

1968

## Klans D. Gurgel v. D. Wayne Nichol : Respondent's Brief

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### Recommended Citation

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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KLAUS D. GURGEL,  
*Plaintiff and Respondent,*

vs.

D. WAYNE NICHOL,  
*Defendant and Appellant.*

Case No.  
10793

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## RESPONDENT'S BRIEF

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Appeal of Defendant from the  
District Court of Salt Lake County  
Honorable Stewart M. Hanson, Presiding

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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KLAUS D. GURGEL,  
*Plaintiff and Respondent,*

vs.

D. WAYNE NICHOL,  
*Defendant and Appellant.*

} Case No.  
10793

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## RESPONDENT'S BRIEF

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### NATURE OF CASE

This action was commenced by the Plaintiff on July 5, 1966, in the Third District Court for Salt Lake County against the Defendant for conversion and trespass.

## STATEMENT OF FACTS

The Defendant was the owner of a certain residential property located at 2512 East 4800 South, Salt Lake County, State of Utah, which was mortgaged to the Tracy Collins Savings and Trust Company. On the 7th day of December, 1964, Tracy Collins Savings and Trust Company took judgment against the Defendant in the Third District Court for Salt Lake County, Civil No. 149792 and on the 26th day of January, 1965, said property was sold at Sheriff's Sale to one D. L. Holt (record page 19). On the 7th day of August, 1965, the Defendant vacated the premises (recorded page 11, Answer No. 6) and on the 25th day of April, 1966, D.L. Holt and his wife and the Plaintiff and his wife entered into a Uniform Real Estate Contract for the sale and purchase of the aforescribed property (record pages 15 & 16). Plaintiff took possession of the property on that date. On the 8th day of May, 1966, the Defendant, without permission of the Plaintiff and without prior demand entered the premises of the Plaintiff while he and his family were away and removed the items described in Paragraph 2 of Plaintiff's Complaint (record page 11, Answer 8 & 9).

After demanding the return of the property removed by the Defendant from the premises and Defendant's failure to do so, this action was commenced.

## DISPOSITION IN LOWER COURT

The Plaintiff filed a Motion for Summary Judgment upon the grounds that the pleadings, Answers to Interrogatories, Affidavit, and Exhibits show that Defendant had transferred all right, title, and interest in the property in question at the Sheriff's Sale or abandoned same, and that the Plaintiff had acquired the right to the immediate and sole possession of

said property on the 25th day of April, 1966, and therefore there was no genuine issue as to any material fact between the parties and Plaintiff was entitled to a judgment against the Defendant for the value of the property converted by the Defendant and such punitive damages as may be reasonable and judgment dismissing Defendant's counterclaim (records pages 17 & 18). Said Motion was granted and the Plaintiff awarded judgment against the Defendant for \$1500.00 and \$1.00 punitive damages and dismissing Defendant's counterclaim (record pages 21 & 22).

### ARGUMENT

THE DEFENDANT EITHER TRANSFERRED ALL INTEREST HE HAD IN THE PROPERTY OR ABANDONED IT AND THE PLAINTIFF HAD ACQUIRED THE RIGHT TO ITS POSSESSION WHEN REMOVED BY THE DEFENDANT ON MAY 8, 1966.

The property involved in this dispute consists of five diving boards, three swimming pool heating units, one swimming pool ladder, one swimming pool heater, one swimming pool lighting fixture, and one work table. The property conveyed by the Sheriff's Deed on January 26, 1965, consists of the real property, a residence, a garage, a bathhouse, and a swimming pool. The aforementioned items, except for the work table, even though not attached to the swimming pool itself on May 8, 1966, the date of Defendant's conversion, could have been so attached and used by the Plaintiff in connection with the use of the swimming pool on the premises.

The last paragraph of the Sheriff's Deed after the legal description of the property states:

"Together with all and singular the tenements, hereditaments, an appurtenances thereunto belonging or in anywise appertaining, to have and to hold the same unto said party of the second part, its successors and assigns forever."

Black's Law Dictionary, Fourth Edition, 1957, at Page 1637 defines "tenement" as follows:

"This term, in its vulgar acceptation, is only applied to houses and other buildings, but in its original, proper, and legal sense it signifies everything that maybe holden, provided it be of a permanent nature, whether it be of a substantial and sensible or of an unsubstantial, ideal, kind."

The term "hereditaments" is defined in Black's Law Dictionary, Fourth Edition, 1957, at Page 859 as:

"Things capable of being inherited, be it corporeal or or incorporeal, real, personal, or mixed, and including not only lands and everything thereon, but also heirlooms, and certain furniture which, by custom, may descent to the heir together with the land."

In Moore vs. Sharpe, 91 Ark 407, 121 S.W. 341, at Page 344, it was stated:

"The term 'hereditaments' includes anything that may be inherited, be it corporeal or incorporeal, real, personal, or mixed. The word is almost as comprehensive as 'property'."

Black's Law Dictionary, Fourth Edition, 1957, defines "appurtenance" at page 133 as follows:

“That which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land; an out-house, barn, garden, or orchard, to a house or messuage, (case cited) An article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold.”

An article may become an “appurtenance” to realty without physical attachment. Metropolitan Life Insurance Company vs. Jensen, 69 S.D. 225, 9 N.W. 2d 140, 141

The Defendant states that the Sheriff's Deed conveyed only the real property and no personal property was included in this transaction. If this were true, the aforementioned terms which were included in the deed are mere surplusage and meaningless. Almost all real property transactions, especially those involving private residence, necessarily include the transfer of ownership of personal property which is related to the use and enjoyment of the fee. It is not unreasonable to conclude that swimming pool equipment is related to the use and enjoyment of real property which contains a swimming pool even though the equipment is not actually physically attached to the real property or pool.

Defendant's ownership of the real property ceased on January 26, 1965, when the Sheriff's Deed conveyed ownership to D.L. Holt. On August 7, 1965, seven and one-half months after the Sheriff's Sale, the Defendant vacated the premises and took with him all of his personal effects. He left behind the items listed in Plaintiff's Complaint and some of the items listed in his counterclaim. On May 8, 1966, he went to the Plaintiff's residence and without notice or demand trespassed on the property and removed the items



listed in Plaintiff's Complaint. This act took place 16 months after the Sheriff's Sale and over nine months after the Defendant had vacated the premises.

In the case of *Duckett vs. Home Building and Loan Association*, 10 Pa. D. & C. 2d 181, (1957) the Plaintiffs purchased a home and after one year defaulted on the mortgage payments. The defendant brought legal action and foreclosed on the property and it was sold at Sheriff's Sale to the Veterans Administration. The Veterans Administration notified the owner to vacate the premises which they did, leaving on the premises the storm windows, screens, and venetian blinds. The Veterans Administration then sold the the property to another party. Plaintiff brought this action to recover the value of these items.

The Court held that the storm windows and screens were fixtures and as such passed with the realty. However, they held in regard to the venetian blinds as follows:

"The venetian blinds purchased by the Plaintiffs may be said to fall within the class of chattels, which, in the case of *Clayton vs. Lienhard*, 312 Pa. 433, are described as 'those which are manifestly furniture, as distinguished from improvements, and not particular fitted to the property with which they are used.' These chattels are held to always remain personalty. However, where the owners of chattels voluntarily relinquish control thereof and leave them on the premises after due notice to vacate, knowing that the property has been sold to another, they must be considered to have abandoned these chattels. See 1 Am Jur 2d §3 on Abandonment."

It has been held that mere nonuse of property and lapse of time without claiming ownership is insufficient to prove abandonment. However, such facts are competent evidence

of an intent to abandon and are entitled to great weight when considered with the other circumstances. 1 Am Jur 2d, §41, Abandonment, Pages 33 & 34. In the case at hand there are numerous circumstances present to show conclusively that the Defendant intended to abandon the swimming pool equipment as well as the other items involved herein. First, the Defendant had knowledge of the Sheriff's Sale in January of 1965 and was aware that the new owner would request him to move. Second, the Defendant vacated the premises in August of 1965, and took with him his personal effects and those chattels he desired leaving behind all others. Third, the Defendant knew that the property had been resold to the Plaintiff and that the Plaintiff had moved in on April 25, 1966. Fourth, the Defendant made no claim to ownership of the property until the date he trespassed to remove it. Fifth, the Defendant did not make claim to ownership of the property listed in his counterclaim until August 7, 1966, one month after this action was commenced.

The Defendant states that even if he has abandoned the property the title to said property would not vest in the Plaintiff. By the very definition of abandonment, the owner relinquishes his right, title, claim, and possession to any person who reduces it to possession. When the Defendant walked away from the property and left the swimming pool equipment, work bench, and other items behind, his intention was to either abandon it to the next owner or to make a sale of the property to Mr. Holt, the Plaintiff's predecessor in interest. The chain of title is without interruption either way. The only other logical conclusion is that he intended to make a gift of the property to Mr. Holt.

The Defendant's position as to the damages awarded to the Plaintiff is correct. Since the value of the property

converted by the defendant has not been established in record and the value alleged in Plaintiff's Complaint was denied by the Defendant, the Trial Court should have only granted Plaintiff's Motion for Summary Judgment as to liability and set the matter for trial on the issue of damages.

As to the Trial Court's award of \$1.00 punitive damages, there is ample evidence in the record to show a wilfull trespass on Plaintiff's property to support an award of such a nominal amount. Plaintiff's Interrogatory No. 8 asks the following question:

"8. Did the Defendant ask and receive permission from the Plaintiff or his authorized agent to enter the premises located at 2512 East 4800 South, Salt Lake City, Utah, on or about the 8th day of May, 1966?" (record Page 8)

The Defendant's sworn answer was:

"8. The Defendant went to the door and no one was at home." (record page 11)

## CONCLUSION

There is ample evidence contained in this record to support the Trial Court's finding that there was no genuine issue as to any material fact and that the Plaintiff was entitled a Judgment as a matter of law against the Defendant on the issue of liability.

The Trial Court's award to the Plaintiff of the alleged value of the property without proof as to it's value was in error.

The award of punitive damages of \$1.00 for trespass upon Plaintiff's property is supported by the record.

The Trial Court's ruling on liability should be affirmed and the matter referred back to the District Court for a determination as to damages.

Respectfully submitted,

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