IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00274 COA

DENNIS JOSLIN **APPELLANT**

v.

CITY OF PICAYUNE AND SUNBURST BANK **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/26/94
TRIAL JUDGE:	HON. SEBE DALE JR.
COURT FROM WHICH APPEALED:	PEARL RIVER COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	F. DOUGLAS MONTAGUE
ATTORNEY FOR APPELLEE:	BYRON STOCKSTILL AND PRENTISS G. HARRELL
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	JOSLIN ENJOINED FROM PROCEEDING WITH FORECLOSURE
DISPOSITION:	AFFIRMED IN PART AND REVERSED AND REMANDED IN PART - 11/4/97
MOTION FOR REHEARING FILED:	12/10/97
CERTIORARI FILED:	2/20/98
MANDATE ISSUED:	5/14/98

EN BANC

SOUTHWICK, J., FOR THE COURT

This is a dispute between a bank and city on the one hand, and a commercial purchaser of mortgages on the other. The Chancery Court of Pearl River County held that Sunburst Bank had conveyed good title on a tract of land to the City of Picayune, after having first foreclosed a deed of trust. At the time of foreclosure, Sunburst owned two deeds of trust on the property and gave public notice of foreclosure only on the junior lien. Three years after the foreclosure and conveyance to the City, Dennis Joslin entered the picture by purchasing from bank regulators a deed of trust that had been executed on the same property after Sunburst's first deed of trust, but before the second. Joslin appeals arguing that his deed of trust gained priority over Sunburst's interests, and that therefore he

should be allowed to foreclose. We agree with the chancellor's determination that Joslin was not entitled to displace the City's title. However, Joslin has a right to show that by failing to foreclose the senior deed of trust, Sunburst adversely affected the ability of Joslin's predecessor in title to protect its interest at a foreclosure. Consequently we remand for additional proceedings.

FACTS

This dispute arises from the execution by the former record title owner, V. L. Stanfield, of three deeds of trust on the same property. Sunburst Bank acquired the first deed of trust from the initial lender, South Mississippi Bank, and was itself granted by Stanfield the third deed of trust. The interest created between the dates of those two deeds of trust was granted to First Guaranty Bank for Savings. First Guaranty was taken over by the federal government and its assets were managed by the Resolution Trust Corporation (RTC). Sunburst foreclosed in 1990. In 1993 the RTC assigned the second deed of trust to Dennis Joslin. Joslin testified at a hearing that his principal business is purchasing assets from failed financial institutions through the RTC and the Federal Deposit Insurance Corporation. The interest in the second deed of trust was just one of a package of interests that Joslin purchased at the same time.

A summary of the transactions and litigation is as follows:

> July 1, 1985. First deed of trust executed by Stanfield to South Mississippi Bank. The deed of trust covers a specific promissory note and all future advances.
>
> August 7, 1986. Second deed of trust executed by Stanfield to First Guaranty Bank.
>
> October 5, 1988. Third deed of trust executed by Stanfield to Sunburst Bank. The *note* states that it is a renewal and is secured by the first deed of trust and the third. The *deed of trust* makes no reference to the first deed of trust nor to being a renewal.
>
> March 2, 1990 Sunburst forecloses; notice only refers to third deed of trust.
>
> May 9, 1990 Quitclaim deed, Stanfield to Sunburst.
>
> May 16, 1990 Special warranty deed, Sunburst to City of Picayune.
>
> July 30, 1991 Sunburst enters of record a cancellation of the first deed of trust.
>
> April 8, 1993 The second deed of trust assigned by the RTC to Joslin.
>
> July 22, 1993 Joslin publishes notice of intent to foreclose the second deed of trust.
>
> July 26, 1993 This suit was commenced by the City's filing for an injunction against the foreclosure, and for specific performance from Sunburst.

The chancellor conducted a hearing on September 27, 1993. He determined that Sunburst's 1990 foreclosure in effect foreclosed both the first and the third deeds of trust. The 1990 conveyance to the City of Picayune divested Sunburst of all title, such that it had no right in 1991 to enter a cancellation on the record of the first deed of trust. Barring Joslin from foreclosing, the chancellor also criticized Sunburst for having created the confusion by the "laxity" with which it conducted the

foreclosure. Accordingly, Sunburst was order to pay the City $2,000 in attorneys fees and to pay all court costs. Joslin filed a motion for new trial, which was denied.

Joslin has appealed. Sunburst has not cross-appealed, and thus the one point that is not subject to review is the award of attorneys fees to the City.

DISCUSSION

Joslin structures most of his argument around his disagreements with the chancellor's interpretation of *Shutze v. Credithrift of America, Inc.*, 607 So. 2d 55 (Miss. 1992). That case generally upheld the enforceability of dragnet clauses in deeds of trust. *Shutze*, 607 So. 2d at 58-59. We follow a different order in presenting the issues, but will address each of Joslin's complaints.

I. NO RENEWAL OR DUTY ON JOSLIN TO INQUIRE BEYOND THE RECORD

Joslin argues that he was an innocent purchaser for value without constructive notice of the City's interest acquired through Sunburst's foreclosure. Joslin acknowledges that he was obligated to examine the state of title held by the prior encumbrancer, Sunburst. Joslin insists that his obligation was met by rather limited record review. He only had to look on the margin of the recorded first deed of trust and follow the path that any marginal notation took him. That margin showed no renewal, and furthermore, it indicated that the earlier deed of trust had been canceled. As a result, Joslin argues that he had no constructive notice of any current claim by Sunburst or the City.

First, Joslin and all other interested parties are on notice not only of record title, but of the claims of the person possessing the property regardless of whether the source of title appears of record. *Stevens v. Hill*, 236 So. 2d 430, 434 (Miss. 1970). When Joslin purchased the batch of mortgages and deeds of trust from the Resolution Trust Corporation, the City was in possession of this parcel of land. Thus whether the City was adversely possessing, had acquired title through a foreclosure, had purchased by deed, or had even gotten a patent from the United States government because of a long-ago defect in the title, Joslin was required to know of the City's claim. On notice of the claim, Joslin had to inquire as to its origin. The "notice sufficient to incite a party to inquiry is equivalent in law to notice of those further relevant facts which such inquiry, if pursued with reasonable diligence, would have disclosed." *Stevens*, 236 So. 2d at 434. Investigating the City's claims would have uncovered a deed from Sunburst, the owner of the deed of trust that was superior to Joslin's. Upon learning that the owner of the interest that was superior to Joslin's had conveyed to the City, Joslin would also have been required to investigate further and discover the foreclosure.

Secondly, the owner of a subordinate lien is on notice to examine the records fully on what the owner of the superior lien has done as to the property. Joslin argues that the only constructive notice was given on the margins of the first deed of trust. That is in error, since the margin of the deed of trust would not necessarily contain reference to all the properly pursued rights of the interest owner. Since no statute requires that a foreclosure of a deed of trust be noted on the margin of the recorded instrument, a purchaser of an interest subordinate to that deed of trust must at least search the name indices to determine whether the owner foreclosed, though of course an easier search is through the sectional index if available. The examination apparently would have given notice of the foreclosure of the later deed of trust. A marginal notation of the cancellation of a deed of trust, which Joslin says was the limit of notice constructively given him, might indicate nothing more than Sunburst says it

meant in our case, i.e., it could mean that the deed of trust had been foreclosed.

In effect, the purchaser of an existing security interest in real property cannot claim to be a bona fide purchaser for value without notice of the claim of the owner in possession, and without notice of a foreclosure by the owner of the superior security interest. The notice given may not defeat Joslin's claims, but notice exists. There is some question whether Joslin examined the records at all. Regardless, the question is the extent of constructive notice to a purchaser of a mortgage interest. Joslin was not only on constructive notice of events of record during the period from the recording of the first deed of trust up to the recording of the deed of trust under which Joslin claims, but also of later events affecting that first deed of trust. *See, generally, Florida Gas Exploration Co. v. Searcy,* 385 So. 2d 1293, 1296 (Miss. 1980).

Since Joslin was on notice of that foreclosure, he also was on notice of the legal effect of the foreclosure. We proceed to discuss what interests were transferred, which were terminated, and which were unaffected by that event.

II. EFFECT OF EXECUTION OF 1988 DEED OF TRUST

In determining what the purchaser at the 1990 foreclosure received, we must first analyze the relationship between the two deeds of trust that Sunburst came to own. From July 1, 1985 until the execution of the third deed of trust on October 5, 1988, the first deed of trust secured all notes up to the original face amount of the deed of trust, which was $62,000. Whether the deed of trust secured any amounts greater than that is an open question in Mississippi. Many states have passed statutes restricting such clauses. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW, §12.8 (Lawyer's 2d ed. 1985) at 902. One of the most common statutes is to mandate that under a future advance clause the security applies only to advances that do not exceed the stated amount on the deed of trust. NELSON & WHITMAN, at 902. No legislative restrictions on these clauses have been created in Mississippi. In Mississippi, the general rule -- but nothing should be read too literally -- is that future advance and dragnet clauses "are enforceable according to their tenor." *Shutze v. Credithrift of America, Inc.*, 607 So. 2d 55, 58 (Miss. 1992).

A second supreme court decision on future advance clauses was handed down the same year as *Shutze,* even though it does not mention the previous case. *Merchants Nat'l. Bank v. Stewart,* 608 So. 2d 1120 (Miss. 1992). The *Merchants* court had to decide whether a debt that was created before the deed of trust with the dragnet clause, was included within that clause. *Merchants,* 608 So. 2d at 1126. The "normal" dragnet clause covers additional loans that could not be explicitly described at the time of the deed of trust. As the court said, the bank was aware of the previous loans and could have "easily and explicitly included them. . . ." *Id.* That problem does not exist in the Stanfield instruments before us, where additional loans to buy more land were anticipated. The extension of the deed of trust to cover those additional purchases is not only a fair reading of the parties' intent, it is unavoidable. The *Merchants* court stated that when the intent to cover future loans is "clear and unambiguous," then the terms of the instrument would be enforced as written. *Id.*

The *Merchants* court also found that if the "nature of the secured debt" varies between the original note and deed of trust and subsequent extensions of credit, then the dragnet clause may not be applicable. *Id.* In *Merchants* the deed of trust secured a line of credit for crop production, while the previous loan that was at issue was to purchase the land. *Id.* In our case, the dragnet clause is being

used to secure future advances used for the same purpose as the original loan-- to buy land.

Thus, even though *Merchants* did not enforce a future advance clause, none of the reasons that caused that result apply here. As for other restrictions, we do not impose by judicial fiat a limitation on the amount a dragnet or future advance clause covers. The clause itself makes no reference to amount, other than to say that the advances are optional "as to amount. . . .."

On October 5, 1988, a new, twice-as-large note was executed. It is difficult to discern what prior notes had been paid down, and how high the pre-1988 debt was when the 1988 deed of trust was executed. Several notes appear in the record that are renewals of the original debt. It is evident that the earlier notes had not been paid. Had that occurred prior to a new advance, the first deed of trust would have been canceled by operation of law. Miss. Code Ann. § 89-1-49 (Rev. 1991); *Shutze,* 607 So. 2d at 60 n.3. The 1988 note on its face is called a "renewal." It would appear to be a consolidation of previous unpaid balances and an extension of considerable additional credit. The 1988 *note* referred to the 1985 deed of trust and to several others. The tract of land described in the 1985 deed of trust is just one of several tracts located in five different counties that constitute the security in the 1988 deed of trust. It appears that part of the reason for the original loan and advances between 1985 and 1988 was for the borrower to purchase additional lands.

Since the dollar amount of the original deed of trust is not the limit of what the dragnet clause covers, the 1988 note could also have been secured by the 1985 deed of trust. Whether it was or not depends on whether the parties followed through in 1988 on what they could do under the 1985 instrument. It would appear, though perhaps only as dicta, that in Mississippi the execution of an additional deed of trust does not suggest an intention to cancel the security provided by an earlier trust deed. The supreme court said that a second deed of trust granted to the original lender, executed when a renewal loan was made, was "arguably superfluous." *Shutze*, 607 So. 2d at 57. The court in *Shutze* said that all the parties agreed that if the lender had not taken out new deeds of trust, the original deed of trust would have secured the new loans. "No sensible reason is offered why we should seize on this additional security precaution [of executing a new deed of trust] and thereby render [the lender] less secure." *Id.* at 60. Actually, some cases have focused on the execution of a new deed of trust as the basis for holding that the parties did not intend to have the dragnet clause cover the new loans. *Second Nat'l. Bank of Warren v. Boyle*, 99 N.E. 2d 474, 478 (Ohio 1951). The different viewpoints, to be colloquial, is whether a second deed of trust should be viewed as a lender's desire for a belt and suspenders to hold up his bargain, or instead as a desire to forget about the old ragged belt and get a new one. The court in *Shutze* found it to be the former. Absent language explicitly making the new deed of trust the sole security, both deeds of trust remain in effect.

Therefore, in 1990 when Sunburst determined that it should foreclose, both deeds of trust were in effect. The foreclosure notice only informed the public that the later (third) deed of trust was being foreclosed. The notice itself does not appear in the appellate record, but there is no marginal notation on the first deed of trust of the substitution of a trustee, nor does the subsequent trustee's deed refer to the 1985 deed of trust. Presumably, then, the notice by publication did not refer to it either. The only deed of trust considered by the trustee would appear to be the later one.

Sunburst now says that the substituted trustee was foreclosing everything, but the documents do not support that. Public notice matters. Owners of interests that arose between the two deeds of trust,

specifically Joslin's predecessor in title, either do or do not have to protect themselves from the effects of a foreclosure. It is not enough to say that "everyone knows" Sunburst would not foreclose its junior position and ignore its superior rights. What one can logically assume and what the documents do are quite different in this case. Foreclosure of the first deed of trust would have automatically removed the security interest that later deeds of trust provided in that same property, because the property is being sold free and clear of those liens to a new owner. In a quite different result, foreclosure of subordinate mortgages leaves the property subject to security interests executed prior to the one being foreclosed.

There may be reasons that would explain why a lender who had two deeds of trust would want to leave one alive. Perhaps a lender with two mortgages, who also sees an intervening security interest, may want the property and would prefer paying the intervening creditor on a periodic basis and not have to come up with enough cash to pay him off completely. That might have more relevance if this were not an institutional lender. Regardless, there is nothing that would prevent a lender from doing just that unless the terms of the deeds of trust require otherwise.

After this foreclosure, since the mortgagee under the first deed of trust purchased the mortgagor's interest, there was arguably a merger of title. That is because the holder of the fee and the owner of a security interest are now the same entity, thereby potentially extinguishing the first deed of trust by operation of law. If this unity of title terminates the security interest under the first deed of trust, it would leave Joslin's deed of trust as the only operative one. A more common situation in which the same unintended consequence might occur is if a mortgagee obtains the mortgagor's interest through something other than a foreclosure, such as through a deed, a bankruptcy sale or a tax sale. NELSON & WHITMAN, §6.15 at 463, § 6.17 at 470. The nearly universal answer by courts is that merger does not occur and the prior lien remains in effect. *Id.* Often the intent of the mortgagee is seen as the key: no self-respecting mortgagee would intend to cancel his superior security interest. *Id.* Foreclosing a subordinate deed of trust is the functional equivalent, at least vis-a-vis the unaffected first deed of trust, of a lender's taking a deed in lieu of foreclosure. In both situations the lender has received title without foreclosing the deed of trust that has priority over every other claim. Thus there was no title merger in this case. Sunburst's first deed of trust remained in effect. Exactly what the purchaser owns, and the relationship between the purchaser's title and the claims of the owner of a subordinate deed of trust, will be subsequently discussed.

III. 1991 CANCELLATION ON THE RECORD

The first deed of trust was canceled by Sunburst itself in 1991. The chancellor below found the cancellation to be beyond Sunburst's rights as it had conveyed all of its right, title and interest to the City of Picayune. No doubt Sunburst considered this a housekeeping matter, straightening out the records to reflect it no longer claimed a security interest. The fact remains that if there were a security interest, it was owned by the City of Picayune, and not by Sunburst Bank. Sunburst's statutory obligation to enter satisfaction of deeds of trust on the record in no way obligates it to cancel deeds of trust that have not been satisfied and which it does not own. Miss. Code Ann. § 89-5-21 (Rev. 1991).

Sunburst sold everything it had to Picayune, and thus it is no answer to say that the deed of trust was subsequently canceled by someone who, if the deed of trust was alive, had no interest in it.

Regardless, we will discuss next whether the cancellation even matters, or whether Sunburst and the City's interests became fixed in 1990 when the foreclosure occurred.

IV. EFFECT OF THE OWNER OF THE SUPERIOR DEED OF TRUST FORECLOSING A SUBORDINATE ONE

To summarize, the City of Picayune in 1991 owned record title through a series of transactions of which Joslin had constructive notice. That title was subject to the deed of trust subsequently to be owned by Joslin, and subject to the unmerged mortgagee interest formerly owned by Sunburst that was not terminated by the foreclosure of Sunburst's junior lien interest. Joslin argues that this not quite equilibrium ended in 1993. He alleges that enforceable rights under the first deed of trust, never foreclosed upon, ended six years from the date of maturity unless a renewal was entered on the margin or a new deed of trust that noted the fact of renewal was filed. Miss. Code Ann. § 89-5-19 (Rev. 1991). A grace period to enter the renewal lasted for six months after the six year limitation period had run. *Id.* The note secured by the first deed of trust said on its face that it was due six months after July 1, 1985, or January 1, 1986. The lien under that deed of trust became time-barred six years from January 1, 1986, or January 1, 1992. The only way to prevent the termination was if by July 1, 1992, a renewal was entered of record, and none was. Under Joslin's approach, by the time the present suit was brought in 1993, Picayune had no rights under the 1985 instrument.

Whether Joslin is correct depends on the effect of Sunburst's foreclosure and acquisition of title in 1990. Already mentioned under the discussion of merger of title are the similar issues that arise when a mortgagee purchases the security in another manner that keeps its security interest alive, e.g., takes a deed in lieu of foreclosure, or purchases through some other sale like a bankruptcy. Thus the first deed of trust did not terminate because of the foreclosure of the junior one. What we have not discussed is whether Sunburst had to take any steps to enlarge the interest that it had acquired by foreclosure or risk losing it when the statute of limitations ran for enforcing the first deed of trust.

The principle in related fact situations is consistently applied. A junior lienor is unjustly enriched if it takes priority because the senior lienor has acquired title by means other than foreclosing his senior lien. As one set of writers stated, "the later lien or interest is elevated to a priority for which its owner paid nothing and hence is, as to him, a pure windfall." NELSON & WHITMAN, § 6.17 at 473. Those writers did not discover authority that would make it relevant that the senior lienor was negligent in handling of its affairs, was ignorant of the junior lien, or otherwise was the cause of its own predicament. *Id.* The reason is stated this way:

> By bringing a foreclosure action in which [the junior lienholders] were joined as parties defendant the property could have been sold free and clear of their interests and the mortgagee could have bought it in that state. *Acquisition of the redemption in any other way should not prejudice its position with respect to such junior interests if the mortgagee did not intend to do so and was not under a duty to do acts which would have that result.*

Id.(emphasis added). The owner of the junior interest has no legitimate objection "to being kept or returned to a subordinate position because he never bargained for an advancement . . . ." *Id.*

Ironically perhaps, the best authority these writers found on the subject is from Mississippi. *Jaubert*

Bros. v. Walker, 203 Miss. 242, 33 So. 2d 827 (1948); GEORGE E. OSBORNE, GRANT S. NELSON, DALE A. WHITMAN, REAL ESTATE FINANCE LAW, § 6.15 (1st ed. 1979) at 421 n.82. P.A. Dale owned the relevant property, and executed a deed of trust to S.S. Dale, Jr. Within days, Jaubert received a judgment against the landowner P.A. Dale and it was duly enrolled. Nothing was done as to P.A. Dale's property until nineteen months later when P.A. Dale conveyed the land to the Merchants Company, which had acquired the deed of trust. Thus the owner of the first deed of trust and the owner of the fee were now the same. The company in turn conveyed the property to two individuals, Walker and Buckley. *Jaubert*, 203 Miss. at 247-248, 33 So. 2d at 828. The deed in lieu of foreclosure by Dale to Merchants Company might have resulted in a merger of title, giving the judgment lienor preference over successors to the senior mortgage lien. The court found the deeding of property to the mortgagee to be a common practice. Such a deed did not result in a junior lienor's taking priority once the right to bring suit on the senior, unforeclosed deed of trust had expired.

However, even though "the mortgagee had the right to take the mortgaged estate, in good faith, in satisfaction of their preexisting debt," there was also a duty on that mortgagee. *Id.* at 249, 330 So. 2d at 829 (quoting *Yates v. Mead*, 68 Miss. 787, 792, 10 So. 75, 76 (1891)). The duty was for the non-foreclosing senior lien-owners "to show that they so dealt with the mortgaged estate, in taking to themselves absolute title to the same as not to injure or destroy the rights of junior lienors." *Jaubert*, 203 Miss. at 250, 33 So. 2d at 829, quoting *Yates*, 68 Miss. at 792-93; 10 So. at 76. This burden would be met only if the court could be satisfied of the following:

> 1) the amount due under mortgage at time of acquisition of title by a means other than foreclosure;
>
> 2) the value of property at that time;
>
> 3) the debt was at least equal to value of mortgaged estate at time mortgagor acquired title; and therefore
>
> 4) the equity of redemption was valueless.

Jaubert, 203 Miss. at 250, 33 So. 2d at 829.

Similar results were reached in *Tulane Hardwood Lumber Co. v. Perry*, 226 Miss. 492, 85 So. 2d 496 (1956); *Moses v. Ehrlich*, 217 Miss. 341, 344, 64 So. 2d 352 (1953); and *Cade v. Toler*, 155 Miss. 606, 611-12, 124 So. 793 (1929). This form of title acquisition is sometimes caused "equitable foreclosure," i.e., action akin to foreclosure that is meant to serve the same purpose.

This *Jaubert* rule has been applied when a junior lienor was sidestepped by not having a foreclosure. The same analysis should apply if junior lienors are sidestepped by a foreclosure that did not alert them to the need to protect their interests. In both fact situations, equity demands that the court look at what would have happened had a foreclosure been conducted. In essence, the court is determining whether there was sufficient equity in the property had a foreclosure properly been done, such that the senior lien would have been satisfied and value remained for the junior.

We apply the *Jaubert* approach here because a deed from the mortgagor to the senior mortgagee,

and an owner of two mortgages foreclosing on the junior one, are generically the same action: a senior lien-holder with rights superior to all other creditors acquires title through a means other than foreclosure of that superior lien. It would be inequitable to permit even a careless party to forfeit the position, when the forfeiture also means someone else is being unjustly enriched.

Protection of third parties is still necessary:

> [i]t has long been a common business custom to consummate a foreclosure by agreement between the mortgagor and the mortgagee accompanied by a conveyance by the mortgagor to the mortgagee of the mortgaged property when the property is actually and distinctly worth less than the debt. This works to the advantage of both the mortgagor and the mortgagee, because it saves the cost of a formal foreclosure, and is of no actual disadvantage to the junior encumbrancers because when the property is worth distinctly less than the mortgaged debt there is nothing left over to which the equity of redemption could attach as being of any value.
>
> It will be noted that, to cut off the junior lienholder, it must be shown that the property is not worth more than the amount secured by the senior encumbrance, and that, therefore, the junior lienholder is not prejudiced by the arrangement, and the same case holds that the burden of so showing is upon the senior encumbrancer.

Moses, 217 Miss. at 343-344.

It is true that Joslin does not raise these points. However, this proof is a burden of the senior lien-owner. If the senior creditor is not going to foreclose, then it is incumbent on that creditor to prove that failing to foreclose did not adversely affect junior creditors. In the absence of this proof, Joslin's claim remains alive.

There is no statute of limitation affecting Sunburst. It did not matter in *Jaubert* that the note secured by the first and only deed of trust, recorded in April 1931 with no due date stated in the opinion, probably no longer could be enforced under the then-six year statute of limitation. Miss. Code 1930 § 2292, now Miss. Code Ann. § 15-1-49 (Supp. 1996) (3 years beginning in 1990). Suit was not brought by the junior lienor until 1945. *Jaubert*, 203 Miss. at 248, 33 So. 2d at 828. The point in the court of equity proceeding was whether a company or individual with superior rights had taken action that actually adversely affected the rights of the junior lienor. The court concluded its opinion by stating:

> It is fundamental in our equity procedure that a complainant must not only show a right in himself which has been infringed, but also that he has been harmed thereby beyond that which is merely technical.

Id. at 251, 33 So. 2d at 830. Joslin's principal claim may also only be technical: that because of Sunburst's negligent attention to Sunburst's own rights, Joslin now has title to the property.

The statute of limitations for Sunburst is not an issue because there is no suit that the senior lien-holder has to bring. A senior lien-holder's acquisition of title through means other than foreclosure gives it title, subject to claims that can be asserted by others. Sunburst never needed to foreclose the superior deed of trust, as its entitlement to its superior claim became fixed in the 1990 foreclosure of

the junior lien. There is no statute of limitations running on the senior lien-holder because there is nothing it needs to do. It is the junior who needs to act.

A remand is needed to determine the relationship between the value of the property on the one hand, and on the other the total amount owed Sunburst in 1990, plus costs of foreclosure and other appropriate expenses. "Value" in foreclosure proceedings is a shifting term of art. There are several lines of Mississippi cases addressing the price paid by a mortgagee who buys at a foreclosure. These cases have varying perspectives on the obligation of a mortgagee to bid some quite rough approximation of a fair price, which is not to say fair market value. *Wansley v. First National Bank of Vicksburg,* 566 So. 2d 1218 (Miss. 1990) (foreclosure must be commercially reasonable); *Lake Hillsdale Estates, Inc. v. Galloway,* 473 So. 2d 461 (Miss. 1985) (foreclosure sale price so inadequate as to shock the conscience and sale set aside).

Joslin's predecessor was not put on notice that a senior lien was being foreclosed. Therefore that junior mortgagee was not in a position to protect its interest by bidding. It is true that a junior lienor under Mississippi statute does not have to receive personal notice. *Crystal v. Duffy,* 493 So. 2d 942 (Miss. 1986). However, proper notice by publication would give sufficient information for a junior lienor to know whether his rights will be affected. A junior lienor with notice of a foreclosure can himself bid, and acquire the property if the senior interest owner's bid is inadequate.

What none of the *Jaubert*-line of cases discuss is the result if the senior lienholder cannot prove that the equity of redemption was valueless. Here Sunburst had for the reasons already discussed the right to foreclose on the first mortgage; because of the future advances clause, all the notes between Sunburst and Stanfield were secured by the first trust deed. Such a foreclosure would have wiped out all subordinate deeds of trust, including Joslin's. If Joslin's predecessor in title believed that there was enough equity in the property it could have bid the balance due to Sunburst, obtain the property, and still have some value to satisfy its own loan. If Sunburst cannot prove now that the property was worth no more than Sunburst's claims, does Joslin get a money judgment, get title to the property, or something else?

This is an equitable proceeding. To wipe out the senior lien-holder's interest if there was some slight value to the property in addition to the debt, but allow the senior lien-holder to retain everything if its debt was only slightly greater than the value of the property, is an inequitable and bizarre result caused potentially by the difference of only a small amount of value. Therefore we hold that Joslin would not gain title if Sunburst cannot carry its burden of showing there was no value in the property beyond the amount of the Sunburst secured claims. Instead, Joslin would be entitled to a money judgment, plus interest from the date of the 1990 foreclosure, for the difference between Sunburst's secured claims and the value of the property at the time Sunburst acquired title.

Since Joslin's predecessor was not on notice that a senior lien was being foreclosed, we remand for additional proceedings. The parties may present evidence that permits the trial court to construct what reasonably would have occurred had a foreclosure been conducted. Had the junior lienor been present to bid, and considering the requirements regarding sales in parcels at least for comparative price purposes, would there have been sufficient equity in the tract covered by the first deed of trust to permit a junior lienor to make a higher bid on that parcel? Miss. Const. Art. 4, § 111; Miss. Code Ann. § 89-1-55 (Rev. 1991). The junior lienor does not get greater rights than he would have had

under a properly conducted foreclosure, but neither is he to be disadvantaged by the absence of a properly-noticed sale. The chancellor must determine the values that would have guided the decision of a junior lienor to bid at the foreclosure. Certainty will not be possible; constructing what would have happened rarely reaches that level. The chancellor will then need to fashion a remedy if, as stated in *Jaubert,* the first mortgagee's claims (including under the dragnet clause) and expenses were less than the value of the property. This is a messy fact reconstruction problem, one that arises from Sunburst's "laxity" as found by the chancellor. Sunburst's entitlement to maintain its priority arises from a mixture of its first-in-time lien rights and equitable doctrines that have been applied in similar cases. Whether equity and the Sunburst deed authorized the attorneys fees already awarded the City is not before us, and whether additional fees are proper is for the chancellor to decide.

There is a question not addressed below of Joslin's rights having expired before enforcement of the deed of trust was sought. The only issue is the applicability of a federal statute passed as part of the massive financial institution bail-out effort of the late 1980's. That statute would toll the running of any statute of limitation regarding security interests held by financial institutions that were taken over by the Resolution Trust Corporation. 12 U.S.C. § 1821 (d)(14)(A, B). On remand the parties may address whether all the requisites for that statute apply.

We remand for a *Jaubert* determination, as well as for the threshold question of whether the period for suit on Joslin's deed of trust had expired.

We will close with a few observations concerning the dissent. The legal points that the dissent raises have been dealt with under the relevant sections of this opinion. What has not been addressed is the charge that the majority is undermining the reliability of record title. The dissent adopts the perspective of a person in the business of purchasing mortgages owned by defunct savings and loans, who whether he actually checks the records or not wants to be limited to constructive notice of what is on the margins of any prior deeds of trust. He does not wish to be bound by the notice that prior case law has held arises from possession, and the notice that arises from the obligation to inquire regarding the source of the possessor's title. There is also ample case law cited that the failure by the owner of the dominant security interest to foreclose that interest, but instead that owner's acquires title in another way, does not give the junior security interest owner a windfall priority. However, actions by the senior interest owner cannot prejudice the junior, and that is what we are remanding for the trial court to consider.

The disruption of title that would arise in this case is not what the dissent suggests, but would arise from the ousting of the City that had been in possession of this property for three years before Joslin even purchased his interest. Joslin was on constructive notice of the City's claims, on notice of the source of those claims, on notice that the City's predecessor foreclosed a junior lien even though it had a senior one as well, and finally on notice that Mississippi law does not give a subordinate interest-owner a windfall when that occurs. Joslin was *not* a bona fide purchaser for value without notice of the City's title acquired through a superior lien. Titles are stable, though more effort has to be expended by a purchaser to determine title than apparently occurred here.

THAT PART OF THE JUDGMENT OF THE CHANCERY COURT OF PEARL RIVER COUNTY THAT PERMANENTLY ENJOINS THE FORECLOSURE OF THE DEED OF TRUST OF AUGUST 7, 1986 BETWEEN V. L. STANFIELD AND FIRST GUARANTY

BANK, AND THE AWARD OF $2,000 ATTORNEYS FEES, IS AFFIRMED. THE REMAINDER OF THE JUDGMENT IS REVERSED AND THE CAUSE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE TAXED ONE-HALF TO DENNIS JOSLIN AND ONE-HALF TO SUNBURST BANK.

BRIDGES, C.J., THOMAS, P.J., AND HERRING AND HINKEBEIN, JJ., CONCUR.

PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ AND KING, JJ.

McMILLIN, P.J. AND COLEMAN, J., NOT PARTICIPATING.

PAYNE, J., DISSENTING:

I dissent from the majority because of its holding that the foreclosing of a third mortgage effectuates a foreclosure of an unmentioned first mortgage held by the same mortgagee, thereby extinguishing the lien of the intervening (second) mortgage. I believe that beginning the analysis with the duty of an assignee of the second mortgagee is beginning in the middle and working backwards. As a former teacher of a course on real estate transactions and as a practitioner with an extensive real estate practice, I know the importance of being able to rely on the accuracy of record title. I believe that the rule in this case, were it ever to become precedential (by certiorari and affirmance), would turn title examinations, in general, and priority of liens, in particular, on end. And why would we have felt it necessary to do such a thing? It would have been brought about in order to correct mistakes made first by a bank and then by a city. I, for one, believe that is too high a price to pay to correct those mistakes. I also believe the decision in this case is a mistake even if it may appear to be the most desirable result for the bulk of the players in the script. The reliability of record titles is too important to attorneys, realtors, bankers, and the public in general to upset the order of notice of priority of liens where there is a foreclosure.

The majority opinion begins with the duty of a purchaser of a second mortgage to search the title for matters subsequent to the foreclosure of a third mortgage. Of course, the purchaser of any interest in land should fully check the title of record before the purchase. However, the absence of that undertaking does not affect the law in regard to the priority of liens, nor of the adequacy of an acknowledgment nor of any of a dozen legal matters that may present themselves of record.

Next, the majority opinion deals with the effect of the execution of the third mortgage. I have no argument that the parties to the third mortgage may have intended it to be a renewal of the first. The missing link here, however, is that only the note (which is not recorded in the land records) states that it was a renewal. The record title is devoid of that information, so that the mortgagee of the second mortgage would not be informed of his loan's being extinguished upon reading notice of foreclosure of the third mortgage. Therefore, I believe it was error to find that there was notice that the third mortgage was a renewal of the first. I wholeheartedly agree with the information on page nine of the majority's opinion questioning the reasons for the bank's action and discussing generally the issue of record notice. However, the discussion beginning at the bottom of page nine is the point at which my opinion diverges from that of the majority. I shall not indulge in a page by page dispute, as the majority and I agree on many things. However, if I were writing the majority opinion, I would have

its analysis read as follows:

> I. DID THE DRAGNET CLAUSE IN THE FIRST DEED OF TRUST SO ATTACH TO THE THIRD DEED OF TRUST THAT FORECLOSURE OF THE THIRD DEED OF TRUST EXTINGUISHED THE LIEN OF THE SECOND DEED OF TRUST?

Both Joslin and Sunburst make somewhat convoluted arguments consisting of numerous issues which all boil down to a single legal issue: Did the foreclosure of the Third Deed of Trust extinguish the lien of the Second Deed of Trust? Therefore, I will not rehash the arguments made by each party and go directly to the heart of the problem. At the time of Sunburst's foreclosure on the Third Deed of Trust, there was no question of bona fide purchasers for value without notice because the Second Deed of Trust (which was later assigned to Joslin) was either superior to the Third Deed of Trust or was extinguished by foreclosure of the Third Deed of Trust under the dragnet clause in the First Deed of Trust. If it were extinguished by the Third Deed of Trust, Joslin bought "a pig in a poke" and could not revive his claim by an argument of "no notice." If, on the other hand, the foreclosure of the Third Deed of Trust did not extinguish the Second (prior) Deed of Trust, Sunburst took the title subject to the Second Deed of Trust and neither Sunburst nor its successor in title has a right to enjoin the holder of the Second Deed of Trust from foreclosing on its interest. No amount of diligence or lack thereof can breathe new life into an extinguished deed of trust. By the same token, no amount of activity by the bank or its grantee can undo a second deed of trust if the third deed of trust was inferior to it. This is not to say, however, that notice is irrelevant. Quite to the contrary, as my discussion will bear out, we must take the presence or absence of notice into consideration in determining the validity of Sunburst's claim that the Third Deed of Trust was a renewal of the First Deed of Trust. Throughout this discussion, it is imperative that our focus remain on the primary issue of whether the foreclosure of the Third Deed of Trust extinguished the lien of the Second Deed of Trust while, at the same time, not losing sight of the purpose of our filing statutes which is to give notice of the status of title.

In the present case, the trial court held that the Second Deed of Trust was extinguished by the Third Deed of Trust. I would reverse and hold that the Second Deed of Trust was superior to the Third Deed of Trust.

The law in Mississippi regarding the priority of mortgages is clear: priority is determined according to the date of filing of the deed of trust. Miss. Code Ann. § 89-5-5 (Rev. 1991). In other words, the first to file or perfect his instrument takes priority over subsequent purchasers or creditors. *Id.* The law is equally as well established in the area of future advances. The Mississippi Supreme Court has stated:

> Future advance clauses are enforceable according to their tenor. Accepting their creative and constructive role in a credit economy and, as well, freedom of contract, we have upheld such clauses for more than a century. The point has been repeatedly litigated since, and we have repeatedly ruled, incident to a secured transaction, the debtor and secured party may contract that the lien or security interest created thereby shall secure other and future debts which the debtor may come to owe the secured party. Such clauses are treated like any other provisions in a contract and will be enforced at law subject only to conventional contract defenses, e.g., fraud, duress, and the like . . . .

Shutze v. Credithrift of America, Inc., 607 So. 2d 55, 58-59 (Miss. 1992) (citations omitted). The court states further that "[w]hen inserted in a deed of trust, such a clause operates as a convenience and an accommodation to . . . [borrowers]. It makes available additional funds without . . . [their] having to execute additional security documents, thereby saving time, travel, loan closing costs, costs of extra legal services, recording fees, et cetera." *Id.* at 59 (quoting *Newton County Bank v. Jones*, 299 So. 2d 215, 218 (Miss. 1974)). Additionally, the court has stated "matter-of-factly" that "'dragnet clauses' are enforceable in Mississippi."[(1)] *Id.* (quoting *Whiteway Finance Co., Inc. v. Green*, 434 So. 2d 1351, 1353 (Miss. 1983)).

In the present case, it is undisputed that both the First Deed of Trust held by Sunburst and the Third Deed of Trust also held by Sunburst contain dragnet clauses. The general rule for priority purposes is that "the lien securing the future advance takes its date from the recording of the original deed of trust and by operation of law reaches forward to secure the advance made after intervening rights became perfected." *Id.* at 63. Here, if the Third Deed of Trust recorded on October 5, 1988 is in fact a renewal pursuant to the dragnet clause in the First Deed of Trust recorded on July 1, 1985, then the Third Deed of Trust comes under the umbrella of and assumes the date of the First Deed of Trust, making the new loan take priority over the Second Deed of Trust which was recorded on August 7, 1986. In the lower court, the chancellor found such to be the case and ruled in favor of Sunburst Bank. I, however, have some problems with the analysis of the lower court. The chancellor, in making his decision, relied heavily on *Shutze v. Credithrift of America, Inc.* However, I do not believe *Shutze* to be conclusive of the issue presently before this Court. In *Shutze*, Credithrift executed its initial deed of trust in the amount of $23,679.36. *Shutze*, 607 So. 2d at 57. Subsequently, Credithrift renewed the debt pursuant to a dragnet clause for the amount of $14, 150.26. *Id.* Some years later, Credithrift again renewed the debt in the amount of $14,150.26. *Id.* at 58. Each renewal was made by the same parties as executed the initial deed of trust, and as is obvious, each renewal was for an amount less than the initial loan made by Credithrift. *Id.* at 57-58. It should be noted that Credithrift in no way canceled or released the initial deed of trust, although it did execute a new deed of trust each time it renewed the debt. *Id.* More importantly, when Credithrift foreclosed on the deed of trust it did so on the initial deed of trust not the last. *Id.* at 58.

In the present case, the First Deed of Trust was executed by V. L. Stanfield in the amount of $62,000. The Third Deed of Trust was executed by Verna Oden Stanfield, V. L. Stanfield, individually, and as president of Hillcrest Farms, Inc., in the amount of $128,000. At the time Stanfield executed the Third Deed of Trust (October 5, 1988), the First Deed of Trust had already matured and was past due (January 1, 1986). When Sunburst foreclosed, it foreclosed on the Third Deed of Trust not the First Deed of Trust. Furthermore, Sunburst canceled its First Deed of Trust on July 30, 1991, which is noted on the face of the First Deed of Trust.

The court in *Shutze* stated that it is "apparent" that Credithrift regarded the subsequent loans to be renewals of the original indebtedness pursuant to the dragnet clause in the initial deed of trust. In the present case, I do not find that the execution of the Third Deed of Trust was an "apparent" renewal on the part of Sunburst. I believe the lower court erred in relying wholly on *Shutze* as I find it to be distinguishable for several reasons. First of all, in *Shutze*, the renewal amounts were not significantly greater or lower than the original note whereas, in the present case, the Third Deed of Trust consisted of a debt that was more than twice the original loan amount. Secondly, each of the deeds in

Shutze was executed by the same parties whereas, in the present case, the Third Deed of Trust was executed by two additional parties; Verna Stanfield and V. L. Stanfield in his capacity as president of Hillcrest Farms were not parties to the First Deed of Trust. Thirdly, in *Shutze*, Credithrift foreclosed its first deed of trust, not its "renewal" deed. Here, Sunburst foreclosed on the Third Deed of Trust and claimed that its foreclosure automatically reached backward and encompassed its First Deed of Trust. Sunburst relied on *Shutze* to support this proposition; however, *Shutze* does not expressly state that a foreclosure on a renewal deed of trust also effectuates a foreclosure on the deed of trust renewed nor do we find this proposition to be supported by our case law. In the present case, there was nothing on the face of the document of record to indicate that it was intended to be a renewal of the original loan. Finally, in *Shutze*, at no time did Credithrift release or cancel a prior deed of trust. In the present case, Sunburst noted on the face of the First Deed of Trust that it had been canceled.

Granted, the above actions by Sunburst, standing alone, may not be enough to invalidate a renewal pursuant to a dragnet clause. However, taken together, I can see how a subsequent purchaser might be confused as to the priority of an intervening lien. At the time Joslin examined the First Deed of Trust, it was clear from the face of the document (1) that the deed of trust had been canceled, (2) that the deed of trust was time-barred by the statute of limitations, and (3) that there was no extension of the time period through renewal in a subsequent deed of trust as there was no notation indicating such intent as required by Miss. Code Ann. § 89-5-19 (Rev. 1991). Our case law tells us that "dragnet clauses are enforceable if properly executed and stated in clear and unambiguous language." *Merchants National Bank v. Stewart*, 608 So. 2d 1120, 1126 (Miss. 1992) (quoting *Trapp v. Tidwell*, 418 So. 2d 786, 792 (Miss. 1982)). In the present case, while the dragnet clause itself was clear and unambiguous in its form, the fact that the First Deed of Trust had been canceled coupled with the fact that the face of the document revealed that the statute of limitations had run seems to be enough to circumvent the purpose of the notice requirements set forth in our statutes.

Sunburst contends, however, that Joslin was not diligent in his search of the records. I do not find this argument to be persuasive. Joslin examined the First Deed of Trust, discovered the cancellation, and determined from the face of the document that the statute of limitations had run. Despite the presence of a dragnet clause, Joslin did not pursue any further investigation in that he was satisfied that the First Deed of Trust was no longer the superior lien. Sunburst contends that had Joslin ignored the cancellation and the obvious expiration of the statute of limitations and searched the records for an advance or renewal pursuant to the dragnet clause or if he had searched the bankruptcy records of Mr. Stanfield, he would have discovered the Third Deed of Trust. I must agree with the appellant's brief which states that "[r]equiring Joslin to search through these [bankruptcy] records to find one written reference to Sunburst's renewal intentions is like asking him to go on a scavenger hunt for evidence of renewal, when he had evidence to the contrary in his hands."

Even if Joslin had discovered the foreclosed Third Deed of Trust, there was nothing on the face of the deed of trust to indicate that it was intended to be a renewal of the original loan. Sunburst, in its brief, cites *Merchants & Marine Bank v. The T. E. Welles*, 289 F. 2d 188, 193-94 (5th Cir. 1961), a case dealing with the priority of a ship's mortgage over intervening maritime liens for supplies. In *Merchants*, the court allowed the foreclosure of a third mortgage to take priority from the time of the first mortgage despite the fact that the first mortgage was canceled. *Id.* Sunburst suggests that we just replace the parties in *Merchants* with the parties in the case at hand and follow the ruling of the court. Specifically, Sunburst relies on *Merchants* for the proposition that:

> [t]he accepted rule is that unless a contrary intention of the parties clearly appears, the execution and delivery of a new mortgage in renewal of a former one, even though accompanied by a formal satisfaction and discharge of the initial mortgage, does not have the effect of extinguishing the priority which the initial mortgage carries. The subsequent mortgage given in renewal is prior to liens which arose or would otherwise have come into being during the period of the initial mortgage.

Id. (citations omitted). However, as Joslin correctly points out, no simple substitution can be made as *Merchants* differs significantly from the present case.

In *Merchants*, the court voided the effect of the cancellation of the first lien and allowed the subsequent mortgage to take priority from the date of the first mortgage because the cancellation was made "contemporaneously" with the later mortgage. *Id.* In the case at bar, the cancellation was made over two and one-half years after the third mortgage was created, far from being contemporaneous. In *Merchants*, the intervening lienholder took the lien during the period of the first deed of trust. *Id.* at 194. Thus, the intervening creditor was left in the same position as if no renewal mortgage had been created. To the contrary, Joslin, as assignee, took the second deed of trust after the period of the first deed of trust had ended without notice that a renewal deed had been executed.(2) Therefore, Joslin, as a subsequent purchaser for value without notice of the renewal, would be left in a far worse position if the third deed of trust was now allowed to take priority over his second deed of trust. Furthermore, the holding in *Merchants* was expressly limited to "subsequent mortgages given in renewal" of an earlier mortgage. *Id.* In the present case, I am not convinced that the Third Deed of Trust was given in renewal of the First Deed of Trust. As I stated earlier, the third deed referenced a loan amount more than twice that of the original loan and it was executed by three parties instead of one.

A final note concerning the applicability of *Merchants* to the facts before us is that *Merchants* is based upon the Ship Mortgage Act of 1920, U.S.C.A. § 953 et al. *Id.* at 192. It does not even address renewal requirements for land deeds of trust. If *Merchants* is applicable at all, it would seem to strengthen the argument by the Appellant.

As I stated initially, the question that must be answered is whether or not the land records give notice that Sunburst's Third Deed of Trust was in fact a renewal of or a future advance under the First Deed of Trust. I find that the Third Deed of Trust was not a renewal nor a future advance and therefore is subject to Joslin's Second Deed of Trust. It is entirely possible that Sunburst intended for the Third Deed of Trust to be a renewal of the original loan. I believe, however, that Sunburst was careless in its actions and could have easily prevented the confusion that it created. At the time Sunburst executed the Third Deed of Trust, Sunburst was fully aware that a Second Deed of Trust existed and should have been cognizant of the possibility that someone at some point in time would want to exercise its interest in the property in question. It seems only prudent that Sunburst would insure that there would be no question as to the priority of the Third Deed of Trust. Instead, Sunburst relied entirely on the dragnet clause in the First Deed of Trust to protect it from any claims by an intervening lienholder. Had the First Deed of Trust been foreclosed, this would be enough. *Whiteway Finance Co., Inc. v. Green*, 434 So. 2d 1351 (Miss. 1983), and its progeny were all cases in which a dispute arose as to the status of a subsequent renewal or future advance. In these cases, the first deed

of trust which established a date prior to intervening lienors was foreclosed. Thus, a review of the record would indicate to second deed of trust holders (be they original or assignees) that the first deed of trust was superior and that the presence of a dragnet clause would indicate that all future advances also were superior to the second deed of trust. However, under the facts of this case, the mere presence of the dragnet clause was not enough to put a subsequent creditor on notice that foreclosure of the Third Deed of Trust extinguished the Second Deed of Trust.

> II. IS JOSLIN PRECLUDED FROM FORECLOSING ON HIS DEED OF TRUST BY THE APPLICABLE STATUTE OF LIMITATIONS?

In his brief, Joslin argues this point although the trial court did not reach this issue as it was unnecessary to do so in light of the chancellor's decision in favor of Sunburst Bank. Joslin asserts that he is not barred by the state statute of limitations. Joslin contends that he, as an assignee of the FDIC, is governed by 12 U.S.C.A. § 1821(d)(14)(A, B)[(3)] and is entitled to an extension of the statute of limitations. I agree. According to Section 1821(d)(14)(A, B), the FDIC was entitled to a six year limitations period from the date it acquired the failed bank. The FDIC closed First Guarantee Bank For Savings on January 6, 1990. Such being the case, the FDIC would not be barred from foreclosing on the property until January 6, 1996. Thus Joslin, as assignee, stands in the shoes of the assignor and is entitled to the same extended limitations period. *Federal Deposit Insurance Corporation v. Bledsoe*, 989 F. 2d 805, 810 (1993). Of course, the statute of limitatio ns has been tolled during the time period in which this litigation has been in the courts. Miss. Code Ann. § 15-1-57 (Rev. 1995).

> III. DID SUNBURST BANK BREACH ITS SPECIAL WARRANTY DEED TO THE CITY OF PICAYUNE?

Again, the lower court did not reach this issue as it was unnecessary to do so in light of the chancellor's decision in favor of Sunburst Bank. Although this issue is not officially before this Court, I will briefly address it.

The City of Picayune argues that Sunburst Bank breached its contract to the City in which it agreed to convey the subject property free and clear of all liens and encumbrances. The City of Picayune contends that the existence of the Second Deed of Trust constituted a breach of the special warranty deed by Sunburst. I find no merit in this argument. The definition of a special warranty is as follows:

> The words "warrant specially," in a conveyance, shall constitute a covenant that the grantor, his heirs and personal representatives, will forever warrant and defend the title of the property unto the grantee and his heirs representatives, and assigns, *against the claims of all persons claiming by, through, or under the grantor*.

Miss. Code Ann. § 89-1-35 (Rev. 1991) (emphasis added). I am satisfied that Joslin's claim did not arise by, through, or under Sunburst Bank as the Second Deed of Trust was already in existence when Sunburst foreclosed, much less when it conveyed the subject property to the City of Picayune.

DIAZ AND KING, JJ., JOIN THIS SEPARATE WRITTEN OPINION.

1. "The term 'dragnet clause' connotes breadth of reach and is thought something much more than a conventional future advance clause. Future advances are one sort of debt included within dragnet

clauses. All such clauses are enforced by reference to their language and law and not their label." *Shutze v. Credithrift of America, Inc.,* 607 So. 2d 55, 59 n.1 (Miss. 1992).

2. When a lien appears on its face to be time-barred, it ceases to exist unless within six (6) months of its expiration a notation is made in the margin of the instrument indicating that it has been renewed. Miss. Code Ann. § 89-5-19 (Rev. 1991).3. (14) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be--

(i) in the case of any contract claim, the longer of--

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 1441a(b)(14) of this title), the longer of--

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of--

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

12 U.S.C.A. § 1821(d)(14)(A, B).