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Local Realty Company, a corporation v. V.A.
Lindquist and Mary Lindquist, his Wife : Petition
for Rehearing and Brief in Support Thereof

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

6004 P-R

In the Supreme Court of the State of Utah

LOCAL REALTY COMPANY,
a corporation,

Appellant,

vs.

V. A. LINDQUIST and MARY
LINDQUIST, his wife,

Respondents.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

STEPHENS, BRAYTON & LOWE,
and CALVIN BEHLE,

Attorneys for Petitioner.

In the Supreme Court of the State of Utah

LOCAL REALTY COMPANY,
a corporation,

Appellant,

vs.

V. A. LINDQUIST and MARY
LINDQUIST, his wife,

Respondents.

No. 6004

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Comes now the Local Realty Company, a corporation, Plaintiff and Appellant in the above entitled case, and respectfully petitions this Honorable Court for a rehearing of this matter upon the following grounds and for the following reasons:

1. That the opinion of the court is in error for the reasons hereinafter stated.
2. That the opinion of the court was handed down on December 17, 1938, at a time when the competency of one of the Justices concurring in that opinion, and whose concurrence was necessary to make the prevailing opinion the opinion of the court, was in question in certain proceedings which resulted in the resignation

of such Justice on the day that the opinion of the court was handed down.

3. That the Home Owners Loan Corporation, an Agency of the U. S. of America, and other members of the Bar interested in the law of real property and mortgages in this state, are perturbed with the opinion of the court as it now stands and would like to be heard and render assistance to the court in formulating a decision in this case.

ARGUMENT.

1. It is difficult for any lawyer to render a more critical analysis of the errors in the prevailing opinion as it now stands than has been done by the dissenting Justices in the above case. It would likewise be a useless expense and duplication to include in this brief such criticism and accordingly by reference Petitioner adopts and incorporates herein the opinion of Mr. Justice Wolfe in this case in support of its first ground for granting a rehearing in this case.

We have considered it elementary that the judicial reasoning of an impartial tribunal is founded upon the acceptance of certain facts and legal premises from which the conclusion and order of the court follows regardless of whether or not the end as such may be that desired in so far as the personal preferences of the members of the tribunal are concerned. This distinguishes judicial reasoning from the argument and reasoning of the advocate who to support a desired

result urges reasons to support that result. We submit that the prevailing opinion is a patent violation of these cardinal principles. While relying upon the detailed analysis of the dissenting opinion to point this out, may we stress the following:

(a) Petitioner's case is founded upon the following Statute of the State of Utah: (R. S. U. 1933, Section 104-37-37) "The purchaser from the time of sale until a redemption, and a redemptioner from the time of his redemption, until another redemption, is entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof." It cannot be disputed that Petitioner was the purchaser at the time of the sale of the property in question, that there was no redemption, that the defendants were in possession of the property in question, and that the stipulated sum was the value of the use and occupation thereof. Under such facts *the only question* before the court is whether or not as a matter of law these defendants, only one of whom was the mortgagor, were "tenants in possession". If this is so there can be no escape from the conclusion that there should be judgment for Petitioner. These identical words have been construed by the courts of many states *and in every instance* it has been held that the words "tenant in possession" includes a mortgagor in possession. (See cases cited in briefs and in dissenting opinion; repetition of these citations and of pertinent wording in these cases seems to involve unnecessary expense and mere duplication.)

Yet the prevailing opinion states that this Statute “specifically denies the grant of rents and profits to the purchaser and expressly recognizes them as the property and money of the owner” when the statute is just the opposite. (Note dissenting opinion).

The steps to which the writer of the prevailing opinion went to avoid the plain terms of the Utah Statute and the decisions of cases construing the language involved, are apparent when one reads the prevailing opinion and the briefs filed in this case and contemplates the initiative of the author in departing from the briefs and arguments of counsel and discovering that the Utah Statute adopted in 1870 had additional provisions *not here involved* which were not present in the parent California Statute until two years later. The author then cites this statutory difference *in no way in point* to escape Petitioner’s claim that the California Statute which was adopted by Utah *in identical words* was adopted free from the construction of this identical wording by the California courts.

We quote from the dissenting opinion:

“Of course it follows that if as early as 1859 California held the statute to give to the purchaser the equitable title and that he was entitled to the value of the use and occupation from the mortgagor or former owner during the period of redemption, and we adopted that very language from the California statute in 1870, that we adopted the construction which the court put on *that* language. The fact that the California statute did not adopt the part about the account-

ability until 1872 or two years after we took the portion to which the decision in 1859 pertained can make no difference, especially in view of the California case of *Petersen v. Jurras*, *supra*, where the California Court gave the same construction to its statute with the accountability features added as it did in *Harris v. Reynolds*, *supra*, when they were absent.

“And it becomes not only difficult to ascertain how, but astounding that the opinion can state that such holding in the *McCusker* Case was “without discussion and citing as authority the *Lathrop* case, *supra*, which declined to so hold.” A glance at the *McCusker* case reveals the following: That not only was the *Lathrop* Case cited (which did not “decline to hold” that the judgment debtor was a tenant in possession, but expressly left the question open), but there were cited *Harris v. Reynolds*, *supra*, and *Hill v. Taylor*, *supra*. In fact, the former is quoted from. Other cases are also cited, but the above two are definite early authorities on which the *McCusker* Case rests.”

(b) We quote from the dissenting opinion:

“I think the opinion becomes hopelessly confused in its consideration of the reasons for the rent money going to the purchaser. Since the opinion lays down the principle that the mortgagor or owner is not only entitled to possession but has all the rights and attributes of title until six months after “sale”, it of course is precluded from holding that rents or value of use and occupation are an incident of the purchaser’s status. But since the rents and value of use and occupation are given to the purchaser by statute, some reason must be found in the opinion for giving these to the purchaser. And what reason do we find? That they are given to the purchaser

as an offset to his debt. But the idea occurred to the opinion writer that in some cases the purchaser might not be the judgment creditor. So there is inserted in parentheses that the purchaser "is in the status of a creditor". In the status of a creditor as to what? If he never was a creditor, how can he succeed to that credit by becoming a purchaser? How can a stranger to the note secured by the mortgage who is a purchaser be "in the status of a creditor?" Why is he entitled to the rents and value of use and occupation as a credit on an indebtedness which never existed as to him? Furthermore, it is elementary that even the judgment creditor occupies a different status as a purchaser. His judgment is satisfied if the property is bought in for the debt and costs, and he owns the property, not as judgment creditor but as purchaser. Why give him credit on an indebtedness which is no longer owing? The fact that in case of mistake, where the purchaser is the judgment creditor, there is better opportunity to rectify the mistake by placing the parties in status quo does not make him any the less a purchaser and not a creditor."

In connection with this subject we treated the question of title in our original briefs as moot in this case because the basis of Plaintiff's action was Section 104-37-37. But how can the reasoning of the prevailing opinion on this point stand in face of that part of Section 104-37-32 which reads: "If the debtor redeems, the effect of the sale is terminated and he is restored to his estate." Useless words, since the Court would have us understand that the debtor still has his estate! See also the discussion of this problem in the case of *McQueeney v. Toomey et al.*, (Montana) 92 Pac. 561, where

statutes identical with those of Utah are construed. The prevailing opinion expressed itself on this point without benefit of counsel; with respect to the result we again quote from the dissenting opinion:

“The prevailing opinion goes on to say that our statute “specifically denies the grant of rents and profits to the purchaser and expressly recognizes them as property and money of the owner.” The statute does not so provide. It provides just the opposite. It provides that they shall go to the purchaser because he has all the right, title, and interest in the property; but it further provides that if the owner or other redemptioner redeem, the money so collected by the purchaser be credited on the redemption price. This is harmonious with the conception that the purchaser is entitled to the rents and profits as an incident to his interest, but that if his equitable estate (not merely an equity but a full right recognized in equity) which he has obtained by the purchase, is defeated by redemption, he must pay over the rents and profits because all he is entitled to is to recoup his purchase price with interest. In the anxiety of the opinion to establish the doctrine that these rents and value of use and occupation belonged all the time during the redemption period to the execution debtor, despite the express statutory provision that the purchaser was entitled to them, we are told that they are paid to the purchaser as a credit upon his debt. And in order to arrive at this conclusion a purchaser who never was a creditor is treated as a creditor. He seems to be in the “status of a creditor”.

“But it seems to me that the crowning absurdity of the whole reasoning is revealed in the statement that “if there are any rents due and owing to the owner when the deed issues, they

may vest in the purchaser or his assigns for he then is subrogated to and acquires all the right, title, and interest to everything the owner could assert with respect to the property; including title, possession, growing crops, rents," etc. This is the first instance in the law that I have come across that rents or profits owing to an owner before title passes become the property of one who buys the real estate. But certainly if the "sale" does not become complete until six months after the "sale" and the rents belong to the owner, no passage of title by "subrogation" passes such moneys to the purchaser. Nowhere in the law can such a principle be discovered. It reveals the plight the opinion finds itself in in order to justify the statement that the ownership of the property remain in the mortgagor for six months after sheriff's sale rather than in the purchaser as the statute declares. If the ownership is in the purchaser, it follows naturally that the rents and value of use and occupation belong to him. If his estate in equity is defeated by the happening of the condition subsequent—to-wit, redemption—he, by statute, is required to account and credit on the purchase price the rents which, up to such time, belonged to him."

(c) We have at no time suggested that a person in possession of property is not entitled to its use and occupation. Yet the opinion accuses us of advancing this "paradox that destroys itself". The question before the Court is whether a statute giving Plaintiff the right to hold the tenant in possession for the value of that use and occupation means what it says. We contend that if the defendants choose to elect to exercise their right (in this case conceded) to possession, *thus becoming entitled to the use and occupation of the*

premises, they must, under the statute, pay the plaintiff. If they do not wish to pay, they have the choice of not exercising their option. We again quote from the dissenting opinion:

“The contention is not that use and occupation can be separated from possession, but that the owner in possession after sale must account for *the value* of the use and occupation. The opinion uselessly sets up and knocks down a straw man, forgetting the earlier statement in the opinion that California holds this possession a mere right of occupancy subject to a right in the purchaser to the value of the use and occupation. In the California case of *Petersen v. Jurras*, *supra*, it was held that the “right to possession of the property was not in issue in the case.” Likewise, in this case right to possession is not an issue, only the question of whether the purchaser may recover for the use and occupation without notification that he intends to do so. That is all that need be decided in this case.

“The opinion goes on to say: “property is the right to the use and occupation of a thing or to the usufruct and enjoyment thereof and without such right there is no such thing as property rights in it. Ownership of property is the right to enjoy the beneficial interest, the use and occupation, or to receive the usufruct thereof. Without such right there is no ownership. Such a thing as ownership of realty without beneficial interest or a possession of real property without right of use and occupancy is an absurdity if not an impossibility.” Every day owners of property lease it so as to deprive themselves of right of occupancy or possession. I do not see, therefore, that ownership without right to use and occupancy is an “absurdity if not an impossibility.” But here again as all along in the opinion the

question of who is the owner during redemption period is asserted or assumed. I find no valid reasons given in the opinion. Such reasons would need to be very convincing in the face of the language of the statutes which seem expressly to give the purchaser all the right, title, interest, and claim of the owner on "sale" by the sheriff and give him by another section the rents or value of the use and occupation during the redemption period, and in the face of opinions from every state having statutes like ours holding to the contrary."

(d) The prevailing opinion closes with "three other reasons why the owner in possession should not be chargeable with rents during the redemption period." In our opening brief we tried to point out why these and other similar reasons had led many legislatures to change statutes originally identical with those of Utah. We did not suspect that this Court would use these reasons—in no way involved in the logic of the legal proposition before the court—to legislate a result deemed desirable even by the dissenting justices. We again respectfully submit that this is a matter for legislative attention if the conclusion based upon the facts of this case coupled with our present law seems socially undesirable. To burden this brief with the results of experience leading to contrary conceptions would seem to be equally inappropriate before this tribunal. To support our statement above that some of these reasons are not here involved, we say as did the dissenting opinion: "It happens that the statutes are different."

(e) Finally, the prevailing opinion does not deal directly with the question of the liability of one of the defendants who was not a mortgagor. We submit that the opinion should discuss this point and make definite the law concerned, even though it be held that a mortgagor who elects to take possession during the redemption period may do so without liability despite Section 104-37-37.

But we have already passed beyond our self-imposed limitation that it would be an unnecessary and therefore useless task to dwell further upon the errors in the prevailing opinion. We respectfully submit that if the Justices of this Court conscientiously examine the prevailing and dissenting opinions in this case, the briefs already filed, and if necessary the three key cases of *Harris v. Reynolds*, *Walker v. McCusker*, and *Clifford & Company v. Henry*, the desirability of a rehearing of this matter will become at once apparent except to those who will not see.

2. Likewise the less said about this ground for rehearing the better, although we submit that a case involving the differences of opinion in the court itself and the ramifications and inuendoes of the prevailing opinion merits a rehearing when the deciding vote was cast under a cloud.

3. We are authorized to state that without solicitation upon the part of counsel in this case, attorneys for the Home Owners Loan Corporation and for Utah banks

and trust companies have requested Petitioner to file this petition for a rehearing with the thought that if a rehearing is granted they may file briefs as amici curiae. It seems clear under our decisions that prospective amici curiae can not of their own volition request a rehearing or file briefs in support thereof, but such counsel have indicated their desire to do so if the Court desires such briefs to be filed in advance of its ruling on this Petition.

In conclusion may we say that counsel in this case have no additional fees to be earned by filing this petition, and that no hardship will be rendered any party in this cause by any delay involved in a more mature consideration of this interesting and difficult question. It has been our thought that further consideration of this case (both by the Court and counsel—see Paragraph 7 of the Conclusions of the dissenting opinion) might assist in harmonizing the divergent opinions now ready for the books. In this spirit we respectfully request that a rehearing be granted.

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