

2000

Local Realty Company, a company v. V.A. Lindquist and Mary Lindquist, his Wife : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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In the Supreme Court of the State of Utah

LOCAL REALTY COMPANY, a Corporation, <i>Plaintiff and Appellant,</i>	}	No. 6004
vs.		
V. A. LINDQUIST and MARY LINDQUIST, his Wife, <i>Defendants and Respondents.</i>		

BRIEF OF RESPONDENTS

Introduction: Respondents accept the Statement of Facts, Findings of Fact and Conclusions of Law, and the Judgment printed in Appellant's brief.

On page 8 of Appellant's brief is stated the question of law which Appellant asserts is involved in this case. We submit that such statement is inaccurate. The real question, we believe, would more nearly be stated thus:

Is the purchaser at execution sale entitled to recover rent from the mortgagor-owner for the latter's use and occupation during the redemption period?

In the lower courts it was stipulated that if a receiver had been appointed during the redemption period in this case, the value of his services in caring

for the property would be tantamount to rentals claimed by Appellant-Purchaser, and further, that Respondents, during said period, took as good care of the property as a receiver would have done.

ARGUMENT

1. A MORTGAGOR-OWNER HAS TITLE AND THE RIGHT TO POSSESSION OF HIS PROPERTY THROUGHOUT THE REDEMPTION PERIOD WITHOUT PAYMENT OF RENT.

It is elementary in a "Lien" State (Utah) that the mortgagor has title throughout the redemption period, appellant's novel revenue stamp argument, page 21 of its brief, to the contrary notwithstanding. Our Court is not concerned with the construction the Collector of Internal Revenue places on our statutes. The Utah cases and many of appellant's authorities establish that title does not pass until sheriff's deed.

Occupation without payment of rent is an incident to mortgagor's rights. Under 104-37-37, purchaser at execution sale might be entitled to a profit, proceed, rent or income extra the occupation and use.

Holmes v. Gravenhorst, 263 N. Y. 148, 188 N. E. 285, 1933.

If Lindquists had rented a room or the garage in our principal case, there may be a basis in equity for turning the "proceeds" over to the appellant. But it

is submitted that this is as far as 104-37-37 could go. *At least it is as far as any case cited by Appellant goes.* We are concerned with whether the mortgagor-owner in possession during redemption is to be burdened with payment of rent for *his own occupation and use*. Examining appellant's authorities either factually or by decision, we find no case requiring such payment for his own occupation and use. In the order cited by Appellant, the case of:

Farm Mortgage Loan Co. v. Pettet, 200 N. W. 497, 36 A. L. R. 598, 1924, concerns the appointment of a receiver and decides North Dakota statutes entitle the mortgagor to the rents and profits and possession of the property,

Reynolds v. Lathrop, 7 Cal. 43, is not pertinent since it involves recovery by the purchaser from a third party lessee of the mortgagor-owner.

McDevitt v. Sullivan, 8 Cal. 593, is inapplicable for the same reason,

Harris v. Reynolds, 13 Cal. 515, 73 Am. Dec. 600, 1859, is not pertinent, since Harris did not sue Reynolds for rent based on the latter's own occupation, but merely for "profits" accruing through sales of water,

Hill v. Taylor, 22 Cal. 191, is not in point, the plaintiff merely praying for appointment of a receiver to collect profits, not praying for rentals based on defendant's own occupation and use,

Walker v. McCusker, 71 Cal. 594, 12 P. 723, is not pertinent for the reason that plaintiff seeks

recovery from a third party other than the mortgagor-owner,

Clarke v. Cobb, 121 Cal. 595, 54 P. 74, does not apply since recovery is sought from a third party lessee,

Shintaffer v. Bank of Italy, 13 P. (2d) 668, 1932, does not apply since plaintiff sued for crops received as "rent" by the mortgagor from his lessee,

First National Trust v. Staley, 25 P. (2d) 982. 1933, is inapplicable since it seeks to collect rents, there being no prayer for rent for the mortgagor's own occupation and use, and

Clifford v. Henry, 169 N. W. 508, 1918, is not applicable since it was for recovery of crops by way of rent.

Apparently counsel for appellant misinterpret the facts of our principal case. They erroneously attempt to categorize our case by citation of authority not in point. Careful analysis of the case reveals no fact or decision bringing our case within appellant's authorities. *Harris v. Reynolds*, supra, the backbone of appellant's theory and the backbreaker of mortgagors if appellant be correct, does not solve our problem. Attention is directed to the following companion cases, carefully omitted by appellants, for a factual understanding of *Harris v. Reynolds*:

Raun v. Reynolds, 11 Cal. 15,
Reynolds v. Harris, 14 Cal. 668,
Raun v. Reynolds, 15 Cal. 460,
Raun v. Reynolds, 18 Cal. 276, and
Harris v. Reynolds, supra.

From these related cases it appears that Reynolds mortgaged to Harris' assignor. Default and foreclosure ensued. In the words of *Reynolds v. Harris*, 14 Cal. 668 at page 677, Harris sued Reynolds "*to obtain a receiver of the rents and profits* pending the time of redemption. In this action (Harris v. Reynolds) the District Court compelled Reynolds (in possession) to pay the PROCEEDS of the canals into court during the time allowed for redemption; and after the time for redemption had expired and Harris had obtained his deed the Court rendered final judgment in favor of Harris and directed that the *money in Court* (collected from third parties) be paid over to him." Nowhere in these cases is there a suggestion or prayer that Reynolds, the mortgagor-owner in possession, be required to pay rent for his own occupation. Only "profits," or "rentals," or "collections" were prayed for. Reynolds was treated as a "trustee." Numerous other phrases in the cases indicate that it was something over and above mere occupation and use by the mortgagor for which the plaintiff was praying, and about which the court was talking. In one of the cases, Reynolds retrieved what he had paid over. If appellant be correct, Reynolds could have sued Harris as "tenant in possession" for use and occupation by Harris, but such was not attempted.

We urge at this point that Proposition II on page

22 of appellant's brief is a generality based on false logic. No case cited warrants a construction including the facts of our principal case.

II. SECTION 104-37-37 R. S. U. 1933 DOES NOT APPLY TO A MORTGAGOR-OWNER IN POSSESSION DURING REDEMPTION PERIOD.

A. This seems to be born out by the Utah Cases:

McLaughlin v. Park City Bank, 63 Pac. 589, 1900. 22 Utah 473.

Carlquist v. Coltharp, 248 Pac. 481, 67 Utah 514.

In the *McLaughlin* case, decided in 1900, Sec. 104-37-37 then operative, one Cupit, judgment creditor, caused execution to issue and petitioned the Court to require the receiver, who represented the debtor-owner in possession, to account for rents, etc. With respect to liability for rents, occupation and use during the redemption period the case is squarely in point with our principal case. The Court, among other things, said:

“ . . . The real estate in controversy was rightfully held by the receiver with the right to the use, rents, and profits thereof for the benefit of the estate until Cupit should acquire title by sale on his execution. . . . An execution creditor is not entitled to possession and rents of the property levied upon *before sale and before the time for redemption has expired*. . . . Under such circumstances Cupit had no right to charge the receiver with the rents and use of

the premises, which at most would about cover the expense of operating and keeping the building, etc. in repair."

In the *Carlquist* case, 1926, after deciding that the mortgagor had title throughout the redemption period, the Court refutes even the doctrine of *Harris v. Reynolds*. The Court states that the mortgagor, being entitled to the possession of premises, "as a necessary corollary" is entitled to the crops grown thereon, i.e., takes the view that as long as the mortgagor is entitled to possession, he is entitled as a corollary, to the crops grown during his right of possession.

III. SUBSTANTIVE RIGHTS UNDER FORECLOSURE DECREE ARE NOT NECESSARILY DETERMINED BY THE STATUTES ON EXECUTION.

A. Mortgage statutes are separate and distinct from the execution statute. 104-55-1 R. S. U. 1933 says:

"There can be but *one* action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of *this* chapter. Judgment shall be given adjudging the amount due. . . . and directing the sheriff to proceed and sell the same according to the provisions of law *relating to sales on execution*.

Does the last sentence mean a "method" or "procedure" of sale? Does it also mean that substantive rights of the parties are determinable by the exe-

cution statute? We submit that the execution statutes govern the *mechanics* of obtaining title, but not necessarily the substantive rights of the parties. The established principles of ownership, right to possession and the incidental rights to rents, profits and the like, we believe, are left to the general law, i. e., that in this respect the mortgage and execution statutes are mutually exclusive.

In conclusion, we submit that: The appellant has cited no authority for his position; that our Court has construed 104-37-37 to exclude a mortgagor-owner in possession; that execution statutes need not be interpreted to govern substantive rights in mortgage situations, and that to require payment of rent by the mortgagor-owner would encourage him to vacate immediately upon foreclosure, would discourage redemption, lead to waste and depreciation, cause indiscriminate trespass, vandalism, would require mortgagee to employ a caretaker though he has no right of possession, would put words in the statute which do not exist, and would place upon our statute a construction not based on any cited authority.

Respectfully submitted,

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Attorney for Defendants and Respondents.