

CONCEPCION J. VIUDA DE SYQUIA, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF THE DECEASED GREGORIO SYQUIA, PLAINTIFF AND APPELLEE, VS. PERFECTO JACINTO ET AL., DEFENDANTS. ...

G. R. No. 41320. November 09, 1934

Ponente: BUTTE, J.

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BUTTE, J.:

On December 15, 1924, the Bank of the Philippine Islands obtained a judgment against Perfecto and Felipe Jacinto and Rafael Palma on a promissory note in its favor executed by the defendants on May 27, 1922, for the sum of P24,000 with interest at the rate of 9 per cent per annum plus 10 per cent of the principal as costs and attorney's fees. The dispositive part of this judgment is as follows:

"Se condena a los Sres. P. y F. Jacinto y Rafael Palma a que paguen a la parte demandante, los primeros como obligados principales y el ultimo como fiador, la suma de veinticuatro mil pesos (P24,000) al interns de 9 por ciento al ano desde el 27 de mayo de 1923, mas el uno por ciento sobre el principal en concepto de honorarios de abogado y costas.

"No debe expedirse ejecucion contra el demandado Sr. Rafael Palma, sino despues de haberse hecho excusion de los bienes de los senores P. y F. Jacinto."

On August 16, 1928, the Bank of the Philippine Islands "in consideration of the sum of P1 and other valuable considerations" assigned and transferred said judgment to Gregorio Syquia.

On July 12, 1932, the widow of Gregorio Syquia, as administratrix of his estate, filed suit in the Court of First Instance of Manila against Perfecto and Felipe Jacinto and Rafael Palma reciting the aforementioned judgment and assignment and alleging that since the date of said judgment none of the defendants had paid anything thereon and there remains still due the sum of P24,000 with interest at 9 per cent since May 27, 1923. The plaintiff prayed that the judgment be revived and that the defendants Perfecto and Felipe Jacinto as principal and Rafael Palma as guarantor be adjudged to pay the sum of P24,000 with interest since May 27, 1923, and costs. To this petition were attached a copy of the judgment of December 15, 1924, Exhibit A, and a copy of the assignment thereof to the plaintiff, Exhibit B.

The defendants filed a joint amended answer in which they admitted the judgment, Exhibit A, and that said judgment had lapsed and it was necessary to revive the same; but they denied the assignment to Syquia and the allegation that nothing had been paid on said judgment and that the full amount thereof was still due. They set up as a special defense that the judgment which the plaintiff was attempting to revive has been fully paid; that at the time of making the assignment to Gregorio Syquia, the bank had no right or interest under said judgment, the same having been fully paid, and that the petition does not state facts sufficient to constitute a cause of action.

In the same answer they set up a counter-demand to the following effect: that in the month of April, 1925, the

Bank of the Philippine Islands caused an execution to be issued under said judgment and the sheriff on the request of the bank sold at a public sale three properties belonging to the defendants Jacinto which had been previously attached; that at said public sale the bank was the highest bidder crediting the amount of its bid on the said judgment; that said parcels of land with their improvements consisting of four houses yielded a monthly revenue of P880 or P10,560 a year; that during the year allowed the judgment debtors for redemption the said bank took control and possession of the said parcels of land and collected and retained the revenues thereof as aforesaid and that Gregorio Syquia has been receiving the same since that time, though without any right whatever; that the said revenues during the year of redemption in the sum of P10,560 were never applied by the bank as a credit on said judgment. The defendants prayed that they be absolved from the demand of the petitioner and that the estate of Gregorio Syquia be condemned to pay the sum of P10,560 with costs. The answer concludes with a prayer for general relief.

On the trial of this cause it was shown that at the execution sale held on April 18, 1925, the bank bought two of the properties of the defendants Jacinto for the sum of P15,045. The third property was sold to Rufino Reyes for P1,000 which was not credited on the judgment debt pending the determination of Reyes' claim of priority. The trial court stated the judgment debt as of April 18, 1925, as follows:

Loan	
924,000.00	
Interest from May 27, 1923 to April 17, 1925 at 9 per cent	
4,083.29	
Costs including sheriff's sale.....	
657.96	

Total obligation.....

P28,741.24

from which is to be deducted P15,045 the value of the two parcels sold to the bank on April 18, 1925, leaving a balance due of P13,696.24. On September 2, 1925, the defendant Palma paid the bank P100 leaving thus a net balance due of P13,596.24. The trial court entered the following judgment:

"Dictese sentencia condenando a los demandados, Perfecto Jacinto y Felipe Jacinto, como obligados principals, y Rafael Palma como fiador, a pagar a la demandante la cantidad de trece mil quinientos noventa y seis pesos con veinte y cuatro centimos (P13,596.24), mas las costas del juicio.

"Se sobresee la reconvenccion de los demandados.

"Asi se ordena.

"Manila, I. F., 25 de septiembre de 1933."

From this judgment only defendant Palma appeals. He submits the following assignments of error:

"1. El Juzgado err6 al no apreciar que la cuenta de los deudores P. y F. Jadnto quedo liquidada con el banco al efectuarse la venta de las tineas embargadas por 6ste a favor de Gregorio Syquia por la suma de P45,000 y que, por consiguiente, la sentencia firme de diciembre 14, 1924, quedd ipso facto saldada y con creces, en virtud de aquella venta.

"2. El Juzgado erro al no apreciar que el banco no transmitio ningun derecho, interns o participacion en la sentencia referida al tiempo de hacerse el traspaso de los mismos a Gregorio Syquia.

"3. Atin suponiendo que la sentencia firme era subsistente contra los deudores y su fiador al tiempo de hacerse el traspaso por el banco de cualquier tftulo, derecho, interns o participacion en dicha sentencia, el Juzgado erro al no apreciar que se ha constituido una novacion de la obligacion del fiador sin su conocimiento ni consentimiento, y, por tanto, sin eficacia juridica contra el.

"4. El Juzgado erro al no apreciar que el demandado Rafael Palma, como fiador, ha quedado eximido de su obligacion no solo por efecto de la novacion hecha sin su conocimiento ni consentimiento, sino tambien por efecto de la aceptacion por el banco de los bienes inmuebles de los deudores P. y F. Jacinto, en pago de deuda."

It is to be noted that Palma filed no separate answer nor special defenses available to him as guarantor but merely joined in the answer of his codefendants pleading that the bank had been fully paid. It should be noted too that the execution which was issued under the judgment of December 15, 1924, and under which said parcels of land were sold on April 18, 1925, was directed solely against the principal debtors, Perfecto and Felipe Jacinto, Palma not being mentioned therein.

Under his first and second assignments of error, the appellant argues that when the bank acquired said properties at the sheriff's sale on April 18, 1925, for the sum of P15,045, it paid much less than they were worth, in view of the fact that they yielded an annual, revenue of P10,560; and this is further established by the fact that the bank on August 16, 1928, sold and conveyed said parcels to Gregorio Syquia for the sum of P45,000. Exhibits 2-A and 2-B are copies of pages of the "Ubro de diversas euentas" of the bank, upon which appears the account of Perfecto and Felipe Jacinto and Rafael Palma. From these it appears that after the sale by the bank to Syquia, said account was marked as balanced and closed. From these facts the appellant contends that the principal debtors, and therefore the guarantor, were discharged from further liability on the judgment; and that being true, Syquia acquired nothing by the assignment of the judgment to him by the bank. In strict law, it is obvious that the plea that the defendants had paid their debt cannot be sustained. Indeed the appellant himself in arguing his first and second assignments of error invokes the equitable principle that no person should enrich himself unjustly at the expense of another. Clearly this equitable principle has no application to a legally conducted sheriff's sale. The appellant does not question the regularity of the sale. A purchaser at a sheriff's sale, when his title has once become vested, may dispose of the property for such consideration as he sees fit or as he can obtain. The rule which the appellant asks us to introduce into our jurisprudence with regard to sheriff's sales would cast such a doubt upon such sales that bidders would abstain therefrom and even judgment creditors would offer less, all to the prejudice of judgment debtors. The Code of Civil Procedure goes far in protecting the judgment debtor. He may prevent the sale of the property on execution (sec. 456); or he may redeem it from the purchaser at any time within twelve months after the sale (sec. 465). In the instant case, although it was alleged the property was sold for greatly below its value, the defendants did not exercise any right of redemption. We hold, therefore, that the judgment debt in its entirety was not discharged before the action for the revival of the judgment was brought.

However, the majority of the court are of the opinion that there should be credited upon the judgment for the benefit of the guarantor alone the sum of P10,560, being the revenues collected and retained during the year of redemption by Gregorio Syquia from said properties, according to the testimony of Perfecto Jacinto (t. s. n., 19,

20, 22). This conclusion is based on the interpretation given to the provisions of the Code of Civil Procedure by this court in the cases of *Pabico vs. Ong Pauco* (43 Phil., 572); *Flores vs. Urn* (50 Phil., 738); *Powell vs. National Bank* (54 Phil., 54). It is the view of the writer that this defense so far as the guarantor is concerned is premature.

In his brief and upon the oral argument the appellant has pressed upon our attention several defences available to guarantors under our law which, he claims, entitle him to a reversal of the judgment. With reference to all these defences, it suffices to say that it is conceded that Palma as guarantor is still entitled to the benefits of articles 1830, 1832 and 1852 of the Civil Code. Up to the present, the judgment creditor has made no demand on Palma. Joining him in the suit against the principal debtor is not the demand intended by article 1832 of the Civil Code. That demand can be made only after judgment on the debt, for obviously the "exhaustion of the principal's property"—the benefit of which the guarantor claims—cannot even begin to take place before judgment has been obtained. Only then can the creditor "levy upon the property of the principal"—only then can the liability of the creditor begin under article 1833 of the Civil Code. It would be absurd and futile to point out "saleable property of the debtor" at the inception of the suit, when it cannot be seized or sold, and require the creditor to make a "levy" upon it.

There is no competent evidence that the principal debtors, Perfecto and Felipe Jacinto, are insolvent—even if they were not be in funds when an execution on the revived judgment is issued. So far as this record shows, the judgment creditor has not exhausted his remedies against the principal debtors and he is still looking to them for payment. It is not for the guarantor to anticipate that there will be a return of *nulla bona* on the execution, when and if issued. Nor is it for him to anticipate a demand on him under article 1832 and to offer defences thereto which have not matured. The occasion for these defences may never arise. The present revived judgment could not therefore be *res judicata* as to such future differences. The revived judgment does not foreclose any deference which the guarantor may raise when "demand for payment" is made in him. Indeed, he cannot claim the benefits of articles 1830, 1832, 1834 and 1852 of the Civil Code before demand is made on him; they are all available to him only after "demand for payment" (art. 1832).

The appellant's defences may all be considered when they are properly presented at the proper time. The case which he now presents, in anticipation of a demand which has not yet been made, is purely hypothetical. The courts do not undertake to decide hypothetical cases.

It results that the judgment appealed from must be modified in the sense that Refael Palma as guarantor may be held contingently liable only in the sum of P3,036.24 under said judgment, which is in all other respects affirmed, without special pronouncement as to costs in the instance. So ordered.

Street, J., concurs.

CONCURRING

AVANCENA, C. J.,

I concur in this decision. Although I dissented in the decision in the case of *Powell vs. National Bank* (54 Phil., 54), I have to agree with it as long as it is not revoked by the majority.

IMPERIAL, J., concurring in the result:

On December 15, 1924, judgment was rendered in civil cause No. 26942 of the Court of First Instance of Manila in favor of the Bank of the Philippine Islands and against Perfecto Jacinto and Felipe Jacinto, as principals, and Refael Palma, as guarantor, for the amount of P24,000 together with interest at the rate of 9 per cent per annum

from May 27, 1923, plus 1 per cent on the said amount, as attorney's fees, and cost of the proceedings. It was ordered in the said judgment that no execution shall be issued against the guarantor until after salable properties of the principal debtors shall have been exhausted. The judgment became final and the law between parties. On February 20, 1925, execution of the judgment was issued against the Jacintos and the sheriff levied upon real properties belonging to them which were purchased at public auction by the Bank of the Philippine Islands for P15,045. During the year of redemption the properties so sold earned rentals amounting to P10,560 which were collected and actually received by Gregorio Syquia, with the knowledge and consent of the judgment creditor. On August 16, 1928, the judgment creditor sold the same date but in separate instrument it also sold the same date but separate value of P1 and for other valuable considerations all its rights, participation and interest on the aforesaid judgment. The purchaser died without taking any further step and his administratrix on July 12, 1932, after the lapse of about eight years from the date of the judgment, instituted another action against the same debtors and guarantor for the revival of the judgment.

The guarantor appealed from the judgment rendered by the lower court whereby he was condemned to pay, as guarantor, to the administratrix the sum of P13,596.24 plus costs of the suit. His counterclaim for the rentals was dismissed.

The appellant, being a mere guarantor, no execution could be issued against him without first exhausting the salable properties of his principals, as provided by article 1830 of the Civil Code. Same provision was made in the original judgment rendered against him. Pursuant to article 1832 the benefit of exhaustion is not available to the guarantor until after demand for payment is made upon him by the creditor. In view of the change in our procedural system in civil litigations the proper and only time for a formal demand for payment could only be made at the time the execution of the judgment is issued; but it happened that the execution actually issued has never been directed against the guarantor.

This being the case and because both the Bank of the Philippine Islands and its assignee remained inactive for many years and due to this attitude the principal debtors became insolvent, the guarantor cannot now be subrogated to the rights and privileges of said creditors as against the principal debtors and for this reason his obligation on the surety has been released in accordance with the provisions of article 1852 of the said Code.

It is argued that the insolvency of the principal debtors has not been proven, but such fact is virtually admitted by both parties and the circumstance that neither the Bank of the Philippine Islands nor its assignee has taken any step to secure an alias writ of execution against the principal debtors is a clear indication of the latter's insolvency.

It is also intimated that inasmuch as there is no positive evidence of the principal debtors' insolvency and that the guarantor failed to allege it in his answer as a special defense it is now premature to pass upon the obligation contracted by the guarantor. On this point it might be said that if the guarantor has really been released by positive acts performed by the Bank of the Philippine Islands and its assignee, as shown above, the right of the guarantor to be exonerated has accrued and he is entitled right now to a complete discharge. Further proceedings are useless and will only promote multiplicity of actions.

The matter presents another feature which calls for solution under the principles of justice and equity. The judgment of the bank was only for P24,000, plus interest and costs.. It bought the real properties of the principal debtors for P15,045 but afterwards it sold them to Gregorio Syquia for the sum of P45,000, thus realizing a profit which amounted to P29,955. As to the assignee, it is true that he paid P45,000, but the properties so bought are worth more than P68,000 and in addition to this bargain he collected the rentals during the year of redemption which amounted to the substantial sum of F10.560. Under these circumstances and applying the principles of justice and equity it should have been held that the judgment, which is sought to be revived, has fully been

satisfied. Any other determination on this particular point will encourage enrichment of a person to the prejudice of an innocent one.

There can be no question that the late Gregorio Syquia has collected the rents of the properties assigned to him during the year allowed by the law for redemption. The testimony of Perfecto Jacinto on this point is positive, clear and convincing and it was not contradicted by any evidence of the appellee. Said rentals amounted to P10,560 and it should have been credited to the judgment debtors. (*Pabico vs. Ong Pauco*, 43 Phil., 572; *Flores vs. Lim*, 50 Phil., 738; and *Angeles and De Angeles vs. Lozada and Saguisag*, 54 Phil., 184.)

Other members of this court further maintain the opinion that the defendant-appellant Rafael Palma has been relieved from further responsibility as surety through the failure of the Bank of the Philippine Islands, the predecessor in interest of the herein plaintiff-appellee, to secure a writ of execution after it was ascertained, through the levy of the writ of execution issued against the principals Perfecto Jacinto et al. that the latter had not sufficient property to satisfy the judgment, thus depriving the defendant-appellant of the opportunity to point out other properties of the judgment debtor upon which a levy could be made. To this I am also agreeable.

The foregoing reasons, as can readily be seen, call for a dissenting opinion, but in order to expedite the matter with a sufficient number of votes and inasmuch as defendant-appellant is given credit for the yearly rentals earned by the properties sold and his right of exhaustion is upheld and reserved, I concur in the result of the majority decision.

MALCOLM, VILLA-REAL, and ABAD SANTOS, JJ.;

We concur in the foregoing concurring opinion of Justice Imperial.

DISSENTING

GODDARD, J.,

I dissent.

Upon a sale of real property, under a writ of execution, the purchaser is substituted to and acquires all the right, interest, title and claim of the judgment debtor thereto, subject only to the right of redemption. The officer making the sale must give the purchaser a certificate of sale containing a particular description of the property sold; the price paid for each distinct lot or parcel; the whole price paid and the date when the right of redemption expires. (Sec. 463, Code of Civil Procedure.)

The judgment debtor, or the redemptioners mentioned in section 464 of the Code of Civil Procedure, may redeem the property from the purchaser at any time within twelve months after the sale, on paying the purchaser the amount of his purchase, with one per cent per month interest thereon in addition, up to the time of redemption, together with the amount of any assessments or taxes which the purchaser may have paid thereon after purchase, and interest on such last-named amount at the same rate. (Section 465, Code of Civil Procedure.)

The purchaser, from the time of the sale until a 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. But when any rents have been received by the judgment creditor or purchaser from property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid. (Sec. 469, Code of Civil Procedure.)

Is there any provision in our Code of Civil Procedure aside from that contained in section 469 of that Code, quoted above, that authorizes this court to allow a judgment debtor a credit for the amount of the rents and profits

of land sold under execution? No. Was there any "redemption money" paid the purchaser by the judgment debtor in this case? No. Have the above quoted sections of the Code of Civil Procedure been repealed or modified? Not by the Legislature. "However, the majority of the court are of the opinion that there should be credited upon the judgment for the benefit of the guarantor alone the sum of P10,560, being the revenues collected and retained during the year of redemption by Gregorio Syquia from said properties, according to the testimony of Perfecto Jacinto (t. s. n., 19, 20,22)."—Majority opinion.

In short the "majority are of the opinion" that the defendant-appellant, Rafael Palma, is entitled to the rents and profits on the property during the year of redemption, although the law clearly provides that the purchaser, from the time of the sale until a redemption, is entitled to receive such rents and profits and, pursuant to that opinion, Palma is allowed a credit of P10,560 upon the judgment against him, not upon "redemption money" which he might have profitably paid the purchaser. I say might have profitably paid, because this appellant, in his brief, puts the value of the property sold under execution at P88,000. The purchaser only paid P15,045. Let us suppose the appellant had redeemed the property on the last day of the year of redemption, he would have had to pay the purchaser the sum of P15,045 plus 12 per cent, a total of P16,850.40 less a credit of P10,560, the alleged value of the rents and profits for the year of redemption, or a total of only P6,290 for property worth P88,000, a clear profit of P81,710.

The sections of our Code of Civil Procedure, cited above, are taken from the California Code of Civil Procedure. The courts of that state, interpreting the phrase "upon a sale of real property, the purchaser shall be substituted and acquire all the right, title, interest and claim of the judgment debtor thereto", have held that it is by the sale that the title passes, or, in other words, that at the sale the purchaser acquires the legal title to the land subject to defeasance by the happening of the condition subsequent (redemption). (McNutt vs. Nuevo Land Co., 167 Cal., 459; 140 Pac, 6; Leet vs. Armbruster, 143 Cal., 663; 77 Pac, 653; Pollard vs. Harlow, 138 Cal., 390; 71 Pac, 454, 648; Reynolds vs. London & Lancashire F. Ins. Co., 128 Cal., 16; 79 Am. St. Rep., 17; 60 Pac, 467; Breedlove vs. Norwich etc Ins. Society, 124 Cal., 164; 58 Pac, 770 ["It is by the sale that the title passes"]; Leaver vs. Smith, 47 Cal. App., 474; 190 Pac, 1050; Wangenheim vs. Garner, 42 Cal. App., 332; 183 Pac, 670; Youd vs. German Savings & Loan Society, 3 Cal. App., 706; 86 Pac, 991. In McQueeney vs. Toomey, 36 Mont, 282; 122 Am. St. Rep., 358; 13 Ann. Cas., 316; 92 Pac, 561, the court holds that the title passes to the purchaser on the sale and notes that in Simpson vs. Castle, 62 Cal., 644, the statute so providing was overlooked.)

It is also held that the various qualifications to the purchaser's title are not inconsistent with the vesting of the legal title in him and that even the continued possession of the land by the judgment debtor is no more incompatible with the existence of a legal title in another than in the ordinary case of a tenant and his landlord. (Pollard vs. Harlow, 138 Cal., 390, 393; 71 Pac, 454, 648.)

It is undoubtedly true that independent of some express statutory provision to that effect a purchaser at an execution sale would not be entitled to rents and profits during the time allowed for redemption. In California, however, the courts have held that this right has been expressly conferred upon purchasers at sales on civil judgments obtained in the ordinary administration of justice, it being provided, in the Code of Civil Procedure of that State, as it is in our Code, that "The purchaser from the time of the sale until a 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. * * * " (Mayo vs. Woods, 31 Cal., 269; California Code of Civil Procedure, section 707; Yndart vs. Den, 125 Cal., 85; Robinson vs. Thornton, 102 Cal., 675.)

The courts of California have also held that the "tenant in possession" is liable to the purchaser at a sheriff's sale for the rents and profits of the land sold. The phrase "tenant in possession" has been held to be a generic term designed to apply to all cases of tenancy. In a broad sense, a "tenant" is held to be "one that holds or possesses

lands or tenements, by any kind of title, either in fee, for life, years, or at will." Under this definition the owner in fee in possession is no less, in legal contemplation, a tenant, than the one who occupies under him. (Harris vs. Reynolds, 13 Cal., 514; 73 Am. Dec, 600.)

The phrase "tenant in possession" also includes a mortgagee of the judgment debtor (Knight vs. Truett, 18 Cal., 113), the trustee and his successor in interest under a trust deed from the judgment debtor (Shores vs. Scott River Co., 21 Cal., 135) and the administrator of the estate of the judgment debtor (Walls vs. Walker, 37 Cal., 424; 99 Am. Dec, 290), when they are in possession after a sheriff's sale.

In California, prior to 1869, the purchaser at an execution sale was given the rents and profits of the property without any liability to account for them in case of a redemption. (Page vs. Rogers, 31 Cal., 293; Kline vs. Chase, 17 Cal., 596, holding that a debtor who received rent from his tenants between the sale and a redemption is liable to the purchaser for the amount received.) In that year the rule was changed by the adoption of an amendment to section 707 of the Code of Civil Procedure of that state under which the amount of any rents or profits received by the judgment creditor or purchaser will be a credit upon the redemption money to be paid. This section thus liberalized in favor of the judgment debtor is section 496 of our Code of Civil Procedure.

It is, however, evident that the majority of this court is of the opinion that the Legislature of the State of California and the Philippine Legislature did not do enough for the judgment debtor, who, for some reason or other, fails to redeem his property within a year after it is sold under a writ of execution. Well, Mr. Judgment Debtor, cheer up! If you fail to redeem your land within the year provided by law, your cruel judgment creditor, if he be the purchaser of your property sold under execution, will now be obliged to allow you a credit on his judgment against you equal to the amount of the rents and profits that he may have received from your property during the year of redemption.

Suppose the judgment creditor is not the purchaser and a third party buys the property of the judgment debtor at the execution sale, the former will receive the purchase price to be credited against the amount of the judgment. In case the judgment debtor fails to redeem from the third party purchaser, who has received the rents and profits during the redemption period, would the majority of this court hold that the judgment debtor then had a right to a credit against the judgment equal to the value of the rents and profits received by the purchaser during the period of redemption? In other words would the judgment creditor have to repay his judgment debtor the value of such rents and profits? If it be legal and logical to allow such a credit in the case under consideration, the answer to these questions must be in the affirmative. However, it would also be just as legal and logical to compel the third party purchaser to return the rents and profits to the judgment debtor even though the latter failed to redeem his property within the period fixed by law.

In view of the provisions of our Code of Civil Procedure and the decisions of the courts of California, cited above, it is clear that in the case of a sale of real property, under a writ of execution, the purchaser, whether he be the judgment creditor or a third party, is regarded as the owner of such property during the period elapsing between the sale and the time for redemption; that he is entitled to the rents and profits, or the value of the use and occupation thereof during said period and that when such rents, etc. have been received by the purchaser and the judgment debtor redeems the property within the period provided by law, then and then only, is the latter entitled to a credit of the amount of such rents, etc., upon the redemption money to be paid by him to the purchaser.

The judgment of the trial court should be affirmed with costs in both instances against the defendant-appellant

HULL, VICKERS, and DIAZ, JJ.:

We concur with the above dissenting opinion.

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