

2000

Local Realty Company, a corporation v. V.A. Lindquist and Mary Lindquist, his wife : Reply Brief of Appellants

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

6004A

In the Supreme Court of the State of Utah

LOCAL REALTY COMPANY,
a corporation,
Plaintiff and Appellant,

vs.

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

No. 6004

REPLY BRIEF OF APPELLANTS

The brief of the respondents in this appeal under Heading II cites two Utah cases which are claimed to support the contention of respondents. These are McLaughlin vs. Park City Bank, 63 P. 589; 22 Ut. 473 (1900), and Carlquist vs. Coltharp, 248 P. 481; 67 Ut. 514 (1926).

In our opening brief we said at page 13 that there are no Utah cases on the point involved, and that it would serve no purpose to cite or discuss authorities involving points which are not involved in this particular case. Thus no mention is made whatsoever of these two cases which are now relied upon by respondents. Appellant respectfully suggests that the court must de-

termine whether these cases are or are not in point. In this connection, however, we may observe:

The McLaughlin case in brief involves the claim of an attaching creditor of real property as against the general receiver of the mortgagor, to proceeds of a fire insurance policy which were paid because of a fire which occurred subsequent to the attachment, but prior to any sale under execution. The insurance policy had been taken out by the receiver and he had paid the premiums; he had also remained in possession. It seems sound enough under the circumstances that the court held:

1. "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 (attaching creditor) should acquire title by a sale on his execution."

2. The receiver had an insurable interest in the property; also the right to use it, receive rents from it, repair it and preserve it from loss the same as any other owner would have.

3. That as between the attaching creditor who at the time of the fire had not yet bought in the property at execution sale, let alone obtained unconditional title by expiration of the period of redemption without a redemption, the receiver was entitled to the proceeds of the insurance.

This case is brief and it is obvious in reading the opinion that Section 104-37-37 as it then existed, was

neither involved nor discussed in any way. It is in no sense authority either for or against the issues now before the court in this case.

In the Carlquist case a receiver pendente lite was appointed after the mortgagee commenced his foreclosure action. Subsequent to the execution of the mortgage and prior to the commencement of the foreclosure action the mortgagor executed a crop mortgage covering crops which were growing at the time the foreclosure action was commenced. The mortgage did not contain any provision giving the mortgagee the right to possession or a lien upon the crops. The receiver harvested the crops and sold them; then he turned the proceeds into court and was discharged—all this before the date set for the trial of the foreclosure proceeding, and thus of course before the sale or the period for redemption had expired. The case involved the conflicting claims of the mortgagee and the crop mortgagee to the proceeds, and the court held that under the circumstances the crop mortgagee prevailed. This was the sole question presented on the appeal; the cross appeal involved subjects in no possible way pertinent to our case. The court said: "The mortgagor has, therefore, the legal title, and is entitled to retain possession of the premises until the expiration of the time for redemption, unless the terms of the mortgage give the mortgagee the right of possession." The case now before this court does not involve the question of the right of possession which is conceded; nor is the strict question of title involved.

There is thus nothing in the two foregoing cases which has any bearing whatsoever on our point, and in so far as these decisions are concerned they seem to be sound and consistent with plaintiff's contention in this particular case.

The other matters urged in respondents' brief are fully covered in the opening brief of appellant and further discussion with respect thereto would serve no useful purpose. Section 104-37-37 as a matter of substantive law by its plain language vests in the purchaser at the sale the right not only to the rents of the property sold, but also to "the value of the use and occupation thereof," despite any attempt by respondent to restrict the statute in its operation to "rents", and to ignore and disregard the part above quoted. The cases of Harris vs. Reynolds and Walker vs. McCusker in California, Clifford & Company vs. Henry in North Dakota, and Citizens National Bank vs. Western Loan & Building Company in Montana, all of which are fully discussed in appellant's brief, hold that the mortgagor—execution debtor is a "tenant in possession" under this statute, and subject to its terms.

Respectfully submitted,

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and Appellant.*