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The Foreclosure Purchase by the Equity of Redemption Holder or Other Junior Interests: When Should Principles of Fairness and Morality Trump Normal Priority Rules?

*Grant S. Nelson**

I. INTRODUCTION

I am both delighted and honored to be able to participate in this celebration of Dale Whitman's forty years as an outstanding teacher, dean and scholar. Our relationship goes back to 1973, when Roger Noreen, a vice president at West Publishing Co (now West Group) asked the two of us to consider doing a real estate finance casebook together. Dale and I had never met, but within a few days we had a long telephone conversation during which we agreed to collaborate on the casebook project. As they say, "the rest is history." The Nelsons have enjoyed an almost thirty-five year close friendship with Dale and his family. I have been equally blessed by a long and fruitful professional partnership during which Dale and I have worked together on numerous books and articles and as co-reporters on the Restatement (Third) of Property: Mortgages. Needless to say, Roger Noreen had a major impact on our lives.

Real estate finance law is a natural fit for Dale. Teaching mortgage law is in many respects like teaching math or algebra. Like algebra, mortgage law is both logical and analytically demanding. Both subjects employ certain basic rules. Moreover, to understand and apply mortgage law, one must have skills that are similar to those required in mastering algebraic formulae and solving algebraic word problems. As teachers we spend countless hours pressing students on the law of mortgage priorities and the maximum amount that a rational person should bid at a foreclosure sale. On this subject we emphasize two rules. First, we stress that a validly conducted foreclosure of a *senior* mortgage wipes out all junior interests in the foreclosed real estate.¹ Consequently, the purchaser may rationally bid up to the fair market value of the property because she will purchase a title free and clear of liens. Second,

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1. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.1 (1997) ("A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law.").

we emphasize that a valid foreclosure of a *junior* mortgage is subject to all senior interests in the real estate. In other words, senior liens and other senior interests will continue to encumber the title in the hands of the foreclosure purchaser.² Consequently, in calculating the maximum foreclosure bid, a rational purchaser should subtract the amount of any senior liens and other interests from the fair market value of the land.

Dale is superbly qualified for the foregoing task because in an earlier life he was a practicing electrical engineer. Thus, the analytical and logical side of Dale's brain is a perfect match for much of what we do as teachers and scholars of mortgage law.

There is another important reason why mortgage law and Dale are uniquely suited to each other. Mortgage law, after all, is more than the sum of logic and analytical rigor – its origins are significantly rooted in fifteenth century English chancery (Equity).³ Moreover, “the chancellor was usually a great ecclesiastic, learned in the canon and moral law.”⁴ Consequently, mortgage law has always been deeply rooted in and tempered by concepts of justice and fairness. For example, Equity recognized early that a mortgagor in default has an “equity of redemption” which may only be cut off by a valid foreclosure.⁵ Moreover, mortgage law will not enforce an *ex ante* agreement of the parties to dispense with foreclosure in the event of mortgagor default.⁶ This prohibition against “clogging the mortgagor's equity of redemption” has been a fixture of mortgage law for several centuries.

Here is where another side of Dale's persona is compellingly important. He is a deeply moral and principled person. Part of this surely stems from his Mormon religion and the fact that he has served it virtually all of his adult life both as a pastor and an administrator. But Dale is more than the product of his religion. Everyone who comes into contact with him quickly senses that he is a genuinely caring and compassionate person who exudes integrity. Moreover, as one who has been Dale's friend for over three decades, I can attest that not only does Dale's character survive first impression, the more one deals with him, the more one senses that he is an exceptionally moral man.

2. *Id.* (“Foreclosure does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed.”).

3. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 1.2, 1.3 (4th ed. 2001).

4. Walter W. Cook, *Equity*, in 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 585 (1931).

5. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.1 cmt. a (1997) (“[B]y the end of the 17th century, the mortgagor routinely was permitted, as a matter of right, to redeem the land by payment of the mortgage debt, so long as mortgagor tendered the principal and interest . . . within a reasonable time after the law day. . . . The foregoing right to ‘pay late’ became known as the mortgagor's equity of redemption . . .”)

6. NELSON & WHITMAN, *supra* note 3, at 9.

In sum, while Dale, as an engineer, brings to mortgage law a highly analytical and logical approach, it is always tempered, like mortgage law's equitable underpinnings, by an overriding and deep concern for normative fairness and morality. For me, it is a bit disappointing that this bimodal approach to mortgage law at least initially eludes students. One example from the classroom stands out in this regard. Each year when I teach foreclosure and mortgage priority, I start with the rule explained earlier that a valid foreclosure of a senior mortgage destroys junior liens and other junior interests in the real estate. After substantial class discussion, a student will ask the inevitable question: "Why shouldn't a mortgagor in default simply wait to act until the foreclosure sale and then attempt to be the successful foreclosure purchaser? At that point, after all, he will own the real estate free and clear of preexisting junior liens." Of course, if mortgage law were purely logical, the student's intuition would be correct. But, as we see later in this paper, this is a situation where logic is often tempered by fairness concerns. My initial response is to request that the student hold this question until the issue is confronted specifically later in the course. Nevertheless, I do raise some preliminary questions. I ask whether such an approach seems too good to be true. I also ask whether a mortgagor should be rewarded for breaching his promise to pay promptly. Usually I also interject the law professor's favorite maxim that "perhaps one should not be able to accomplish in two steps what cannot be accomplished in one."

The foregoing leads to the major question posed by this paper – when should the logic of mortgage foreclosure law and its priority rules be trumped by an overriding concern for fairness and morality? This question is uniquely suited to a symposium dedicated to Dale Whitman's career as a teacher and scholar. This paper examines this question in two distinct contexts. In Part II of this paper, the focus is on whether the mortgagor or other holder of the equity of redemption⁷ who purchases the property at the foreclosure sale of a senior lien acquires a title free and clear of junior interests. Part III examines whether the holder of a junior interest who purchases at a foreclosure sale of a senior lien acquires a title free and clear of the mortgagor's equity of redemption and other interests that were junior to the foreclosed lien. Part IV offers a brief conclusion.

II. FORECLOSURE PURCHASE BY THE HOLDER OF THE EQUITY OF REDEMPTION

This Part focuses on a variety of fact situations where the original mortgagor or the holder of the equity of redemption purchases at the foreclosure

7. Frequently, the mortgagor will transfer the real estate to a transferee who assumes or takes subject to the original mortgage. When this occurs, the transferee becomes the new holder of the equity of redemption. *See infra* text accompanying notes 48-52.

of a senior mortgage or other lien. In each case, the purchaser claims that she owns the land free and clear of any liens that were junior to the foreclosed lien. In response, we assess whether normal foreclosure rules should apply or whether fairness or moral considerations dictate a contrary result.

A. Mortgagor Purchase at a Foreclosure Sale of a Senior Lien

The textbook or paradigm case is the purchasing mortgagor who asserts the destruction of a junior mortgage where the mortgagor is personally liable on its underlying obligation.

Consider the following illustration from section 4.9 of the Restatement (Third) of Property: Mortgages:

Mortgagor borrows money from Mortgagee-1 and gives Mortgagee-1 a promissory note secured by a Mortgage on Blackacre. The mortgage is immediately recorded. Mortgagor then borrows money from Mortgagee-2 and gives Mortgagee-2 a promissory note secured by a mortgage on Blackacre. The latter mortgage is immediately recorded. Mortgagor later goes into default on the obligation secured by the mortgage to Mortgagee-1 and Mortgagee-1 validly accelerates that obligation and forecloses its mortgage. Mortgagor purchases Blackacre at the foreclosure sale. Mortgagee-2 still has a valid lien on Blackacre.⁸

Indeed, some courts go so far as to characterize a mortgagor's purchase at a senior foreclosure sale as constructively fraudulent vis-à-vis the junior lienor.⁹ A focus on terminology is important in this connection. Under the foregoing illustration, the junior lien *survives* rather than *revives* because it was not destroyed by the senior foreclosure in the first place.

What is the justification for a departure from the normal rule that a foreclosure purchaser acquires a title free and clear of all interests that were junior to the lien that was foreclosed? First, courts frequently employ the *payment theory*. Under this reasoning,

8. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. b, illus. 1 (1997). See, e.g., *Transamerica Fin. Servs., Inc. v. Lafferty*, 856 P.2d 1188 (Ariz. Ct. App. 1993); *Webb v. Verville*, 434 So. 2d 360 (Fla. Dist. Ct. App. 1983); *Old Republic Ins. Co. v. Currie*, 665 A.2d 1153 (N.J. Super. Ct. Ch. Div. 1995); *Salamanca Fed. Sav. & Loan Ass'n v. Darrow*, 619 N.Y.S.2d 508 (Cattaraugus County Ct. 1994); *Holland v. Fulbert, Inc.*, 371 N.Y.S.2d 509 (App. Div. 1975); *Dixieland Realty Co. v. Wysor*, 158 S.E.2d 7 (N.C. 1967); *Third Nat'l Bank in Nashville v. McCord*, 688 S.W.2d 446 (Tenn. Ct. App. 1985).

9. See, e.g., *Holland*, 371 N.Y.S.2d at 512 (quoting *Duer v. Jaeger*, 186 N.Y.S. 584, 586 (Spec. Term 1921)).

the mortgagor is in effect paying the first mortgage and the second mortgage moves into first position. This is what would have occurred if the mortgagor had paid the first mortgage when it became due. If payment after foreclosure were to alter this result, the mortgagor would be profiting by his own wrong in failing to pay when due.¹⁰

Second, some courts emphasize the “warranties of title” concept. Under this approach,

the [junior] mortgage . . . usually contains a warranty that the mortgagor agrees that he will defend the title against all lawful claims. Permitting the foreclosure of the first mortgage is a breach of warranty to defend the title. Even if the [junior mortgagee] takes subject to the first mortgage, it has been held that the warranty to defend title is not affected by the reference to the first mortgage.¹¹

The Restatement endorses both of the foregoing rationales in taking a “pro-survival” approach: “Where a mortgagor is personally obligated on a junior lien, or where the mortgage simply contains the usual warranties of title, it would be undesirable and inequitable to allow the mortgagor to profit by violating those obligations.”¹²

Finally, survival is justified where there is a provision in a junior mortgage specifically obligating the mortgagor to pay or discharge any senior liens. Where such a covenant exists and the mortgagor’s default on the senior lien results in foreclosure, to permit a purchasing mortgagor to destroy the junior mortgage would allow her to benefit directly from her violation of the covenant. Surely such a result would be unconscionable.

A few cases take the position that unless the purchasing mortgagor is personally liable on the mortgage obligation, the mortgage does not survive.¹³ As one court put it, survival is inappropriate “unless there is an enforceable money claim.”¹⁴ The absence of mortgagor liability can occur in several contexts. For example, anti-deficiency legislation in several states bars personal liability on a variety of purchase money mortgages – in other words, the statutes make such mortgages “non-recourse.”¹⁵ In addition, lenders some-

10. *Old Republic Ins.*, 665 A.2d at 1155.

11. *Id.*

12. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. b (1997).

13. *See* *Mooney v. Provident Sav. Bank*, 705 A.2d 816 (N.J. Super. Ct. Ch. Div.1997).

14. *Id.* at 822.

15. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-729(A); CAL. CIV. PROC. CODE § 580(b); N.C. GEN. STAT. § 45-21.38. Many states prohibit deficiency judgments after power of sale foreclosure. *See, e.g.*, ALASKA STAT. § 34.20.100; ARIZ. REV. STAT. ANN. § 33-814(F); CAL. CIV. PROC. CODE § 580d.

times agree to loan document language specifically making the mortgage obligation non-recourse.¹⁶ Finally, a mortgagor's petition in bankruptcy may result in the discharge of mortgagor's personal liability on a mortgage obligation even though the mortgage continues to be valid.¹⁷

Under the Restatement approach, however, the absence of mortgagor liability does not bar junior lien survival:

Even where the mortgage obligation is completely "non-recourse," the mortgagor agrees to the satisfaction of that obligation out of the mortgaged real estate. Thus, actions by the mortgagor that undermine the ability of the mortgagee to realize on the benefits of that agreement should be discouraged.¹⁸

This approach is surely correct. If anything, there is something perverse about a rule that endorses survival where the mortgagor is personally liable on the junior obligation, but rejects it where the obligation is non-recourse. In the former setting, the mortgagee may have lost its lien, but at least it has the option of obtaining a judgment on the mortgage note and seeking to collect it from all of mortgagor's property, real or personal. In the latter situation, the mortgagee is left completely without remedy.

This irony is especially compelling for sellers of homes in California and a few other states. As we have just seen,¹⁹ under anti-deficiency legislation in those jurisdictions, a seller of a home who takes back a second deed of trust or mortgage has no personal recourse against the mortgagor. Thus if the senior mortgage is foreclosed and the seller's purchase money second is wiped out, the seller is left with no remedy against the mortgagor. Of course, it may be a minor consolation to the wiped out seller that she is not the only loser – at least the mortgagor suffers the loss of the property to the a foreclosure purchaser. On the other hand, where the foreclosure purchaser is the mortgagor herself and the law does not mandate junior lien survival, the seller winds up with no recourse while the mortgagor owns the real estate.

The case for survival is also strong where the junior interest is a judgment lien rather than a mortgage. To be sure, a judgment lien is not a consensual lien. Rather, it arises as a matter of law when a previously unsecured creditor brings suit against a debtor on its claim, obtains a judgment, and docket or records the judgment in the appropriate office in any county where the debtor has real estate.²⁰ Of course, warranties of title and covenants to

16. See generally Gregory M. Stein, *The Scope of the Borrower's Liability in a Nonrecourse Real Estate Loan*, 55 WASH. & LEE L. REV. 1207 (1998).

17. See, e.g., *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992); *Mooney*, 705 A.2d at 819.

18. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. b (1997).

19. See *supra* note 15 and accompanying text.

20. See DAVID G. EPSTEIN, *BANKRUPTCY AND RELATED LAW IN A NUTSHELL* 39-44 (6th ed. 2002); NELSON & WHITMAN, *supra* note 3, at 112-13.

discharge senior liens never existed because there was never an express writing that created them. On the other hand, the judgment debtor is personally liable on the judgment. Moreover, judgment liens contain an “after-acquired property” feature – this means that for the life of the judgment, any real estate subsequently acquired by the debtor becomes subject to the judgment lien.²¹ Thus, in our context, even if we assume the judgment lien is destroyed by the senior foreclosure, it immediately reattaches to the same real estate newly reacquired by the purchasing debtor.²²

A frequent student reaction to the foregoing is to ask: “Why not have a friend of the mortgagor purchase and take title at the foreclosure sale and later convey the property to mortgagor?” My response usually is: “Should the mortgagor be able to accomplish in two steps what cannot be carried out in one?” Or, “if it sounds too good to be true, it usually is.” Ultimately, we come to the conclusion that the survival principle “may not be evaded by collusive arrangements which call for a third party to purchase at the foreclosure sale and thereafter to transfer title to the prior [mortgagor].”²³

B. Mortgagor Purchase at a Sale for Unpaid Real Estate Taxes

Virtually all mortgage forms contain provisions specifically imposing the duty to pay real estate taxes on the mortgagor, and making failure to do so a ground for acceleration of the mortgage obligation.²⁴ Although there is

21. EPSTEIN, *supra* note 20, at 42.

22. Of course, if we assume there is a mortgage lien that was previously junior to a judgment lien and that the mortgage lien survives the foreclosure, and that the junior judgment lien is destroyed but immediately reattaches, then logic suggests that the previously senior judgment lien could lose priority to the previously junior mortgage lien.

23. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. b (1997). As an illustration:

Mortgagor borrows money from Mortgagee-1 and gives Mortgagee-1 a promissory note secured by a mortgage on Blackacre. The Mortgage is immediately recorded. Mortgagor then borrows money from Mortgagee-2 and gives Mortgagee-2 a promissory note secured by a mortgage on Blackacre. The latter mortgage is immediately recorded. Later Mortgagor defaults on the obligation to Mortgagee-1, that obligation is validly accelerated and Mortgagee-1 forecloses. F, Mortgagor’s friend, agrees that, if F is the successful foreclosure purchaser, F will thereafter convey Blackacre to Mortgagor. F then purchases Blackacre at the foreclosure sale and thereafter conveys Blackacre to Mortgagor. Mortgagee-2 still has a valid lien on Blackacre.

Id. § 4.9 cmt. b, illus. 7. See, e.g., *Barberi v. Rothchild*, 61 P.2d 760, 762 (Cal. 1936); *Old Republic Ins. Co. v. Currie*, 665 A.2d 1153, 1155 (N.J. Super. Ct. Ch. Div. 1995); *Dorff v. Bornstein*, 14 N.E.2d 51, 54 (N.Y. 1938).

24. See, e.g., Fannie Mae/Freddie Mac Uniform Mortgage-Deed of Trust Covenant 4: “Borrower shall pay all taxes, assessments, charges, fines, and impositions

authority to the contrary,²⁵ the failure to pay real estate taxes is also increasingly viewed as waste – a tort.²⁶ This is also the Restatement view.²⁷ This concern for tax payment reflects the fact that a real estate tax lien trumps any other lien on real estate, even those that are prior in time. As one leading scholar pointed out over a half century ago,

in most tax systems . . . the burden of the ordinary tax on land and the burden of special assessments for local improvements rest on both mortgagor and mortgagee in the sense that unless these charges are satisfied by someone before the axe falls, the interests of both parties will be rubbed out. The state goes after the land and its claims overrides *all* prior interests whatever their character.²⁸

On the other hand, it clearly is difficult for a mortgagor-owner to lose her property because of unpaid real estate taxes. While state tax foreclosure procedure varies substantially, delinquent owners are afforded substantial protections. Not only are they protected by generous notice requirements,²⁹ they generally are given substantial time periods to cure their tax defaults.³⁰

In California, for example, residential property normally may not be sold for delinquent taxes until five years after an official declaration of default.³¹ At any time during that period, the owner may redeem by paying the amount of the defaulted taxes, certain costs, a redemption fee, and redemption

attributable to the Property which can attain priority over this Security Instrument”

25. *See, e.g.*, *Krone v. Goff*, 127 Cal. Rptr. 390, 392-93 (Ct. App. 1975); *Camden Trust v. Handle*, 26 A.2d 865 (N.J. 1942); *Union Mortgage Co. v. Nelson*, 82 N.Y.S.2d 268 (Spec. Term 1948); *Chetek State Bank v. Barberg*, 489 N.W.2d 385 (Wis. Ct. App. 1992).

26. *See, e.g.*, *Nippon Credit Bank, Ltd. v. 1333 N. Cal. Blvd.*, 103 Cal. Rptr. 2d 421, 428-29 (Ct. App. 2001); *Nielsen v. Heald*, 186 N.W. 299 (Minn. 1922); *N. Am. Sec. Life Ins. Co. v. Harris Trust & Sav. Bank*, 859 F. Supp.1163, 1165 (N.D. Ill. 1994) (applying Illinois law); *Abernathy v. Orton*, 71 P. 327, 329 (Or. 1903).

27. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.6(a)(3) (1997) (waste occurs when the mortgagor “fails to pay before delinquency property taxes or governmental assessments secured by a lien having priority over the mortgage”).

28. EDGAR N. DURFEE, *CASES ON SECURITY* 136 (1951) (emphasis added).

29. *See, e.g.*, ARIZ. REV. STAT. ANN. § 48-601(D); CAL. REV. & TAX. CODE § 3701; CONN. GEN. STAT. § 12-157(a); FLA. STAT. § 197.502(4); GA. CODE ANN. § 48-3-9; N.C. GEN. STAT. § 105-375(c); WASH. REV. CODE ANN. 84.64.050(4). *See also Jones v. Flowers*, 547 U.S. 220, 234 (2006) (where a mailed notice to owner of a tax foreclosure sale is returned undelivered, state, where practicable, must take further steps to provide owner with notice prior to conducting tax sale).

30. *See, e.g.*, CAL. REV. & TAX. CODE § 3361 (five years); TEX. CONST. art. VIII, § 13(c) (two years).

31. CAL. REV. & TAX. CODE §§ 3691, 3791.

penalties of 1.5% per month.³² In other states, there may be a shorter redemption period prior to the tax foreclosure sale, but the mortgagor-owner can reacquire title from the sale purchaser for a period as long as two years after the sale by paying the purchaser the sale price plus interest and certain other fees.³³

Consequently there is ample justification to be unsympathetic to the mortgagor-owner who purchases at a tax sale. Not only is she under a legal obligation to the mortgagee to pay taxes, she also is generally afforded generous statutory protections against loss of her equity due to tax delinquency. Thus, it would be doubly ironic and inequitable to permit the mortgagor-owner to use tax delinquency and purchase at a tax foreclosure sale as a vehicle to harm those mortgagees. Consequently, fundamental fairness dictates that junior liens (including “first” mortgages because all liens are junior to tax liens) survive the purchase by a mortgagor at a tax lien foreclosure sale – and this is the widely accepted traditional result.³⁴ After all, to adopt a contrary approach would reward a mortgagor who defaults on the obligation to pay taxes – she should not be permitted to base a title on the violation of her duty.³⁵ As a result, her purchase will normally be considered a payment of

32. *Id.* §§ 4102, 4103, 4156, 4157.

33. FLA. STAT. § 197.472.

34. *See, e.g.,* Jefferson v. Metro. Mortgage & Sec. Co. of Alaska, 503 P.2d 1396 (Alaska 1972); Weisberg v. Loughridge, 61 Cal. Rptr. 563 (Ct. App. 1967); Salamanca Fed. Sav. & Loan Ass’n v. Darrow, 619 N.Y.S.2d 508 (Cattaraugus County Ct. 1994); Danforth v. Gautreau, 556 A.2d 217 (Me. 1989); Adams v. Sims, 9 S.W.2d 329 (Ark. 1928); Dayton v. Rice, 47 Iowa 429 (1877); Miller v. First Nat’l Bank of Englewood, 435 P.2d 899 (Colo. 1968); Pitman v. Boner, 116 N.W. 778 (Neb. 1908); Giglotti v. Albergo, 115 P.2d 791 (Utah 1941). *See generally*, M.A. Leffingwell, Annotation, *Right of Mortgagor or Purchaser of Equity of Redemption to Defeat Lien of Mortgage by Acquisition of Title at Sale Subsequent to Mortgage for Nonpayment of Taxes, or of Assessment for Local Improvement*, 134 A.L.R. 289 (1941). In some jurisdictions, this principle is characterized as the “delinquent purchaser doctrine:”

This fundamental proposition, sometimes denominated the doctrine of the delinquent purchaser . . . derives from the confluence of equitable considerations whose joinder creates a principle of sufficient strength to overcome the presumptive validity of a tax deed and the time limitations contained in the redemption statute. The doctrine rests in part on the ancient maxim that no man may take advantage of his own wrong The doctrine’s strength derives in part from public policy and the inequitable consequences which would flow if those who owe the duty of paying taxes were permitted to profit from their neglect of that duty. If the statutory mechanism for the collection of taxes is permitted to become a device for a defaulting mortgagor to defeat his obligations, the law would justly be chargeable with connivance in fraud and dishonesty.

Melahn v. Hearn, 460 N.Y.S.2d 103, 109 (App. Div. 1983) (Lazer, J., dissenting) (citations omitted).

35. *See* 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 288-89 (2002) (practitioner treatise).

the taxes. The Restatement endorses this pro-survival position.³⁶ Moreover, as in the mortgage foreclosure context, survival is the rule in collusive arrangements where title is taken in the name of a third party, but for the benefit of the mortgagor.³⁷

Surprisingly, not all recent cases see it this way. A 2004 New Hampshire Supreme Court decision, *Gordonville Corp. v. LRI-A Limited Partnership*,³⁸ interpreted that state's statutory framework as preventing survival or revival of junior liens. Under the applicable New Hampshire statute, when a municipality acts against tax-defaulted real estate, it first takes title by a tax deed to the premises. It then must offer to reconvey the property to the former owner so long as the owner "is ready, willing, and able to pay all back taxes, interest, costs and penalty" as defined by statute.³⁹ Only if the owner fails to repurchase the property will it be sold at a public auction. Finally, "[t]he deed from the municipality upon such repurchase shall convey the municipality's interest in the property."⁴⁰ In *Gordonville*, the former owner paid the back taxes together with interest, costs and penalties. When the holder of two preexisting mortgages attempted to foreclose its liens, the mortgagor sought to enjoin the foreclosure sale. Ultimately, the supreme court held that the tax deed to the municipality destroyed the two mortgage liens and that the owner now held the property free and clear of them. Those mortgages neither survived nor revived. The mortgage foreclosure was dismissed.

The mortgagee made compelling arguments, but to no avail. First, a long established New Hampshire case had held that "a mortgage extinguished by a tax deed, is revived when the original owner redeems his ownership of the property."⁴¹ Moreover, the mortgagee argued that revival was required to avoid conferring a windfall on the mortgagor especially when there had been no "price competition from potential bidders at a public auction."⁴² Nevertheless, the court held that the statutory scheme trumped the common law:

The alternative tax lien procedure set forth in RSA chapter 80 is a comprehensive statutory scheme. As an obvious and immediate benefit, it affords predictability to interested parties, allowing them

36. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9, illus. 4 (1997).

37. See, e.g., *Mendenhall v. Hall*, 134 U.S. 559, 569 (1890); *Lewis v. Fidelity Sav. & Trust Co.*, 181 S.W.2d 22, 23-24 (Ark. 1944); *Horton v. Johnson*, 15 S.E.2d 605, 608 (Ga. 1941); *Adams v. Snyder*, 20 P.2d 827, 827 (Kan. 1933); *Chamberlain v. Forbes*, 85 N.W. 253, 253 (Mich. 1901); *Harrington v. McLean*, 223 P. 912, 914 (Mont. 1924); *Higgins v. Trauger*, 632 N.W.2d 463, 471 (N.D. 2001).

38. 856 A.2d 746, 750 (N.H. 2004).

39. N.H. REV. STAT. ANN. § 80:89(II).

40. *Id.* § 80:89(III).

41. *Gordonville Corp.*, 856 A.2d at 750. See *Woodbury v. Swan*, 59 N.H. 22 (1879).

42. *Id.* at 751.

to determine the status of the property itself, its title, and its encumbrances at any given time. As such, we decline to look beyond that detailed framework, as the alternative tax lien procedure is exclusively statutory. * * * If statutorily-extinguished mortgages are to be revived, they must be revived by statute.⁴³

The New Hampshire Supreme Court was thus unmoved by the fact that its reasoning in effect endorsed a stratagem by which a mortgagor could pay his or her taxes late and, in the process, wipe out pre-existing junior liens on the property.⁴⁴ To label such an approach “bizarre” is hardly an overstatement.

Ironically, by the time the *Gordonville* litigation had commenced the New Hampshire legislature had already amended its statute to make it clear that there is revival when the property is purchased by the mortgagor:

The former owners' title upon repurchase shall be subject to any liens of record against the property as of the time of the tax deed to the municipality, and subject to any leases, easements, or other encumbrances as may have been granted or placed on the property by the municipality.⁴⁵

Unfortunately for the mortgagee, the supreme court held that the foregoing provision became effective after the tax deed was delivered and thus was inapplicable to the *Gordonville* facts.⁴⁶ While the legislature's action provided little comfort to the *Gordonville* mortgagee, at least future New Hamp-

43. *Id.* at 750.

44. In fairness to the New Hampshire Supreme Court, it should be noted that the New York Court of Appeals in 1983 also endorsed an anti-revival approach under a statutory regime similar to the one in *Gordonville*. See *Melahn v. Hearn*, 459 N.E.2d 156, 157 (N.Y. 1983). In so doing, it rejected on statutory interpretation grounds an earlier pro-revival decision, *Oliphant v. Burns*, 40 N.E. 980, 988 (N.Y. 1895). According to one commentator, the *Melahn* court “found a legislative intent to solidify tax sales as final and to free the tax sale purchaser from the doctrine of the delinquent purchaser.” 1-4 BERGMAN ON NEW YORK MORTGAGE FORECLOSURES § 4.14(e) (Mathew Bender & Co., Inc. 2006) (1990). *Accord*: *First Nat'l Bank of Downsville v. Atkin*, 718 N.Y.S.2d 499, 501 (App. Div. 2001) (“The purchaser of property at a tax sale . . . acquires a new and complete title to the land under an independent grant from the sovereign, a title free of any prior claims to the property or interests in it.’ . . . Since the mortgage was extinguished by the tax sale . . . neither the warranty of title nor after-acquired property clauses in the mortgage changed the result.”); *Anderson v. Pease*, 727 N.Y.S.2d 717, 720-21 (App. Div. 2001). On the other hand, one New York lower court decision has reached a contrary result where language in the purchasing mortgagor's mortgage contained warranty of title language. See *Salamanca Fed. Sav. & Loan Ass'n v. Darrow*, 619 N.Y.S.2d 508, 508 (Cattaraugus County Ct. 1994).

45. N.H. REV. STAT. ANN. § 80:89(IV).

46. *Gordonville*, 856 A.2d at 750.

shire mortgagees' liens will be protected from destruction by such manipulative behavior by mortgagors.

In sum, mortgagors are justifiably unsuccessful when they attempt to use the tax lien foreclosure process to destroy mortgages and other liens. Here the law is clearly consistent with common moral intuition.

C. Mortgagor's Transferee as Foreclosure Purchaser

When real estate is sold, instead of obtaining new financing, a purchaser sometimes will "take over" an existing mortgage or mortgages on the real estate. In a common scenario, the purchaser will "take over" an existing mortgage and give the seller a new purchase money mortgage for part of the purchase price. If, of course, there is a "due-on-sale" clause in an existing mortgage, the transaction will require the consent of the mortgagee.⁴⁷ A purchaser takes over a mortgage in one of two ways – she can either "assume" it or take "subject to" it.⁴⁸ In an assumption, she becomes personally liable on the underlying mortgage obligation.⁴⁹ If the transfer is merely "subject to" the mortgage, she stands to lose the land if the mortgage obligation is not paid, but she does not become personally liable on the underlying obligation.⁵⁰ In other words, if the land is insufficient to pay the obligation, the mortgagee may not attempt to satisfy it out of the transferee's other assets.⁵¹

Both assumption and "subject to" transactions share an important common feature. Suppose, for example, a purchaser agrees to purchase a house for \$200,000. This purchase price is to be financed by the purchaser taking over a preexisting mortgage on the property that has a balance of \$120,000. Another \$40,000 is to be financed by the purchaser giving a new note and mortgage for that amount to the seller. The purchaser agrees to pay the balance of the purchase price – \$40,000 – in cash contemporaneously with the transfer of title. Whether the transaction calls for the purchaser to assume the \$120,000 existing mortgage or only to take subject to it, one thing is clear – at the time the title is transferred to the purchaser, she is "out of pocket" only \$40,000. She will wind up paying the full \$200,000 only if she pays off both the preexisting mortgage and the new \$40,000 purchase money mortgage.

Now assume that a few months after the purchaser takes title, she defaults on the \$120,000 mortgage, the obligation is accelerated, and the mortgage is foreclosed. Purchaser-mortgagor is the successful purchaser at the foreclosure sale. Should the seller's purchase money mortgage continue to encumber the title in the purchaser's hands? If, of course, the purchaser had assumed the senior mortgage and thus was personally liable on it, the \$40,000

47. See NELSON & WHITMAN, *supra* note 3, at § 5.24.

48. *Id.* at 311.

49. *Id.* § 5.4.

50. *Id.* § 5.3.

51. *Id.*

mortgage should survive the foreclosure and remain a lien on the land.⁵² As the holder of the equity of redemption who purchased at a foreclosure sale that she precipitated, the assuming transferee is thus treated no differently than the original mortgagor. But should the analysis and result be different had the purchaser simply taken subject to the mortgage? No, because without lien survival the subject-to transferee would still be unjustly enriched:

[T]he purchase price paid by the transferee is almost always reduced by the value of any liens that the transferee agrees are to remain on the real estate. To permit the transferee . . . to acquire title through a senior lien foreclosure and, in so doing, to destroy junior liens, would enable the transferee to acquire the real estate for less than originally contemplated.⁵³

Courts are also unsympathetic to both assuming and subject-to transferees who purchase at tax sales. While the unjust enrichment rationale is just as compelling as in the mortgage foreclosure context, courts usually stress a different rationale. They reason that an assuming transferee, like the original mortgagor, is personally obligated to pay taxes and should not benefit from the failure to do so.⁵⁴ Moreover, courts characterize the subject-to transferee as under substantially the same duty to pay taxes as his or her assuming transferee counterpart.⁵⁵

D. Mortgagor's Reacquisition from a Bona Fide Purchaser

We already have learned that if a mortgagor (or other holder of the equity of redemption) and a third party collude to have the latter purchase at the foreclosure sale and then transfer title back to the mortgagor, junior interests revive upon the mortgagor's reacquisition of title.⁵⁶ Even in the absence of collusion, revival is the norm when the mortgagor reacquires title.⁵⁷

On the other hand, suppose the mortgagor reacquires title from a bona fide purchaser (BFP). This can be the case where either the foreclosure pur-

52. See, e.g., *Beitel v. Dobbin*, 44 S.W. 299, 302 (Tex. Civ. App. 1898).

53. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. b (1997). *But see* *Searles v. Kelley*, 40 So. 484, 485 (Miss. 1906).

54. See, e.g., *Brown v. Avery*, 78 N.W. 331, 332 (Mich. 1899); *New Eng. Loan & Trust Co. v. Browne*, 76 S.W. 954, 956 (Mo. 1903).

55. See, e.g., *Phinney v. Day*, 76 Me. 83, 83 (1884); *U.S. Fid. & Guar. Co. v. Marks*, 142 P. 524, 525 (Nev. 1914); *Roach v. Sanborn Land Co.*, 122 N.W. 1020, 1021 (Wis. 1909).

56. See *supra* note 23 and accompanying text.

57. See, e.g., *DMC, Inc., v. Downey Sav. & Loan Ass'n*, 120 Cal. Rptr. 2d 761, 761 (Ct. App. 2002).

chaser or a subsequent grantee qualifies for BFP status.⁵⁸ The Restatement rejects revival of junior liens and other interests in this context:

Under normal recording act principles, a bona fide purchaser of real estate that is subject to a prior unrecorded interest may transfer good title to a transferee even though that transferee has knowledge of that interest. The latter principle enhances the alienability of real estate and gives a bona fide purchaser the ability to transfer good title to a subsequent person who cannot qualify for bona fide purchaser status. Under this approach, the original holder of the equity of redemption, albeit tainted by unclean hands, becomes the beneficiary of a policy designed to protect bona fide purchasers and foster real estate marketability.⁵⁹

On the other hand, the case law is far from unanimous on this issue. Some courts hold that the mortgagor or other holder of the equity who reac-

58. Either a foreclosure sale purchaser or a subsequent grantee may qualify as a bona fide purchaser:

If the sale purchaser has paid value . . . , it would seem that he should take free of voidable defects if: (a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defect. Where a subsequent grantee is involved, BFP status would seem slightly easier to achieve. If that grantee did not attend the sale, he should be treated as a bona fide purchaser unless he had actual notice of the defect or was on reasonable notice from the recorded documents.

NELSON & WHITMAN, *supra* note 3, at 587-88. While the foregoing definition is directly applicable only to nonjudicial (power of sale) foreclosure, it has general validity in the judicial foreclosure context as well.

59. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. b, illus. 8 (1997). Note that normally a mortgagee who purchases at the foreclosure sale cannot be a BFP with respect to defects that occur at the foreclosure sale or earlier. NELSON & WHITMAN, *supra* note 3, at 587. However, unless a mortgagee who purchases at a foreclosure sale knows or suspects that former holder of the equity of redemption will likely attempt later to repurchase the land from it, it certainly *acquired* the title as a BFP. Thus if a court adopts the Restatement approach the mortgagee as foreclosure purchaser should be able to qualify as BFP in a situation where the former holder of the equity of redemption reacquires title from it. *See Dorff v. Bornstein*, 14 N.E.2d 51, 54 (N.Y. 1938) (mortgagee purchaser treated as BFP).

quires title from a BFP takes title subject to the revived junior interest.⁶⁰ Other decisions are consistent with the Restatement approach.⁶¹

The BFP issue is admittedly a tough call. On the one hand, there is the unclean hands problem – it is difficult to support a result that rewards a person who has violated his or her obligation to lienholders. Yet there is a strong countervailing consideration – public policy generally supports a BFP’s ability to alienate real estate freely.

One commentator has criticized the Restatement rule as “not good policy.”⁶² After all, he concludes, a revival approach means that “the BFP’s market is only reduced by one”⁶³ and thus is presumably a relatively minor burden on the BFP. But is this “one” just like any other potential purchaser? After all, it seems intuitive that a former owner will be a much more motivated potential purchaser than a person who has previously had no contact with the property. This especially would seem to be the case where the foreclosed property was the prior owner’s homestead, farm or place of business. Indeed, as one court observed, “[i]t may often happen . . . that the most beneficial opportunity a foreclosing mortgagee has to realize upon the property is by a resale to the mortgagor. But the latter would be less apt to buy the property if the effect would be to reinstate incumbrances subsequent to the mortgage foreclosed.”⁶⁴

Perhaps a subjectively fairer approach to this issue would be to tie revival to the price paid by the former owner to reacquire title. Thus, to the extent that the BFP receives a price approaching the current fair market value of the property, it is difficult to argue that the failure to revive prior junior

60. See *Transamerica Fin. Servs., Inc. v. Lafferty*, 856 P.2d 1188, 1194 (Ariz. Ct. App. 1993); *Fed. Land Bank of Columbia v. Bank of Lenox*, 16 S.E.2d 9, 10 (Ga. 1941); *Kerr v. Erickson*, 24 S.W.2d 21, 22 (Tex. Ct. App. 1930); *Merchs.’ Nat’l Bank of Fargo v. Miller*, 229 N.W. 357, 359 (N.D. 1930).

61. See *Zandri v. Tendler*, 193 A. 598, 601 (Conn. 1937); *Schultz v. Cities Serv. Oil Co.*, 86 P.2d 533, 533 (Kan. 1939); *Dorff*, 14 N.E.2d at 53-54. Consider the language of *Dorff*:

A bona fide purchaser (other than the owner) on an unconditional sale of real property pursuant to a regular foreclosure acquires a clear and absolute title as against all parties to the suit and their privies which relates back to the date of the mortgage so as to cut off all intervening rights and equities. . . . As to those whose interests in the property are cut off by the foreclosure, such a purchaser has no further obligation or duty after the actual delivery of the referee’s deed. He may do with the property as he sees fit. He may convey it back to the original owner without thereby revesting liens which were cut off by the [foreclosure] sale The mere fact . . . that the original owner acquired title subsequent to the purchaser on the sale did not reinstate the second mortgage lien.

Dorff, 14 N.E.2d at 53-54.

62. BAXTER DUNAWAY, LAW OF DISTRESSED REAL ESTATE § 26:37, at 2 (2006).

63. *Id.*

64. *Zandri v. Tendler*, 193 A. 598, 602 (Conn. 1937).

interests confers a windfall on the former owner. On the other hand, to the extent the BFP chooses to sell to the prior owner for a lower amount (as, for example, where the BFP is the foreclosing mortgagee who chooses to dispose of the property quickly for what it was owed on the mortgage obligation plus costs), the former owner is unjustly enriched unless there is revival. However, to consider such issues would be to inject even more complexity into an already complicated situation. At least a “bright line” rule that either rejects or favors revival in the BFP has the virtue of clarity. Moreover, while the Restatement may at times confer a benefit on an immoral former owner, its rule is clear and it serves in some small measure the policy goal of favoring the interests of BFP’s. While the question is admittedly close, these factors should tip the balance in favor of the Restatement approach.

E. The Statutory Redemption Analogy

In slightly less than half of the states, because of a concept termed “statutory redemption,” a valid foreclosure sale is not the end of the road for the foreclosed holder of the equity of redemption or other junior interests.⁶⁵ This type of enactment allows the mortgagor, her transferee and, in many instances, junior lienholders a period of time varying from a few weeks to a year or longer to regain title after the foreclosure sale by paying the foreclosure purchaser the sale price plus accrued interest and certain other expenses.⁶⁶ Even where the statute confers redemption rights on junior interests, those rights may not be invoked if the mortgagor or her transferee redeems – in other words, redemption by the latter is preemptive and final.⁶⁷

Not surprisingly, just as courts must confront the junior interest survival issue when mortgagors or their transferees are foreclosure purchasers, they must also resolve an analogous issue in the statutory redemption context. Suppose the mortgagor or her transferee does not purchase at the foreclosure sale, but instead opts for statutory redemption – do junior interests that were cut off by the foreclosure revive? Most courts stress that “[p]ublic policy requires [the] revival of junior mortgages. The potential for a mortgagor to eliminate junior mortgagees by allowing a foreclosure by the senior mortgagee and then [redeeming] is a solid basis for such public policy.”⁶⁸ A few

65. See NELSON & WHITMAN, *supra* note 3, at 689 n.2 (identifying twenty-two state statutes giving mortgagors post-foreclosure sale redemption rights). See generally Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Non-judicial Foreclosure Act*, 53 DUKE L.J. 1399, 1404 (2004) (describing policy arguments for and against statutory redemption).

66. NELSON & WHITMAN, *supra* note 3, at 689.

67. *Id.* at 694.

68. *Newman v. Am. Nat’l Bank*, 780 P.2d 336, 340 (Wyo. 1989). See also *Farmers Prod. Credit Ass’n v. McFarland*, 374 N.W.2d 654, 660 (Iowa 1985); *Franklin v. Spencer*, 789 P.2d 643, 644 (Or. 1990); *Donovan v. Farmers Home Admin.*, 19 F.3d 1267, 1269 (8th Cir. 1994) (applying South Dakota law).

courts differentiate between redemption by the mortgagor and one by his or her transferee, the latter taking free and clear of previously existing liens even though they may revive as against the former.⁶⁹ A very few jurisdictions, however, are unambiguously hostile to revival. For example, a California statute provides that “[l]iens extinguished by the sale . . . do not reattach to the property after redemption and the property that was subject to the extinguished lien may not be applied to the satisfaction of the claim or judgment under which the lien was created.”⁷⁰ According to its legislative history, the foregoing statute “encourages the [foreclosing mortgagee] and subordinate lienholders to protect their interest by looking to the property sold. [It] makes it clear that once a lien is extinguished a lien may not be created on the same property to enforce the same claim or judgment.”⁷¹ Thus, even a foreclosed judgment lienor is barred from invoking the “after-acquired property” concept as a basis for revival of its lien against the foreclosed property.⁷²

In sum, a majority of courts favor revival against defaulting mortgagors and their transferees in the statutory redemption context much as they support survival where those parties are foreclosure purchasers. In both situations moral concerns seem to trump logic and efficiency.

F. Policy Justification

We have seen that the Restatement as well as the cases (other than in the BFP context) pervasively protects the foreclosed junior interest whenever the mortgagor or owner of the equity of redemption directly or indirectly purchases at a senior lien foreclosure. Survival or revival of the junior interest is clearly the norm. How can such a sweeping pro-junior interest approach be justified? After all, students sometimes argue, assuming the foreclosure is conducted properly, and the junior interest holder had the opportunity to bid at the sale, don't efficiency and predictability concerns suggest a rejection of survival or revival entirely? Indeed, wouldn't such an approach encourage greater participation in the foreclosure bidding process? There are several problems with these arguments. If the foreclosure is judicial, there is greater validity to the anti-revival position because junior interests must be made party defendants and afforded an opportunity to participate in the foreclosure process.⁷³ On the other hand, nonjudicial foreclosure, which is increasingly becoming the norm nationally, is another matter. A significant number of state nonjudicial statutes fail to require mailed notice of a pending foreclosure

69. See *Turner v. Les File Drywall, Inc.*, 868 P.2d 652, 654 (N.M. 1994); *Sigler v. Phares*, 181 P. 628, 630 (Kan. 1919).

70. CAL. CIV. PROC. CODE § 729.080(e).

71. *Id.* § 729.080(e) cmt. (Legislative Committee Comment on subdivision (e), 1982 edition) (citations omitted).

72. *Id.*

73. See NELSON & WHITMAN, *supra* note 3, at 558. Judicial foreclosure is the sole method of foreclosure in about forty percent of the states. *Id.*

to most junior interests other than the mortgagor or owner.⁷⁴ Thus, it is entirely possible to terminate a junior lien or other interest without its holder ever becoming aware of a pending foreclosure.⁷⁵ Moreover, even where a junior interest is afforded ample notice, it is often unrealistic to expect him or her to be able to defeat a scheming mortgagor through the bidding process. This is especially the case where the junior party is a home seller who has taken back a purchase money mortgage from the mortgagor that is subordinate to a large institutional first mortgage. For the junior lienor to outbid the mortgagor or owner would simply require too much cash.

In the last analysis, survival and revival are grounded in notions of fundamental fairness and morality. This is especially the case where there is personal liability on a junior lien or where the mortgage contains the usual warranties of title – it would simply be inequitable and unconscionable to permit the mortgagor or owner to profit from violating his obligations.⁷⁶ But, as we have seen, survival and revival are also compelling in a variety of “non-recourse” settings as well – in such situations, preventing the unjust enrichment of the purchasing holder of the equity of redemption is a strong enough reason for keeping junior interests alive.⁷⁷

III. FORECLOSURE PURCHASE BY OTHER JUNIOR INTERESTS

In the preceding Part of this article, the focus has been on whether traditional mortgage foreclosure rules should apply when the foreclosure purchaser, directly or indirectly, is the holder of the equity of redemption. We have seen that courts routinely eschew their application and hold in favor of survival or revival of junior interests. They do this to discourage contract violation, to prevent unjust enrichment and because of other fundamental fairness concerns. In other words, morality concerns trump otherwise clear and efficient foreclosure rules.

This Part considers whether courts do or should take a similar approach when the foreclosure purchaser is not the holder of the equity of redemption, but rather a junior lienor or the holder of some other junior interest. In other words, suppose a junior lienor is the successful purchaser at a senior foreclosure sale. Does that purchase terminate the interests of the holder of the equity of redemption and other intervening junior interests in accordance with normal foreclosure rules? Or do fairness concerns or other equitable principles mandate survival or revival of those interests? What we will discover is that the judicial approach to this question varies dramatically depending upon

74. *Id.* at 582.

75. *See, e.g., In re Ocwen Fin. Servs., Inc.*, 649 N.W.2d 854, 857 (Minn. Ct. App. 2002).

76. *See supra* notes 8-23 and accompanying text.

77. *See supra* notes 13-19, 47-53 and accompanying text.

whether the foreclosure is of a traditional mortgage or of a lien for unpaid taxes.

A. Purchase by a Junior Lienor at a Foreclosure Sale of a Senior Lien

The most frequent purchaser at a foreclosure sale is the mortgagee of the mortgage being foreclosed. This is largely the case “because the mortgagee can bid up to the amount of the mortgage debt without putting up new cash” and thus “he has a distinct bidding advantage over a third party bidder, who will have out-of-pocket expense from the first dollar bid.”⁷⁸ However, junior lienors are also common purchasers.⁷⁹ Not only is a junior lienor likely to be familiar with the foreclosed real estate and its value, but any successful bid it enters in excess of the mortgage being foreclosed and other liens senior to its lien will be returned to it as surplus.⁸⁰ Given that junior lienor bidding and purchase at senior sales is commonplace and an integral part of the foreclosure process, it is hardly surprising that survival or revival claims are unavailing, as illustrated by the Restatement:

Mortgagor borrows money from Mortgagee-1 and gives Mortgagee-1 a promissory note secured by a mortgage on Blackacre. The mortgage is immediately recorded. Mortgagor borrows money from Mortgagee-2 and gives Mortgagee-2 a promissory note secured by a mortgage on Blackacre. The latter mortgage is promptly recorded. Mortgagor then borrows money from Mortgagee-3 and gives Mortgagee-3 a promissory note secured by a mortgage on Blackacre. The latter mortgage is immediately recorded. Mortgagor then defaults on the obligation to Mortgagee-1, the obligation is validly accelerated, and Mortgagee-1 forecloses its mortgage. Mortgagee-3 purchases at the foreclosure sale. Mortgagee-3 takes title to Blackacre free and clear of the interests of both Mortgagor and Mortgagee-2.⁸¹

This result is clearly sensible and fair as to both the mortgagor and the intervening mortgagee. After all, “[a]s against the mortgagor or other holder

78. NELSON & WHITMAN, *supra* note 3, at 702-03.

79. *See, e.g.*, *Glidden v. Mun. Auth. of Tacoma*, 758 P.2d 487 (Wash. 1988) (third mortgage is purchaser at sale of first mortgage).

80. NELSON & WHITMAN, *supra* note 3, at 643 (where a foreclosure produces a price that exceeds the mortgage being foreclosed, junior interests “are entitled to be paid out of the surplus in the order of priority they enjoyed prior to foreclosure. The claim of the foreclosed mortgagor or the owner of the equity of redemption normally is junior to those of all valid liens wiped out by the foreclosure”).

81. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 illus. 9 (1997). The Restatement reaches the same result where the foreclosure purchaser is a junior interest holder other than a junior lienor. *See id.* § 4.9 illus. 13 (junior easement holder).

of the equity of redemption, a mortgagee has no duty to pay senior liens."⁸² Indeed, it is almost always the holder of the equity of redemption who has an "obligation (often personal) to pay other liens on the real estate."⁸³ Moreover, "as among junior lienors and other junior interests, there is neither a contractual duty nor a duty inherent in their relationship to pay . . . other senior liens."⁸⁴

B. Purchase by a Junior Lienor at a Sale for Unpaid Real Estate Taxes

As emphasized earlier in this article, a lien for unpaid real estate taxes trumps virtually any other interest in the real estate, including a lien that would otherwise be characterized as a "first mortgage."⁸⁵ Consequently, vis-à-vis a real estate tax lien, a first mortgage is a junior lien. Accordingly, one would assume, based on the analysis of the previous subsection, that when any junior lienor purchases at a valid sale for unpaid taxes, the normal foreclosure rules should apply. In other words, the sale should terminate the interests of the holder of the equity of redemption as well as all other junior interests. Indeed, the Restatement takes this position⁸⁶ and illustrates it as follows:

Mortgagor borrows money from Mortgagee-1 and gives Mortgagee-1 a promissory note secured by a mortgage on Blackacre.

82. *Id.* § 4.9 cmt. c. Of course, in very rare situations, a junior mortgagee may agree with the mortgagor to assume a senior lien. See NELSON & WHITMAN, *supra* note 3, at § 5.16. Where this is the case and the assuming junior lienor purchases at the foreclosure sale of the senior lien, it would inequitable to hold that the mortgagor's equity of redemption has been terminated. This is so because, as between the mortgagor and the assuming junior lienor, the latter had the primary duty to pay the senior mortgage obligation. To permit a foreclosure purchase by the junior lienor to wipe out the mortgagor's interest would reward the junior for violating his promise to pay the senior obligation.

83. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. c (1997).

84. *Id.* However, in an extremely rare situation, the survival of an intervening lien is justified. For example, suppose in the illustration in the text at note 81, Mortgagee-2's mortgage goes into default and, in order to prevent foreclosure, Mortgagee-3 agrees to assume Mortgagee-2's mortgage. Later, Mortgagee-1's mortgage goes into default and is foreclosed and Mortgagee-3 is the successful sale purchaser. It would arguably be inequitable to permit Mortgagee-3 to hold title to Blackacre free and clear of Mortgagee-2's mortgage.

85. See *supra* notes 27-28 and accompanying text.

86. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 4.9 cmt. c (1997): a purchase by a junior lienor or other junior interest at a validly conducted foreclosure of a senior lien cuts off the rights of both the holder of the equity of redemption and other junior interests as well. This is the case whether the senior foreclosure is of a mortgage, a lien for unpaid real estate taxes, or any other lien.

The mortgage is immediately recorded. Mortgagor then borrows money from Mortgagee-2 and gives Mortgagee-2 a promissory note secured by a mortgage on Blackacre. The latter mortgage is promptly recorded. Mortgagor then fails to pay real estate taxes on Blackacre. A tax lien therefore arises and the appropriate government agency forecloses on Blackacre. Mortgagee-2 purchases at the tax lien foreclosure sale. Mortgagee-2 takes title to Blackacre free and clear of the interests of Mortgagor and Mortgagee-1.⁸⁷

The problem, however, is that, while there are cases supporting the Restatement approach both as to the holder of the equity of redemption⁸⁸ as well as other junior interests,⁸⁹ it represents a distinctly minority position.

1. Junior lienor as purchaser at a tax sale v. holder of equity of redemption

Courts generally have been unwilling to permit the normal foreclosure rules to operate where a mortgagee (whatever its priority) purchases at a real estate tax lien foreclosure sale. As a result, under the majority of cases, the purchase represents a payment of the taxes and the interest of the holder of the equity of redemption survives the foreclosure.⁹⁰ One leading case reasoned that:

[T]he mortgagor and mortgagee have a unity of interest in the protection of their title, and it is not equitable that either of them should act adversely to the other in the preservation of the title in the maintenance of which they are both concerned. It was primarily the duty of the mortgagor to pay the taxes, and when he failed to do so, and the property was sold for taxes, the duty devolved upon the mortgagee to relieve the property from the burden. . . .

87. *Id.* § 4.9 illus. 10. The Restatement reaches the same result where the tax sale purchaser is a junior interest holder other than a junior lienor. *See id.* § 4.9 illus. 14 (junior easement holder).

88. *See* *McLaughlin v. Acom*, 50 P. 441 (Kan. 1897); *Reimer v. Newell*, 49 N.W. 865 (Minn. 1891); *Baird v. Fischer*, 220 N.W. 892 (N.D. 1928); *Williams v. Townsend*, 31 N.Y. 411 (N.Y. 1865).

89. *See* *Sec. Mortgage Co. v. Harrison*, 3 S.W.2d 59 (Ark. 1928); *Bank of Univ. v. Athens Sav. Bank*, 33 S.E. 34 (Ga. 1899).

90. *See, e.g., Koch v. Kiron State Bank*, 297 N.W. 450 (Iowa 1941); *Eblen v. Major's Adm'r*, 143 S.W. 748 (Ky. 1912); *Porter v. Corbin*, 82 N.W. 818 (Mich. 1900); *Stallings v. Erwin*, 419 P.2d 480 (Mont. 1966); *Crofts v. Johnson*, 313 P.2d 808 (Utah 1957); *Nat'l Bank of Wash. v. Equity Investors*, 546 P.2d 440 (Wash. 1976); M.A. Leffingwell, Annotation, *Right of Mortgagee or Other Lienor to Acquire and Hold Tax Title in His Own Right as Against Persons Owning Other Interests in or Liens upon Property*, 140 A.L.R. 294, 302-11 (1942).

[A]nd he cannot be permitted to put himself in a better position, by failing to redeem and then buying in the property at the tax sale.⁹¹

The foregoing result and reasoning is flawed for several reasons. A mortgagee has a right, but no duty, to pay liens for unpaid taxes.⁹² Rather, that duty falls on the mortgagor or the holder of the equity of redemption; to hold that the defaulting taxpayer's equity survives a tax sale purchase by a mortgagee permits the taxpayer to take advantage of her own default.⁹³ On the other hand, to apply a "no-survival" rule in this situation "increases the incentive to the mortgagor to pay taxes promptly."⁹⁴ Moreover, it hardly works an undue hardship on the mortgagor because, as this article notes earlier,⁹⁵ tax lien statutes grant defaulting taxpayers generous redemption periods.

Indeed, since the law routinely encourages junior lienors to bid at *senior mortgage* foreclosure sales and permits them to acquire the mortgagor's equity of redemption, why should the rule be any different when the senior foreclosure is of a real estate tax lien? One response with a modicum of plausibility is the assertion that the purchase at the tax lien sale by a mortgagee whose underlying mortgage is in default violates the spirit, if not the letter, of the time-honored prohibition against clogging the mortgagor's equity of redemption.⁹⁶ The essence of this argument is that, absent a mortgagor voluntarily giving mortgagee a deed in lieu of foreclosure post-default, a mortgagee may acquire the mortgagor's equity of redemption in the real estate only if it purchases the title at a valid foreclosure sale of its or some other mortgage on the real estate.⁹⁷ Acquiring title at a tax sale, the argument goes, violates the foregoing principle because a tax sale is not a mortgage foreclosure sale. Technically, of course, this is true because a tax lien is not a mortgage. On the other hand, neither is, for example, a mechanic's lien, but the law routinely permits a junior mortgagee to purchase at a mechanic's lien foreclosure sale and, in so doing, to terminate the mortgagor's interest in the real estate.

91. *Eblen*, 143 S.W. at 748-49.

92. See NELSON & WHITMAN, *supra* note 35, § 4.45. Indeed, the mortgagee has the right to pay off a senior tax lien and to add that amount to its own mortgage debt. *Id.* § 4.46. Many jurisdictions and the Restatement also allow the paying mortgagee to be subrogated to the tax lien. *Id.*; RESTATEMENT (THIRD) OF PROP.: MORTGAGES §§ 2.2, 7.6 (1997).

93. NELSON & WHITMAN, *supra* note 35, at 290-91.

94. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. c (1997).

95. See *supra* notes 29-33 and accompanying text.

96. See *supra* notes 5-6 and accompanying text.

97. NELSON & WHITMAN, *supra* note 35, at 34-35; RESTATEMENT (THIRD) OF PROP.: MORTGAGES at 97 (1997) (introductory note to Chapter 3) ("the mortgagor's equity of redemption [is] the basic and historic right of a [mortgagor] to redeem the mortgage obligation after its due date, and ultimately to insist on foreclosure as the means of terminating the mortgagor's interest in the mortgaged real estate").

In any event, however one characterizes a tax lien foreclosure proceeding, the law governing tax sales increasingly affords a defaulting landowner protections comparable to or greater than those enjoyed by a mortgagor under mortgage law.⁹⁸ Thus, the acquisition of title by a mortgagee at a tax sale is the functional equivalent of a mortgagee purchasing at a mortgage foreclosure sale and, in the last analysis, the clogging argument simply fails.⁹⁹

2. Junior lienor as purchaser at a tax sale v. other junior interests

Now assume that a mortgagee purchases at a sale for unpaid taxes – should that purchase operate to terminate all other junior interests in the real estate, including any liens that were previously senior to that of the purchasing mortgagee? While the Restatement¹⁰⁰ and a minority of cases¹⁰¹ permit a junior lienor to purchase title free and clear of junior liens and other junior interests, most courts hold that junior interests survive a tax foreclosure.¹⁰²

A variety of arguments have been used to support the majority “pro-survival” approach. Occasionally, a court will assert that a mortgagee is a trustee and consequently should be barred from asserting a tax title against others holding interests in the real estate.¹⁰³ This is clearly a dubious assertion. While it is true that a *mortgagee in possession* is sometimes character-

98. See *supra* notes 29-33 and accompanying text.

99. There may be one extremely rare situation where a mortgagee who purchases at a tax sale is doing so in a fiduciary role for the mortgagor’s benefit. Suppose, as part of his or her regular monthly mortgage payment, mortgagor is required to pay one-twelfth of estimated taxes into an “escrow” or “reserve” account for taxes. Under the normal practice mortgagee uses these escrowed funds to pay taxes once annually. Later, mortgagor defaults under the mortgage and, instead of foreclosing its mortgage, the mortgagee allows the tax default to reach foreclosure status and purchases at the tax sale using, as part or all of the purchase price, the funds in the escrow account. In this case a court would clearly be justified in concluding that the mortgagor’s interest survives the tax sale. Cf. *Standard Fed. Bank v. Healy*, 777 N.Y.S.2d 499, 501 (App. Div. 2004) (mortgagee escrow holder could be held liable for neglect to make the payments to the taxing authority under a theory of breach of fiduciary duty).

100. See RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. c, illus. 10 (1997).

101. See *Sec. Mortgage Co. v. Herron*, 296 S.W. 363 (Ark. 1927); *Sec. Mortgage Co. v. Harrison*, 3 S.W.2d 59 (Ark. 1928); *Bank of Univ. v. Athens Sav. Bank*, 33 S.E. 34 (Ga. 1899); Leffingwell, *supra* note 90, at 329-31.

102. See, e.g., *In re Candlewick Lake Ass’n*, 476 N.E.2d 800 (Ill. App. Ct. 1985); *Miller v. First Nat’l Bank of Englewood*, 435 P.2d 899 (Colo. 1968); *Conn. Mut. Life Ins. Co. v. Bulte*, 7 N.W. 707 (Mich. 1881); *Chrisman v. Hough*, 47 S.W. 941 (Mo. 1898); *Buchanan v. Hansen*, 820 P.2d 908 (Utah 1991); *Or. Mortgage Co. v. Leavenworth Secs. Corp.*, 86 P.2d 206 (Wash. 1938); Leffingwell, *supra* note 90, at 319-29 (1942).

103. See *Finlayson v. Peterson*, 89 N.W. 855 (N.D. 1902).

ized as a fiduciary vis-à-vis the mortgagor and others junior interests,¹⁰⁴ virtually all other mortgagees have an interest that is lawfully antagonistic to those parties. Indeed, how else does one justify the pervasive practice of mortgagees being permitted and encouraged to bid and purchase at their own foreclosure sales?¹⁰⁵

Some other courts emphasize that the all of the parties have a “community of interest” in preserving the estate by payment of taxes and that it would therefore be inequitable to permit one of those parties to use a tax title to the detriment of the others.¹⁰⁶ As one court stressed,

[E]quity regards the land as a common fund for the payment of all liens and mortgages and it would be inequitable and a fraud for one lienor to acquire title to the land by a tax sale and use it to destroy the claim of another lienor or mortgagee. The lienor is authorized to redeem from the tax sale and equity will not allow him to acquire the title for an inconsiderable sum when he was authorized to remove the trifling encumbrance by redemption. Equity will relieve against such oppression¹⁰⁷

How is one to react to such language? Unless there is some type of specific contractual duty obligating mortgagees and other non-mortgagor junior interests to pay taxes, why is it inequitable for one of them to choose to purchase at a tax sale rather than to pay the taxes directly? For a moment, let’s assume that we are not in the tax context and that a first mortgage lien is being foreclosed – should a third mortgagee, in order to protect its interest, be required to pay off or redeem the first mortgage in default (as it has a right to do)¹⁰⁸ and in so doing promote the intervening lien in priority? Or should it be able to purchase at the senior foreclosure sale and terminate the intervening lien? Clearly, the law permits the latter “self-interested” course of action.¹⁰⁹ Why should the result be any different in the tax foreclosure situation? In the last analysis, each of the parties possesses a right and an individual self-interest in the payment of taxes – if anything, it seems more appropriate to describe this relationship as a community of antagonistic individual actors rather than one that evokes the notion “that we are all in this together.”

Another “pro-survival” justification finds its roots in the real property law governing joint tenants and tenants in common. In both joint tenancies and tenancies in common, co-tenants sometimes are treated as fiduciaries vis-

104. See NELSON & WHITMAN, *supra* note 3, at 197.

105. See *supra* note 78 and accompanying text.

106. See *In re Candlewick*, 476 N.E.2d 800; *Fair v. Brown*, 40 Iowa 209 (1875); *Woodbury v. Swan*, 59 N.H. 22 (1879).

107. *In re Candlewick*, 476 N.E.2d at 802.

108. See NELSON & WHITMAN, *supra* note 3, at 535.

109. See *supra* notes 80-81 and accompanying text.

à-vis each other – consequently, many courts hold that such persons may not purchase at a tax sale and take free of the interests of the other tenants.¹¹⁰ This is “because each such cotenant has a duty to pay taxes and therefore the principle is applicable that one should not profit by failing to satisfy that duty.”¹¹¹ Thus, as one leading case expressed it, “[i]t is as just and as politic here as it is in the case of tenants in common, to hold that the [tax sale] purchase is only a payment of the tax.”¹¹²

However, the cotenancy analogy should be inapplicable to the purchasing lienor for several reasons. First, the cotenancy cases themselves are not always uniform on the fiduciary issue. For example, there is authority that when “cotenants acquire their interests at different times through different instruments, and no relationship of trust and confidence exists between them, then no fiduciary relationship can be found to exist.”¹¹³ By their very nature, junior lienors are always the products of separate transactions and instruments and it would take a very special case to conclude that there is a relationship of trust or confidence among them. Second, cotenants in a tenancy in common or joint tenancy in a particular tract of land share fractional ownership in the equity of redemption¹¹⁴ – junior lienors, on the other hand, are not owners of that land, but only holders of encumbrances. Moreover, unlike cotenants, mortgagees by their very nature are not co-equals – they are always senior or subordinate vis-à-vis their brethren. In addition, as the Restatement explains:

[A]s among junior lienors and other junior interests, there is neither a contractual duty nor a duty inherent in their relationship to pay taxes If anything, the common derivation of their interests in

110. As one authority articulates this principle,

[a] major consequence of the existence of a fiduciary relationship among a group of cotenants is that an individual cotenant who acquires an outstanding superior title to the common property must hold it for the benefit of the other cotenants, provided they offer to contribute their pro rata shares of the cost of acquisition within a reasonable time.

WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 210 (3d ed. 2000). See, e.g., *Massey v. Prothero*, 664 P.2d 1176 (Utah 1983) (cotenant who purchased land at tax sale did not terminate the interests of other cotenants so long as the latter tendered their share of the sale price).

111. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. c (1997).

112. *Conn. Mut. Life Ins. Co. v. Bulte*, 7 N.W. 707, 710 (Mich. 1881).

113. *Wilson v. S.L. Rey, Inc.*, 21 Cal. Rptr. 2d 552, 556 (Ct. App. 1993). See also 2 AMERICAN LAW OF PROPERTY § 6.16, at 69 (A. Casner ed. 1952) (taking the position that the fiduciary principle should be inapplicable when one cotenant purchases at the foreclosure sale of a mortgage on the entire property).

114. See GRANT S. NELSON, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *CONTEMPORARY PROPERTY* 311 (2d ed. 2002) (“Although the idea of concurrent ownership is difficult to define, the notion is easy to understand without definition, for it is very common in ordinary human experience. Two or more persons own land together. Their rights are equal in quality and are usually equal in quantity.”).

the same land does not create a common interest, but numerous ones that are adverse. Thus, it is appropriate to conclude that, in bidding at a senior foreclosure sale, the holder of a junior interest is acting solely for its own benefit.¹¹⁵

Sometimes it is asserted that the prompt payment of real estate taxes is desirable from a policy perspective and that a “pro-survival” approach in the tax sale context advances that policy goal. According to this argument, since a mortgagee has the right to pay the taxes when due, it should be encouraged to take advantage of that right so that the taxes are paid as soon as possible. By depriving the mortgagee of the right to purchase a clear tax sale title, it will make an earlier decision simply to pay the past due taxes.¹¹⁶ But this argument is a double-edged sword. If the law were to prohibit survival, it is equally plausible that the possibility that one mortgagee could obtain a clear title by a tax sale purchase will provide a greater incentive to other lienors to make sure that the taxes are paid before a sale occurs. Moreover, if junior interest holders know *ex ante* that a tax sale will yield a title free and clear of liens, it may very well encourage them to engage in competitive bidding at such a sale – in other words, the sale may produce a surplus.¹¹⁷ Such a surplus may mean that more junior lienors get paid some or all of what is owed them,¹¹⁸ a desirable policy result. In the last analysis, of course, the impact of either approach to survival on the payment of taxes is an empirical question beyond the scope of this article. However, intuitively, the arguments against survival seem to trump their “pro-survival” counterparts.

The majority rule may have been more acceptable historically because most tax foreclosure legislation did not require that mortgagees and other junior interests be provided personal notice of a tax lien foreclosure sale. Notice by publication was the norm. Accordingly, “it probably was unfair to permit the termination of a mortgagee’s lien where the mortgagee may not have had adequate notice of the foreclosure sale and the opportunity to protect its interest by participating in it.”¹¹⁹ However, the situation since 1983 is substantially different. In that year the United States Supreme Court held that notice by publication and posting to a real estate mortgagee in a tax sale proceeding violated the notice requirements of the due process clause of the Fourteenth Amendment of the United States Constitution.¹²⁰ According to

115. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 cmt. c (1997).

116. See NELSON & WHITMAN, *supra* note 35, at 292.

117. An analogous argument is often made with respect to the impact of statutory redemption on foreclosure bidding. See NELSON & WHITMAN, *supra* note 3, at 691 (“[T]he availability of statutory redemption means that the foreclosure sale purchaser acquires a defeasible title and this uncertainty may discourage outside bidding.”). See also *supra* notes 65-72 and accompanying text.

118. See *supra* note 80 and accompanying text.

119. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.9 reporter’s note (1997).

120. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

the Court, “[w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee’s last known available address.”¹²¹ Legislatures generally reacted not only by requiring mailed notice to mortgagees, but to a wide variety of other junior interests as well.¹²² Since virtually all of these junior parties now have an opportunity to protect their interests by bidding at the sale, the majority survival rule loses much of its justification.

Finally, the statutory redemption analogy works against the majority rule in the tax sale context. As this article explored earlier, a significant number of states have statutory redemption schemes and some of these jurisdictions confer statutory redemption rights on foreclosed junior lienors as well as on the former holder of the equity of redemption.¹²³ Significantly, under most of these statutes, a redemption by a junior lienor gives it the same title the foreclosure sale purchaser would have obtained had there been no redemption.¹²⁴ In other words, there generally is no revival of other junior liens,¹²⁵ an approach that is consistent with the Restatement’s no survival rule in the tax foreclosure setting.

C. Summary

In Part III, we learned that where a junior lienor purchases the land at a foreclosure of a senior mortgage, normal priority rules govern and the purchaser takes title free and clear of the interests of the holder of the equity of redemption and other junior interests.¹²⁶ Here the imposition of traditional priority and foreclosure principles does not reward contractual breach, violate moral norms or cause unjust enrichment. As a result, courts correctly apply the usual rules of foreclosure.

However, we also learned in Part III, that when the foreclosure sale is of a real estate tax lien, and the sale purchaser is a junior lienor, courts take a dramatically different approach – survival of the interest of the owner and junior interests is the norm.¹²⁷ The problem here is that courts stray from normal priority and foreclosure principles when there are no justifiable moral reasons for doing so. Reliance on notions of “communities of interest,” mortgagees as trustees, and cotenancy law analogies in this context cannot be sustained. Where normative justifications for departing from normal rules are

121. *Id.* at 798.

122. *See* statutes cited *supra* note 29.

123. *See supra* notes 65-67 and accompanying text.

124. *See* NELSON & WHITMAN, *supra* note 3, at 701.

125. *See* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT 704 (7th ed. 2006).

126. *See supra* Part III.A.

127. *See supra* Part III.B.

weak or nonexistent, the departure cannot be justified. The Restatement gets it right.

IV. CONCLUSION

This article has explored an issue that is uniquely suited to Dale Whitman's powerful analytical mind and his intuitive moral and ethical sensibilities – when should the core maxim of mortgage law, namely that a properly conducted foreclosure of a senior lien terminates junior interests – yield to higher principles of fairness and morality? In Part II of this article we discovered that when the holder of the equity of redemption directly or indirectly purchases at either a mortgage sale or tax sale, survival or revival of junior liens and other junior interests is the norm.¹²⁸ This is the case even though time-honored foreclosure principles dictate that a valid foreclosure produces a title free and clear of junior interests. In this situation, compelling concepts of morality, fairness and the prevention of unjust enrichment overcome a strong presumption that normal lien priority rules should govern. Overall, courts and the Restatement reach the correct result in this context.

On the other hand, when the purchaser at a tax sale is a mortgagee or other junior interest, we observed in Part III of this article that courts improperly invoke morality and fairness concepts to justify survival and revival. Here the purchaser does not act unethically and there are no valid moral or fairness arguments for departing from normal priority rules. Here modern courts should follow the Restatement approach.

128. *See supra* Part II.