 N.D. 172, 86 N.W. 694 (1901). The *Nichols* court stated: [The statute] provides for the payment of any surplus remaining in the hands of the officer or person making the sale, after satisfying the mortgage, to the "mortgagor, his legal representatives or assigns." . . . The mortgagor, having executed a second mortgage upon the premises . . . is deemed in law to have

cases have characterized a junior mortgage as "an assignment of the mortgagor's equity of redemption to the junior mortgagee"¹¹⁷ A court in Missouri faced with this issue could find either that a surplus clause specifying distribution to "assigns" is ambiguous, thereby requiring application of the general rule of distribution by priority; or could hold that a junior lienor is included in the term "assigns." Thus, applying the *Willis* rule, there are no "qualifying circumstances" in the clause to preclude applying the surplus to junior liens.

Regardless of the particular clause used, the result should comport with the reasonable expectations of the parties. Where a second mortgage specifies that any surplus from its foreclosure will be paid on the first mortgage, any potential mortgagee junior to the second mortgage has notice that his third mortgage is unsecured to the extent that he can no longer rely on proceeds from foreclosure of the second mortgage to satisfy his lien. Presumably, the third mortgagee will charge the mortgagor for this additional risk. But no such notice will occur when a more ambiguous clause, such as in *Trenton*, is used. In this latter, ambiguous case the general rule should be followed.

C. Judgment Liens

The treatment of foreclosure surplus becomes more complicated when one of the junior claimants asserts a judgment lien. Results vary depending on whether the lien is from a general judgment or a mechanic's lien¹¹⁸ and on whether the mortgagor is alive or dead.¹¹⁹

The rule in Missouri that a judgment lien does not have priority in the surplus from a foreclosure sale originated in *Warner v. Veitch*.¹²⁰ In *Warner*, a first deed of trust was foreclosed on property which was subject to a judgment lien and then a subsequent mortgage.¹²¹ The foreclosure resulted in a surplus which the trustee paid to the junior mortgagee.¹²² Warner, the assignee of the original judgment lienor, sued the trustee for the amount of her judgment.¹²³ The court of appeals held that "[n]either in law nor in equity does the statutory lien of a judgment follow the surplus produced by a sale of land under a preexisting deed of trust."¹²⁴ As a consequence Warner was denied

assigned such surplus to the second mortgagee, if there had been any. The word "assigns" is of sufficiently broad meaning, as defined by the authorities, to include a second mortgagee under such circumstances.

Nichols, 10 N.D. at 178-79, 86 N.W. at 696.

117. See *supra* note 42; see also text accompanying notes 57-61.

118. See *infra* notes 159-65 and accompanying text.

119. See *infra* notes 166-72 and accompanying text.

120. 2 Mo. App. 459 (1876).

121. *Id.* at 460.

122. *Id.* at 461.

123. *Id.*

124. *Id.* at 462.

recovery.¹²⁵

The precise basis for the court's determination that a judgment lien does not "follow the surplus" is somewhat obscure. It relied on several arguments in reaching this conclusion. First, the court asserted that a judgment lien extended only to real estate, and therefore could not attach to surplus proceeds. Such proceeds belonged to the grantor of the original mortgagor.¹²⁶ Thus, the court held "the money in this case was rightly paid to Saxton . . ."¹²⁷ The problem with this conclusion was that Saxton was the second mortgagee, and not the mortgagor.¹²⁸ Moreover, this second mortgage was junior to the judgment lien. The only way Saxton would have been entitled to the funds was if the surplus were considered realty after it passed by the judgment lien. But the proceeds, under the court's reasoning, were personalty prior to reaching the judgment lien in order that the judgment lien not attach to the surplus.

This is an odd construction of the equitable conversion principle at best. It seems unusual to say that surplus is real estate if a secured creditor wants to be paid but is not real estate if a judgment creditor wants to be paid. Nor have the courts been adverse to finding that equitable conversion will allow a judgment lienor to share in the proceeds of land in a context outside of foreclosure.¹²⁹

The *Warner* court went on to assert the lack of authority for a judgment lien attaching to the surplus. This is true in a narrow sense. The one case cited, *Strawbridge v. Clark*,¹³⁰ finds that a mechanic's lienor is entitled to the surplus rather than a judgment lienor.¹³¹ Whether this is a reasonable distinction is considered below.¹³²

Finally, the *Warner* court quoted at length from *Conrad v. Atlantic Insurance Co.*¹³³ for the proposition that title to land is not conveyed by a judgment lien.¹³⁴ A closer reading of *Conrad* indicates, however, the point the court made was that a *senior* judgment lienor is not entitled to the proceeds of a sale under a junior judgment lien because the senior lienor is not the owner of the property. This holding does not address the foreclosure surplus problem.

The rule prohibiting a judgment lienor from participating in a foreclosure surplus was more persuasively stated in the recent case of *Hawkins v. Alcorn*.¹³⁵ There, a deed of trust was foreclosed while the property was subject to

125. *Id.*

126. *Id.* at 462 (citing *Reid v. Mullins*, 43 Mo. 306 (1869)). For a discussion of *Reid v. Mullins*, see *supra* notes 87-89 and accompanying text.

127. *Id.*

128. *Id.* at 461.

129. See *infra* text accompanying notes 147-50.

130. 52 Mo. 21 (1873).

131. *Id.* at 22.

132. See *infra* notes 154-65 and accompanying text.

133. 26 U.S. (1 Pet.) 386 (1828).

134. *Warner v. Veitch*, 2 Mo. App. 459, 462-63 (1876).

135. 698 S.W.2d 37 (Mo. Ct. App. 1985).

several junior judgment liens.¹³⁶ On appeal from the trustee's interplead of the proceeds, the court followed *Warner v. Veitch* and awarded the proceeds to the personal representative of the mortgagor's estate. However, the court went beyond simply following *Warner v. Veitch* and specifically addressed the judgment lien statute. It held that proper interpretation of the statute required a finding that judgment liens do not follow the surplus:

[U]nder § 511.350 RSMo Supp. 1984, a judgment against a person results in a lien only against that person's real estate. Under §511.010 RSMo 1978, real estate includes only "all estate and interests in lands tenements and hereditaments liable to be sold upon execution." This definition does not include *proceeds* from the sale of real estate.¹³⁷

This interpretation, by excluding surplus merely because it is not specifically named in the statute, comports neither with the broad definition of "real estate" as used in the statutes nor with the treatment of surplus as if it were real estate as outlined in the above discussion of equitable conversion.¹³⁸

Once again the essential question is whether surplus is or is not to be considered "real estate", here for the purposes of the judgment lien statutes. The rendition of a judgment itself creates a "lien on the real estate which belongs to the persons against whom . . ." the judgment was rendered.¹³⁹ The existence of this "automatic" lien then depends on the definition of "real estate."

136. *Id.* at 38.

137. 137. *Id.* at 39 (emphasis in original). The statute provides in full: "The term 'real estate,' as used in this chapter, shall be construed to include all estate and interest in lands, tenements and hereditaments liable to be sold upon execution." MO. REV. STAT. § 511.010 (1986).

138. See *supra* Section III of text.

139. Section 511.350 provides in full:

1. Judgments and decrees rendered by the supreme court, by any United States district or circuit court held within this state, by any district of the court of appeals, by any circuit court and any probate division of the circuit court, except judgments and decrees rendered by associate, small claims and municipal divisions of the circuit courts, shall be liens on the real estate of the person against whom they are rendered, situate in the county for which or in which the court is held.

2. Judgments and decrees rendered by the associate divisions of the circuit courts shall not be liens on the real estate of the person against whom they are rendered until such judgments or decrees are filed with the clerk of the circuit court pursuant to sections 517.770 and 517.780, RSMo.

3. Judgments and decrees rendered by the small claims and municipal divisions of the circuit court shall not constitute liens against the real estate of the person against whom they are rendered.

MO. REV. STAT. § 511.350 (1986). Prior to 1988, Rule 74 of the Missouri Rules of Court purported to provide substantive definitions for judgments, *e.g.*, Rule 74.34 defining a "judgment lien" and Rule 74.70 defining "real estate." These definitions were eliminated in the new Rule 74, effective January 1, 1988. See 727-28 S.W.2d (Mo. Cases) XXVIII-XXXIV (1987); Laughrey, *Judgments — The New Rule*, 44 J. MO. BAR 11, 11 (1988).

Interests in land that are "liable to be sold on execution" are defined in sections 513.010.¹⁴⁰ and 513.090. Section 513.090 provides in part:

The following property shall be liable to be seized and sold upon attachment and execution issued from any court of record

* * *

(5) All real estate whereof the defendant, or any person for his use, was seized, in law or equity, at the time of the issue and levy of the attachment, or rendition of the judgment, order or decree whereon execution was issued, or at any time thereafter.¹⁴¹

Further the "equity of redemption" itself is subject to sale under execution.¹⁴² Therefore, the rejection by the *Hawkins* and *Warner* courts of lien attachment to surplus proceeds turns on a very literal reading of the term "real estate" as used in Chapters 511 and 513.

This literal interpretation of the judgment lien statutes has not been followed in cases where proceeds of realty are created by means other than power of sale foreclosure. In both judicial foreclosure and partition by sale, there is authority for allowing the judgment lienor to participate in the proceeds. In the case of judicial foreclosure, the authority for applying the surplus to a judgment lien is found in *McGuire v. Wilkinson*.¹⁴³ In *McGuire*, property that was the subject of four mortgages and a judgment lien was sold to satisfy the mortgages.¹⁴⁴ The surplus remaining after satisfaction of the four mortgages was "assigned" by the mortgagor to the fourth mortgagee. The court held that the judgment lien in the property was not extinguished by the sale. Rather, the surplus was subject to the lien and "was subject to garnishment in the hands of [the fourth mortgagee]."¹⁴⁵ This result is considerably different from *Warner* where the court held the judgment lienor would have to garnish the trustee *prior* to foreclosure to have a claim on the surplus.¹⁴⁶

Similarly, courts have applied this equitable lien remedy outside the context of foreclosure. In *Pococke v. Pococke*,¹⁴⁷ a creditor with a judgment lien on the undivided interest of his debtor in a parcel of land was entitled to satisfaction of his lien from the proceeds when the land was partitioned by sale because "[t]he lien attached to the interest of [the debtor] in the proceeds of

140. "The term 'real estate,' as used in this chapter shall be construed to include all estate and interest in lands, tenements and hereditaments." MO. REV. STAT. § 513.010(1) (1986).

141. MO. REV. STAT. § 513.090 (1986).

142. *Munday v. Austin*, 358 Mo. 959, 218 S.W.2d 624 (1949) (en banc); *Holloway v. Holloway*, 103 Mo. 274, 15 S.W. 536 (1891).

143. 72 Mo. 199 (1880).

144. *Id.* at 201. The facts of the case indicate that a single sale was held to satisfy all four mortgages which would tend to indicate a judicial foreclosure, though the opinion itself makes no statement one way or the other.

145. *Id.*

146. *Warner v. Veitch*, 2 Mo. App. 459, 463 (1876).

147. 2 Mo. App. 118 (1876).

the sale"¹⁴⁸ The court justified this result with the rationale that, notwithstanding the statute which terminated the lien upon confirmation of the sheriff's deed from the partition sale, the lien should be impressed, in equity, on the proceeds.¹⁴⁹ "The object of an execution is to convert the land into money, out of which the sum for which execution is issued may be satisfied. This conversion had already been made by sale, under the order looking to partition, before execution could issue under the judgment."¹⁵⁰

There is a more basic problem with the *Hawkins* court's assertion that a judgment lienor's claim fails because the lien is terminated at law. Foreclosure "wipes out" all junior interests in the encumbered real estate, including junior liens of all types as well as the interest of the mortgagor.¹⁵¹ Because the foreclosure has wiped out his lien, a junior lienor can no longer enforce it, if for no other reason than that there is nothing left to sell. But, he is allowed to take the surplus precisely because it is a monetary measure of the lien he had on the real estate.¹⁵² It is the measure of what the junior lienor would receive if he had been joined in a judicial sale, or similarly, what he would have received (hypothesizing a perfect price) if a senior foreclosure did not clear the title of all junior liens. So the issue is not really whether his lien is gone after a senior foreclosure, this is surely the case. Rather the issue is whether a power of sale foreclosure should allow junior lienors, in equity, the same benefits of their liens as they would receive in a judicial action. This is particularly troubling in that even a junior mortgage will participate only in the surplus if the mortgage is considered, in equity, as real estate.¹⁵³

An analogy to judgment liens can be found in the mechanics' and materialmen's lien statute, Chapter 429 of the Revised Statutes of Missouri. The statute uses similar, though not identical, wording to specify the type of property to which it will attach:

The entire land [upon which work has been done] shall be subject to all liens created by [Chapter 429] to the extent, and only to the extent, of all the right, title and interest owned therein by the owner or proprietor of such building, erection or improvement, and for whose immediate use or benefit the labor was done¹⁵⁴

There is a readily apparent difference in the wording of the interest to which the lien will attach: a mechanic's lien will attach to any "right, title or interest" in a building, while a judgment is a lien on "all estate and interests in land."¹⁵⁵ Additionally, a mechanic's lien is "perfected" without any court action — it arises after the statutory prerequisites of notice — not as the result

148. *Id.* at 122.

149. *Id.* at 121-22.

150. *Id.* at 122; *see also supra* note 63.

151. *See supra* note 61.

152. *See supra* text accompanying notes 56-61.

153. *See supra* Section III of text.

154. MO. REV. STAT. § 429.030 (1986).

155. *See supra* note 137.

of a judgment rendered by a court.¹⁵⁶ However, the mechanic's lien must be enforced through a court proceeding.¹⁵⁷ Further, a mechanic's lien results in a lien on specific property of the debtor rather than all real estate of the debtor within a county.¹⁵⁸

Beyond these distinctions, a mechanic's lien shares in the surplus from foreclosure. The issue was indirectly decided in *Strawbridge v. Clark*,¹⁵⁹ where the surplus was the result of an execution sale on a senior judgment lien with, in descending priority, a deed of trust and a mechanic's lien as junior liens.¹⁶⁰ The high bidder at the execution sale refused to tender after the first sale, and therefore, the property owner was entitled to the difference between the highest bids of the first and second sales. However, the court held that this "surplus" would have to be applied to the junior liens before the owner was entitled to receive anything. "In this case the amount of the subsequent deed of trust . . . and the mechanic's lien was sufficient to exhaust the difference between the two bids . . ." ¹⁶¹ Hence, the landowner had no claim against the original high bidder.¹⁶²

This decision was, at best, an indirect statement of the ability of a mechanic's lien to share in the surplus of foreclosure. However, it did provide authority when the issue was addressed directly in *Boeschstein v. Burde*.¹⁶³ The *Boeschstein* court simply dismissed *Warner v. Veitch* as inapposite without discussion¹⁶⁴ and held the mechanic's lienor was entitled to have his lien paid out of the surplus.¹⁶⁵ Despite these arguments, there seems little doubt that the *Hawkins* court reached the proper result. Within the probate context, statutory interpretation suggests a situation where judgment liens *should* be treated differently from other types of liens with respect to foreclosure surplus. Where the mortgagor has died prior to foreclosure and a surplus results there is a strong argument that a judgment lien may only be satisfied in a probate proceeding.

There is specific statutory authority for subordinating a judgment lien to claims against an estate in section 473.397.¹⁶⁶ The court in *Hawkins v. Al-*

156. See MO. REV. STAT. § 429.010 (1986).

157. See MO. REV. STAT. §§ 429.170, 429.210 (1986).

158. See *supra* text accompanying note 153.

159. 52 Mo. 21 (1873).

160. *Id.* at 21.

161. *Id.* at 22.

162. *Id.*

163. 284 S.W. 202 (Mo. Ct. App. 1926).

164. *Id.* at 204.

165. *Id.* at 203; cf. *East Atlanta Bank v. Limbert*, 191 Ga. 486, 489-91, 12 S.E.2d 865, 867-68 (1941) (when a power of sale foreclosure results in a surplus, "the surplus funds represent the equity of the owner in the real estate"; a mechanic's lien would attach to the proceeds notwithstanding that the lien was extinguished at law).

166. Section 473.397 states:

All claims and statutory allowances against the estate of a decedent shall be divided into the following classes:

*corn*¹⁶⁷ relied on this provision to find that a judgment ought to be satisfied within the probate proceeding even if the lien itself was not extinguished.¹⁶⁸ This provision, along with section 473.440, apparently was intended to insure that the claims against the estate can be satisfied, particularly in a situation such as in *Hawkins*, where the decedent's estate is insolvent.¹⁶⁹ However, these two statutes would seem to subordinate a judgment lien only in cases where the decedent's estate was insolvent.¹⁷⁰ Nevertheless, a section of the execution statutes apparently requires all judgment liens to be satisfied through probate. Section 513.075 provides in full:

No execution shall issue upon any judgment or decree rendered against the testator or intestate in his lifetime, or against his executors or administrators after his death, which judgment or decree constitutes a demand against the estate of any testator or intestate, within the meaning of the statute respecting executors and administrators; but all such demands shall be classed and proceeded on in the court having probate jurisdiction, as required by said statute.¹⁷¹

Clearly, then, the Missouri statutes contemplate that an execution will not take place on a judgment lien when the judgment debtor's estate is in probate. A judgment lien should never be satisfied from foreclosure surplus

- (1) Costs;
- (2) Expenses of administration;
- (3) Exempt property, family and homestead allowances;
- (4) Funeral expenses;
- (5) Debts and taxes due the United States;
- (6) Expenses of the last sickness . . . ;
- (7) Debts and taxes due the state of Missouri . . . or any political subdivision . . . ;
- (8) Judgments rendered against the decedent in his lifetime and judgments rendered upon attachments levied upon property of decedent during his lifetime;
- (9) All other claims not barred by section 473.360.

MO. REV. STAT. § 473.397 (1986).

167. 698 S.W.2d 37 (Mo. Ct. App. 1985).

168. *Id.* at 39.

169. *Id.* Section 473.440 provides in part:

When any real or personal property of an estate is bound by the lien of any judgment, attachment or execution, which attached prior to the death of decedent, the personal representative, when the best interests of the estate require, may obtain the redemption thereof, except that, if the estate is insolvent, the property subject to the lien shall be sold in the manner provided by law for the sale of property for the payment of obligations of the estate. The proceeds of the sale shall be used first to satisfy and pay the judgment or execution without regard to the classification thereof, except that claims in classes one through seven of section 473.397 have precedence over such liens, and the residue, if any shall be administered as other assets. . . .

MO. REV. STAT. § 473.440 (1986).

170. *See* *Grace v. Lee*, 227 Mo. App. 766, 769-70, 57 S.W.2d 1095, 1097 (1933).

171. MO. REV. STAT. § 513.075 (1986).

when the mortgagor or his grantee has died. Rather, the judgment should be satisfied through the probate proceeding.

Notwithstanding these arguments, there is no clear authority for a trustee paying a judgment lienor any portion of surplus proceed from a power of sale foreclosure. If faced with a power of sale foreclosure, the judgment lienor should attempt to garnish the trustee.¹⁷² It is doubtful he could force a judicial foreclosure, though it is readily apparent that a junior mortgagee could do so.¹⁷³

V. CONCLUSION

There is ample justification in Missouri law, as well as the general theory of mortgages, to justify the general rule that foreclosure "surplus stands in the place of the foreclosed real estate and the liens and interests that previously attached to that real estate now attach to the surplus"¹⁷⁴ in contexts except for a judgment lien when the mortgagor's estate is in probate¹⁷⁵ or where a surplus clause unequivocally specifies a different recipient.¹⁷⁶ Nevertheless, there is sufficient confusion in the Missouri case law to warrant care in the application of a foreclosure surplus in even seemingly ordinary circumstances. This is particularly true for trustees of the deed of trust who owe a duty to all interested parties.¹⁷⁷ When in doubt — interplead.¹⁷⁸

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172. See *Warner v. Veitch*, 2 Mo. App. 459, 463 (1876).

173. MO. REV. STAT. § 443.410 (1986) provides in part: "Deeds of trust in the nature of mortgages of lands may, in addition to being forecloseable by suit, be also foreclosed by trustee's sale . . ." When read in connection with MO. REV. STAT. § 443.190 (1986) which provides: "All mortgagees of real estate . . . may file a petition . . . that the equity of redemption may be foreclosed, and the mortgaged property . . . sold to satisfy the amount due" (emphasis added), there appears no way for a judgment lienor to force a power of sale foreclosure into a judicial foreclosure. See *Rust v. Kenmare Inv. Co.*, 235 Mo. App. 505, 136 S.W.2d 355 (1940) (the word "mortgagees" must be read literally; the trustee of a deed of trust did not have standing to petition for judicial foreclosure). For a discussion of the junior mortgagee's right to bring a judicial foreclosure, see *supra* note 101.

174. G. NELSON & D. WHITMAN, *supra* note 1, § 7.31.

175. See *supra* notes 166-72 and accompanying text.

176. See *supra* notes 110-14 and accompanying text.

177. *Tipton v. Holt*, 610 S.W.2d 659, 663 (Mo. Ct. App. 1981).

178. *Id.* at 663-64.