

1972

**State of Utah, By And Through Its Road Commission v. Walter C. Rohan And Ella E. Rohan, His Wife, And Medallion Mortgage Company : Brief of Respondents**

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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STATE OF UTAH, by and through  
its ROAD COMMISSION,

Plaintiff and Appellant,

-vs-

WALTER C. ROHAN and ELLA E.  
ROHAN, his wife, and MEDAL-  
LION MORTGAGE COMPANY,

Defendants and Respondents

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}  
Case No.  
12796

BRIEF OF RESPONDENTS

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Appeal from Judgment and Order of  
The Third District Court for Salt Lake  
County, State of Utah, the Honorable  
Stewart M. Hanson, Presiding

-----

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MAY 22 1972

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH  
. . . . .

STATE OF UTAH, by and through its  
ROAD COMMISSION,

Plaintiff and Appellant,

-vs-

Case No.  
12796

WALTER C. ROHAN and ELLA E.  
ROHAN, his wife, and MEDAL-  
LION MORTGAGE COMPANY,

Defendants and Respondents

-----  
BRIEF OF RESPONDENTS  
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NATURE OF THE CASE

Plaintiff filed an action in the lower court seeking to condemn a portion of defendants' property. The sole issue is whether or not the defendants are entitled to the payment of interest on an amount deposited by the plaintiff with the district court clerk.

## DISPOSITION IN LOWER COURT

Defendants moved the lower court to have the interest paid by the plaintiff as a part of the judgment recomputed and increased through the payment of an additional \$279.60. Judge Stewart M. Hanson granted the defendants' motion and ordered the plaintiff to pay such sum.

## RELIEF SOUGHT ON APPEAL

Defendants seek to have the order of the Third Judicial District Court affirmed.

## STATEMENT OF FACTS

Plaintiff filed a complaint in the Third Judicial District Court seeking to acquire a portion of defendants' property and requesting the court to ascertain the just compensation to be paid therefore. Set forth in the complaint as a part thereof was a copy of a condemnation resolution of the State Road Commission, which, in pertinent part, stated as follows:

"The State Finance Director shall be instructed and requested, on behalf of this Commission:

To prepare a state warrant in the sum equal to 75% of the approved appraisal of each parcel of real property...; payee to be the clerk of the district court of the county wherein the real property is located, for

the use and benefit of the landowner . . . .  
That a tender to the landowner of a sum equal to at least 75% of the fair market value of the property to be acquired for rights of way herein shall be made prior to issuance of an Order of Immediate Occupancy" ( R. 1) ( Emphasis added)

The complaint further stated that the approved appraisal made by the plaintiff of the defendants' property was \$1555.00 and the amount to be tendered to the landowner at the time of the Order of Immediate Occupancy was \$1165.00.

Along with the complaint, which was filed October 23, 1968, the plaintiff submitted its Motion for Order of Immediate Occupancy ( R. 8) and a Notice of Hearing on such motion fixing the date thereof as November 1, 1968 ( R. 9).

The Order of Immediate Occupancy was issued by the lower court on November 1, 1968 and was filed by the plaintiff on the same date ( R. 15). This stated that plaintiff was permitted and authorized to occupy the premises belonging to defendants and to take immediate possession of said properties. In pertinent part the order stated:

" This order shall not be effective until the plaintiff herein has deposited with the clerk of the court, for the use and benefit of the defendant parties in interest herein, a sum equal to 75 percent of the approved appraisal of the defendants' property to be acquired in this action.

" It is further ordered that on receipt of said moneys , the clerk of this Court is ordered to remit the same to the appropriate defendants in the percentage and ratio to which they are entitled . "

It should be noted that, although said order was signed and filed by the plaintiff on November 1, 1968, it does not contain a certificate of mailing to the defendants and no copy of the said order was mailed or otherwise furnished the defendants .

A miscellaneous expenditure voucher from the Utah Department of Finance ( R. 25) dated October 22, 1968, discloses the intent to pay to the Third District Court Clerk the sum of \$1165.00 for the use and benefit of Walter C. Rohan, et al. This contains a handwritten note " send to Jack Fairclough, 15 E. 4th South"; however, such a document or copy was not sent to Jack Fairclough or to the defendants .

On November 15, 1968, 14 days after the Order for Immediate Occupancy was filed and possession of the defendants' land was taken by the plaintiff, the plaintiff filed a check with the Salt Lake County Court Clerk in the sum of \$1165.00 (R. 24). This was transferred to the Salt Lake County Treasurer by said clerk on December 2, 1968 ( R. 22). This was not remited nor was it tendered to defendants nor were defendants notified that it had been paid .

The Judgment on the Verdict of the Jury was filed by the plaintiff July 21, 1970 ( R. 113). This



stated, in part, that plaintiff had deposited the sum of \$1165.00 with the court clerk on October 24, 1968 and that \$3035.00 was to be paid together with 8 percent interest thereon. Following an appeal to the Utah Supreme Court the satisfaction of judgment was filed October 13, 1971 ( R. 140) and on October 15, 1971 the Salt Lake County Court clerk paid to the defendants the sum of \$1165.00.

The defendants filed a Motion for Re-computation of Interest on the Judgment on December 15, 1971 ( R. 143) seeking to be awarded the additional sum of \$279.60 as interest at 8% on the sum of \$1165.00 from October 24, 1968 to October 15, 1971. Following argument the lower court granted defendants' motion and plaintiff was directed to pay the defendants the sum of \$279.60.

### ARGUMENT

THE LOWER COURT PROPERLY GRANTED THE DEFENDANTS' MOTION FOR THE PAYMENT OF INTEREST ON THE AMOUNT DEPOSITED BY THE PLAINTIFF IN THE SALT LAKE COUNTY COURT CLERK'S OFFICE.

1. The granting of interest on the amount deposited by the plaintiff with the clerk of court was proper under the law and warranted by the circumstances.

As a condition precedent to occupying the defendants' premises, the plaintiff was required by 78-34-9 Utah Code Annotated to act as follows:

"If the motion is granted the court shall enter its order requiring plaintiff as a condition precedent to occupancy to file with the clerk of court a sum equivalent to at least 75% of the condemning authorities appraised value of the property... The said judgment shall include interest at the rate of 8% per annum on the amount finally awarded-- from the date of taking actual possession thereof by the plaintiff or order of occupancy whichever is earlier-- to the date of judgment but interest shall not be allowed on so much thereof as shall have been paid into court... Upon the application of the parties in interest the court shall order that the money deposited in the court be paid forthwith for or on account of the just compensation to be awarded in the proceeding."

In addition, the plaintiff by the specific order of the Court was directed to deposit 75% of the appraised value with the clerk and that the order would not be effective until such deposit was made. Also, the order provided that the clerk was to remit the sum deposited to the appropriate defendants. Further, in its complaint the plaintiff stated that it would tender the 75% deposited to the defendants.

In each of these particulars, the plaintiff failed to comply. It failed to deposit the 75% required when the order of immediate occupancy was filed and when it took possession of the

property. The clerk failed to remit the amount deposited and the plaintiff did not tender the sum to the defendants.

Despite the fact that the plaintiff did not make a timely deposit as required by the statute and the order and no tender was made in accordance with its complaint, the plaintiff did not in any manner notify the defendants of the deposit made.

Plaintiff contends in its brief that the cited statute carries no requirement for the filing of any documents or the giving of any notice other than that contained in the pleadings. It is true the pleading requires the depositing of a sum equal to 75% of the appraised value of the property as a condition precedent to the issuance of the Order of Immediate Occupancy and to the occupancy of the defendants' land but this is a promise and notice prospective in nature only. It does not say such action was done but only that it would be accomplished at some future time. Thus, clearly the pleadings are notice only of intentions not deeds.

Even if it's assumed that the pleadings give notice of the deposit in a real sense they clearly give notice only when the pleadings are adhered to, i.e. the deposit is made or the money is tendered when the order is issued or when occupancy is taken. When the deposit is not so made and is delayed in contravention of both the pleadings and the order of the court then the defendants are entitled to actual notice that the deposit has been finally made. It is considered implicit in the statute itself and required by equity that the plaintiff has the duty to give actual notice under such circumstances.

When the plaintiff disregards the promise of its own pleading and the order of the court then surely the defendant ought not to be put to the burden of having to make daily inquiry of the plaintiff or the court clerk to ascertain when or if a deposit is made. The onus of notice should be upon the plaintiff, who is responsible for the delay, and clearly this burden is slight. It could very easily notify the the defendants herein of the deposit by phone or even by transmitting to them copies of vouchers, checks or transmittal letters. In the case at hand, plaintiff did not even notify defendants by sending them a copy of the Order of Immediate Occupancy itself, a customary and usual procedure.

In addition, the plaintiff affirmatively stated in its complaint that the sum concerned would be tendered to the defendants. This was not done. The defendants clearly could rely upon this statement and await the actual tender to be made as promised. In this regard see Nichols on Eminent Domain, Vol. 3, Sec. 8.63 (2) page 182 as follows:

"A tender of compensation or a deposit for the use of the owner stops the running of interest. If, however, the owner is prevented from availing himself of the use of the money deposited or tendered by reason of any appeal by the condemnor, interest continues to run."

The rule appears clear, i.e. the plaintiff is obligated to pay interest when no tender of payment is made or when the owner is prevented from availing

itself of the sum deposited by the conduct of the plaintiff. In Nichols it is an appeal but in the case at hand it was a deposit made other than in accordance with the pleadings and the order of the court and without notice.

The meaning of the "tender" required is set forth in Ballentine's Law Dictionary, page 1264 as follows:

"An unconditional offer of payment, consisting in the actual production, in coin of the realm or other lawful money, of a sum not less than the amount due on a specific debt or obligation."

The rule is set forth in Housing Authority of the City of Bridgeport v. Pezenik, 78 A. 2d 546 (1951). There the Court said the sum deposited in court in a condemnation action:

"Is in no sense a tender... a tender must be unconditional, and unqualified... the payment into court did not operate as a tender to stop the running of interest."

In 27 Am. Jur 2d 304, page 118, it is stated:

"The prevailing view seems to be that ordinarily a deposit of the compensation award does not amount to a true tender or stop the recovery of interest."

See also State v. Hamer ( 1936) 211 Ind. 570, 199 N.E. 589, where the court said:

"The rule ought to be and we hold that if a landowner rejects a tender... or in case the condemnor appeals and thereby prevents such owner from using the money thus tendered or paid into court, he would be entitled to interest on the full amount of the award as determined on appeal from the time the condemnor took possession of the property."

Even in the federal jurisdiction where courts have held that interest is not warranted after deposit it has been granted where the owner is deprived of the privilege of withdrawal of the deposit. See U.S. v. 0.45 acre of Land ( 1945 151 F. 2d 114 where the Court pointed out that if an owner of land is entitled to withdraw at any time the amount deposited in court by the Government and if he is not deprived of such privilege, he is not entitled to interest on the sum he chooses not to withdraw. In said case, after judgment, counsel for the landowner moved the Court to reopen and to award the payment of additional interest on one-half of \$4,000.00 that had not been withdrawn from deposit. The landowner obtained \$2000.00 but left the other with the court clerk for some personal reason. The court held the landowner was not entitled to interest on the amount left voluntarily. Clearly the owner had notice of the deposit and was not in any sense prevented from having the money withdrawn.

This is different from the case at hand for here defendants were prevented by lack of notice and the plaintiff's failure to tender the sum or to deposit the same in a timely fashion.

In addition to the duty of the plaintiff in the case at hand the order of the lower court specified that the clerk of court should remit the sum deposited to the defendants. Remit, as set forth in Ballentine's Law Dictionary, page 1089, means to transmit or forward money, especially by way of payment of a debt. This entails an affirmative step in making payment and is not accomplished by a passive holding of money.

2. The lower court's recomputation of the interest owed by the plaintiff to the defendants as a part of the judgment and its required final payment is not barred.

The plaintiff contends that the order of the court granting the payment of an additional sum of \$279.60 interest on the sum of \$1165.00 deposited with the clerk of court was improper inasmuch as the judgment is res judicata and it cannot be raised after the final adjudication of the matter. This clearly is not a bar to the recomputation of interest by the court, as in the case at hand, where the plaintiff, as an integral part of the judgment itself, computes the interest owed to the defendants and attempts to make full remittance. It surely is not true that, if the plaintiff makes an error in the computation of interest that it is in its own view obligated to pay, this error could not be rectified by an order of the court.

A case directly in point is U.S. v. 0.45 Acre of Land, supra, where the defendant moved for a re-computation of interest due on the judgment to include, after judgment, an additional interest on an amount deposited with the clerk of court. The order was granted and then reversed. But not on the grounds that the issue could not be raised or that it was barred but only because the landowner was held to have voluntarily left the amount on deposit with the clerk.

See also Nichols on Eminent Domain, Vol. 3, Sec. 8.63 (2), page 183, where it is stated that when the interest is an integral part of the claim the collection of interest is not waived even though an acceptance of principal due and a part of the interest is made by the landowner.

The signing and entering of the Judgment on the Verdict and the supposed final settlement of the total amount due to the defendants by the plaintiff does not constitute any bar to the defendants' raising, by motion, of the issue that the amount thus paid is inadequate based on the same judgment. It would seem to be a miscarriage of equity for the plaintiff to compute its own interest debt, make an error therein and then claim such error could not be reversed by an appropriate order made and entered after the final payment.

All of the plaintiff's citations of authorities as to the res judicata matter indicate that after judgment and final resolution of the issues tried the court cannot reopen those issues anew or even consider issues that were not but could have been raised. These authorities are correct but do not limit



or preclude the recomputation of interest herein where the payment of interest is an integral part of and required by the judgment. Here the crux is not the introduction of a new issue but merely the resolution of error in the amount to be paid on the judgment itself. It cannot be claimed that the lower court is powerless to make the plaintiff fully comply with the judgment terms and to correct any misinterpretation of its requirements on the part of the plaintiff.

The defendants acquiesced in the judgment as such but did not acquiesce in the plaintiff making an inadequate payment on the judgment. This recomputation of interest, to correct error on the part of the plaintiff was properly raised by motion and resolved by the issuance of a court order.

### CONCLUSION

It is considered that the plaintiff herein is obligated to pay an additional sum as interest on an amount deposited with the Clerk of the Court. The plaintiff failed to send a copy of the Order for Immediate Occupancy to the defendants and no notice otherwise of the deposit was made. Furthermore, contrary to the specific requirements of the Order for Immediate Occupancy and the complaint the deposit was ultimately made. The plaintiff, also contrary to the provisions of its complaint, failed to make a tender of the sum deposited and the clerk of court failed to remit said sum. Having failed to adhere to the pleadings and order the onus is and should be upon the

plaintiff to notify the defendants of the deposit. Finally, the issue of additional interest is not barred as a timely motion for recomputation was made and no new issue was raised following judgment but only correction made of an erroneous settlement of the judgment by the plaintiff based upon its own erroneous computations and conduct.

Respectfully submitted,

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Respondents