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Paul F. Walton v. Kenneth F. Walton and Fife Rock Products & Construction Company : Brief of Plaintiff and Appellant, Paul F. Walton

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

PAUL F. WALTON,

Plaintiff and Appellant,

vs.

KENNETH F. WALTON and FIFE ROCK PRODUCTS & CONSTRUCTION COMPANY

Defendant and Respondent.

District Court No. 21341

Supreme Court No. 15552

BRIEF OF PLAINTIFF AND APPELLANT, PAUL F. WALTON

Appeal from a Final Order of the
Second Judicial District Court for Davis County
Honorable John F. Wahlquist, District Judge

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BRIEF OF PLAINTIFF AND APPELLANT, PAUL F. WALTON

STATEMENT OF THE CASE

This is an appeal from a judgment of the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable John F. Wahlquist, District Judge. The judgment of the court was for the defendant and against the plaintiff, finding no cause of action against either Defendants.

This is also an appeal from a subsequent order from the said court, filed December 7, 1977, issued by the Honorable John F. Wahlquist of said District Court on the 5th day of December, 1977 accepting defendants proposed Findings of Fact and Conclusions of Law, denying plaintiff's motion for a new trial and for an opportunity to rebut the facts as found by the court and for amendment of judgment and denying plaintiff's motion for the publication of a transcript to

be considered with plaintiff's motion for a new trial and for consideration of the law and for an opportunity to rebut the facts as found by the court.

DISPOSITION IN LOWER COURT

Trial in the above entitled matter was heard before the Honorable John F. Walhquist, District Judge, on October 17, 18, and 19, 1977 at which time the court heard testimonies and received the exhibits and evidences presented by Plaintiff-Appellant and Defendant-Respondent and further heard argument of counsel pertaining to the legal issues involved in the case and thereafter took the matter under advisement. On the 27th day of October, 1977, the court issued its memorandum decision containing Findings of Fact and Conclusions of Law in a general statement in favor of the defendants and against the plaintiff. Thereafter the plaintiff filed motions for a new trial and for an opportunity to rebut the facts as found by the court and for an amendment of judgment, and objected to the Findings of Fact and Conclusions of Law and Judgment submitted by the Defendant-Respondent and further moved that in support of the plaintiff's motion for a new trial a publication of the transcript of the deposition of Joseph Moore be made and considered with the plaintiff's motion to support their cause. All of the above referred to motions were denied and the proposed Findings of Fact and Conclusions of Law and Judgment of the defendants were accepted. Plaintiff

filed his Notice of Appeal and the case is now before This Honorable Court pursuant to that Notice of Appeal.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks for a reversal of the judgment of the said Second Judicial Distroct Court of Davis County and further seeks for the relief prayed for in plaintiff's Motion for a new trial, etc., and for plaintiff's Motion for the Publication of the Transcript of Joseph Moore's Deposition permitting the Plaintiff-Appellant opportunity to rebut the facts found by the court.

STATEMENT OF FACTS

On the 18th day of May 1955, plaintiff's predecessor in interest, Orson F. Walton, entered into a lease agreement with Kenneth F. Walton, Kaysville, Utah, one of the Defendant-Respondents herein (Defendants exhibit 1). Thereafter, on or about 1971, defendant Fife Rock Products and Construction Company began operating under a lease in the Walton Gravel Pit (T. 316 line 30; 322 lines 9-16). During the course of preliminary proceedings the parties filed their Motions to Compel Discovery including Plaintiff's Motion to Compel the Production of Documents requesting that a lease between the defendants Kenneth F. Walton and Fife Rock Products and Construction Company be provided. By stipulation of the parties this particular question was taken up on the pretrial conference and Plaintiff's Motion to Compel the

Production of the lease between the defendants was denied (R. 20). Prior to 1971 and as early as sometime prior to 1968 the defendant Fife Rock Products operated under a lease held by Mr. Smedley, issued to him by Kenneth F. Walton (T. 317). It is further evident that they were working on extracting gravel from the pit as early as May 29, 1962 (T. 318

The lease terminated with Fife Rock Products the same time as the lease terminated between Kenneth F. Walton and the Plaintiff-Appellant (P. 16).

On or about 1965, after the first ten year period of the old lease between Kenneth F. Walton and Orson F. Walton, a dispute arose as the language of the lease and as to whether the remainderman, Lerene Walton, the successor in interest to Orson F. Walton, was entitled to reenter and take possession of the premises. That particular dispute was concluded by legal action and a stipulation orally presented in the record of the court on the 7th day of July, 1967 (P. 2). By that stipulation the lease was to continue for another period of ten years, after which the defendant, Kenneth F. Walton was to surface and terrace the land, in compliance with Davis County Planning Commission requirement and fill in large caverns and holes.

> MR. FORBES: "That when the lease terminates, that he so surface and terrace the land to comply with the requirements of the Davis County Planning Commission, but specifically that there be left no large caverns or holes. I think that . . ."
>
> MR. KING: "I think that covers it."

THE PLAINTIFF: "It isn't to be renewed."

MR. KING: "That's right."

MR. FORBES: "That's right."

The stipulation was thereafter enforced on October 23, 1969, and a judgment obtained on the terms thereof. Under item Number 1 (g) thereof we read:

> That upon the termination of the said lease, the defendant shall comply with the requirements of the Davis County Planning Commission with respect to terracing and will specifically see to it that there are no large caverns or holes left upon the premises (P. 1).

The major difference between the stipulation and the judgment is that the judgment does not make reference to the "surfacing" that the stipulation makes reference to. It should be concluded, however, that that was contemplated since that was the stipulation of the party.

Little or no contact or communication occurred between the defendant Kenneth F. Walton and/or Fife Rock Products Construction Company and the Plaintiff-Appellant during the years that followed and this due to the fact that Mr. Paul F. Walton, the final successor in interest, Plaintiff-Appellant herein, had been restrained and enjoined from making contact. The next communication made by Mr. Paul F. Walton and as set forth in the evidence was his letter of the 24th day of March, 1975, advising that the lease hold interest was terminating on the 18th day of May, 1975, demanding that all equipment and materials, scale and scalehouses, etc. be removed from the premises by the 18th day of May, 1975,

further permitting a period until the 18th day of November, 1975, for rehabilitation efforts to be made (P. 16). Subsequent to the receipt of that letter the Defendant-Respondent Fife Rock Products sent in a V-8 caterpillar and approximately 2 or 3 persons to accomplish the "rehabilitation work". This was accomplished within the span of three 8-hour work days at the most (T. 336) following the termination of excavation during the span of twenty years.

Thereafter, one of the workmen presented to Plaintiff-Appellant Exhibit P. 17 purporting to be a letter of release, releasing Fife Rock Products Company, Inc. from a further obligation. The said release was never signed by the Plaintiff-Appellant, who told them that in his opinion there had been no rehabilitation efforts accomplished (T. 17-18 and P. 17).

Thereafter plaintiff wrote a letter on the 12th day of June, 1975, to the Davis County Planning Commission, asking:

> "Will you please look into this matter and determine what type of rehabilitation efforts are going to be required of Fife Construction Company by the County, and the time frame in which such efforts might be expected. I would like a detailed engineering plan submitted, and to have any rehabilitation efforts coordinated with the property owners." (P. 18)

That letter was just an inquiry to find out what Mr. Walton could expect in the way of rehabilitation in the property itself, not really knowing what to expect.

On the 23rd day of June, 1975, a form letter was sent out to all gravel pit operators, one of which was sent

to Fife Rock Products, outlining the salient points of the Davis County Excavation Ordinance, which would be required of all operators, particularly demanding a plan be submitted (p. 19).

On Aug. 8, 1975, Mr. Joseph L. Moore, Davis County Planning Commission Director, sent a letter and enclosed a copy of Plaintiff-Appellant's letter and requested that they arrange an appointment for discussions pertaining thereto (P. 20).

By the Fife letter on February 12, 1976, it was apparent that one new topographical map was submitted indicating the existing contour and showing ". . .the areas in which we performed minor supplemental contour sloping . . . We believe this action fulfills our previous commit with your office concerning this area." He then went on to include the 1(g) clause of the judgment, Civil No. 11601, taken from the second page of P.2.

Thereafter, Mr. Joseph Moore, apparently unsatisfied with the response of Defendant-Respondent, sent a memorandum to Glen Austin asking him to review the submitted rehabilitation plans or documents and to do his own study as to whether or not slope requirements had been met, whether there was any storm runoff, and describing rehabilitation contours with no depressions, further requesting a field trip and requesting notification of when said field trip would be taken (p. 22).

The field trip was taken in the spring when the ground surface could be studied without snow and the effects of winter. That trip was taken on May 28, 1976, and a report was made by Mr. H. Glen Austin, Davis County Engineer, on the "rehabilitation of the now vacated Fife Gravel Pit, at the east end of the Walton Property" (P. 23, see also Exhibit A, attached herewith). The contents of this memorandum from Mr. Glen Austin was put in a letter dated June 3, 1976 to Fife Rock Products, Defendant-Respondent (P. 24). The last statement of the said letter was "Please consider and act upon these statements as soon as possible. If you have any questions, please contact our office."

STATE OF MIND OF THE DEFENDANT-RESPONDENT

It is obvious from the correspondence between Fife and the Davis County Planning Commission that at least Fife and probably Kenneth F. Walton had no intent at any time to perform any more than 3 days worth of caterpillar work to rehabilitate the premises and that they were not really intent on complying with the objectives of the Davis County Excavation Ordinance of 1960 (P. 3). The obvious objective of the Davis County Excavation Ordinance is the restoration or rehabilitation of excavation operations within the unincorporated areas of Davis County, emphasizing as it does, a point in time at the end of the excavation operations. In this respect it is the same as the judgment of October 23, 1969, which looks to a point in time at the termination

of the lease. As an aid to the rehabilitation effort, Chapter 6 of the said ordinance, the owner or operator prior to the commencement of the excavation was required to submit a plan for rehabilitation and specifications were therein provided (P. 3, page 5). The said ordinance on page 1, Chapter 2, under Enforcement and continuing on page 2, states that "in the performance of the duty to enforce the zoning, the building inspector may enter actions in the courts, where necessary . . . and his failure to do so shall not legalize any violations of such provisions." (Emphasis added)

Probably too much emphasis at trial was put upon the fact that defendants never submitted a rehabilitation plan or that they submitted a plan which was never accepted formally or in fact never rejected formally. This particular issue is not really probative of the basic issue of whether or not the Defendants-Respondents in fact, at the termination of the lease and at the conclusion of the excavation operations filled their responsibility to comply with Davis County Planning Commission requirements with respect to terracing, surfacing, and filling in large holes and caverns. The issue of whether or not Defendant-Respondents submitted a rehabilitation plan at most is only probative of their intent or negligence or their state of mind pertaining to their obligations with regard to the pit. Every piece of correspondence from Davis County Planning Commission

to the Defendant-Respondents during the course of time in question,referring to the Defendant-Respondents' obligations to comply with the ordinance,makes reference to the fact that the rehabilitation plan has not been submitted and one must be submitted (P. 4, P. 5, P. 6, P. 9, P. 10, P. 15, P. 20, P. 21, P. 25).

Defendant-Respondents take the position that P. 11, the copy of which is attached herewith as Exhibit B, which is a letter dated October 7, 1971, together with defendants Exhibit 3, constitutes a plan that was accepted and they based their argument upon the fact that P. 12, P. 13, and P. 14, which are documents indicating a certificate of occupancy, which was issued subject to filing of a $10,000 bond, was in fact a constructive acceptance of the rehabilitation plan. One must quickly note that the latest document they are referring to is a certificate of occupancy issued and approved the 3rd day of December, 1971 (P. 14) but however was followed by a letter of the 7th day of December, 1971, 4 days later, wherein the Planning Director, Rodney F. Sutton, makes an additional demand that rehabilitation plan be submitted. (P. 15) Over the objection of Plaintiff-Appellant's Counsel, the hearsay statements of Mr. Sutton, the Planning Director, allegedly made October through December of 1971, were admitted. Plaintiff-Appellant's Counsel objected to statements because they were hearsay and not admissible under any exception to the Hearsay Rule and also because it was inadmissible

under the Statute of Frauds (T. 296, 298). The substance of the telephone conversation reveals that Mr. Sutton was still rather adamant on having a plan submitted when in paraphrasing the conversation Mr. Woodland testified, ". . .He told me that he felt that because the ordinance said plan, he had to have something in his files to fulfill that provision." (T. 299, line 1-3) Apparently Mr. Woodland countered with the argument that he has no knowledge of what depth they were going to be excavating and therefore could not submit such a plan, but still Mr. Sutton recorded:

> "That was basically it, and he still insisted that he have a plan of some sort, so I told him at that time that I would submit to him a sketch indicating the general contours that I felt might be usable, and allow that to be submitted to his file. (T. 300)

What follows was the objectionable portion of the hearsay statement, which is also inadmissable because it is in violation of the Statute of Frauds.

> Q. What did he say?
>
> A. In substance, he said, "That ought to do; that's okay."

At this point in time the defendant's Exhibit No. 4 was submitted into evidence, which is a sketch of contours that Mr. Woodland prepared.

The defendant further claimed that from the date of this last conversation and the submission of the sketch drawings there was no further mention made of a rehabilitation plan by Mr. Sutton or the defendant and no further mention was made to it until 1975, following the termination of

the lease. Whether or not a rehabilitation plan was ever submitted and whether or not a rehabilitation plan was ever accepted and in fact whether the Davis County Planning Commission ever acquiesced in the requiring of a rehabilitation plan or whether by their failure to object they contructively accepted the rehabilitation plan of the Defendant-Respondent, is an issue probative only of the state of mind of the defendant with regard to the submission of the rehabilitation plan. The main issue remains as to whether or not in fact rehabilitation was accomplished as a termination of the case. It was always the position in the correspondence and even in these conversations with Mr. Sutton that a full rehabilitation plan indicating what would be done at the end or what the contours might remain at the conclusion of the lease were held in abeyance and by the correspondence of the Defendant-Respondent Fife and Mr. Woodland, of Fife Rock Products Construction Company, was that full rehabilitation plans would be submitted at the conclusion of the lease and/or that the site would be left in the condition to meet all requirements set up by the State (T. 299-300, P. 5 "It is our intention to proceed with our planned rehabilitation as soon after the court renders its decision as is feasible." P. 9 "Our rehabilitation plans therefore remain in the future and will be done when our operations there are complete." The purported rehabilitation plan, the letter of October 7, 1971, P. 11 "The contours to which the pit will be excavated

prior to rehabilitation are not known at this time. Test holes do not indicate the depth to which usable material exists.") This was reemphasized again in the conversation with Mr. Sutton as the rationale for not submitting a completed or finished rehabilitation plan. Under Chaper 6 of the Excavation Ordinance of 1960 (P. 3, page 5, Sec. 1-6-1(d) one of the requirements is a plan showing proposed contours after rehabilitation, which appears to be a difficult question to answer in submitting a plan.

Again, (i) a plan was not submitted which would cover all requirements necessary under the ordinance; (ii) it was the intent of the party, Defendant-Respondent Fife, to comply at the conclusion of the excavation; (iii) the Judgment of October 23, 1969 and the prior stipulation from which the Judgment was taken dated July 7, 1967 refer to a point in time at the conclusion of the excavation for action to be taken by the Defendant-Respondent.

EXPERT STUDIES

The Plaintiff-Appellant, after learning of the deficiencies as found by Glen Austin and himself being concerned about the rehabilitation of the property, employed the services of an engineering firm, Byrd Engineering, and the President of said company, Mr. Jim Byrd, employed the services of Mr. Herbert Schreiter as a land planner who in turn employed the services of Mr. Guy Alder, who is a specialist in revegetation. It was Mr. Schreiter's responsibility to

study the area to determine what needed to be done. Mr. Schreiter went into the area using an instrument called an abney to measure slopes and a camera to take pictures and he followed a map provided for him by the plaintiff which was a map duly authenticated and admitted to evidence. He had the Exhibit 25, the aerial photo of the gravel pit and based upon his knowledge and experience of soil types and unstable soils and conditions, Mr. Schreiter produced several descriptive overlay charts constituting plaintiff's Exhibits 26-31. P. 26 describes a general condition of sandy, gravel, cobbly type of material and together with Exhibit 27 it indicates that said materials are in some cases on extremely steep slopes. P. 28 indicates that those slopes are not covered by any vegetation as to the present time and P. 29 and 29a indicate that there are approximately 29.8 acres in need of grading and revegetation ranging from moderately severe to severe conditions which could result in erosion problems. Exhibit No. 30 describes the areas where slopes are rather steep, ranging from 40-60% slopes down to a 0-5% slope.

Mr. Byrd and Byrd Engineering produced what is called a Cut and Fill Proposal and described it graphically on P. 36. By his estimation, there it was 143,326 cubic yards of material that must be removed to return the property to any kind of a usable condition. Mr. Byrd indicated that he had prior to developing this plan developed a more ideal

type of plan which would have required approximately 100,000 yards more of fill to fill up the holes that exist but had decided to adopt a more conservative approach, which is the approach which he took (T. 217) which amounted to 143,326 cubic yards (T. 216). Nor would this more conservative plan which Mr. Byrd arrived at toward the development of a subdivision be more extravagant than any other kind of excavation purpose or objective. (T. 214) Mr. Byrd believes in his experience that the cost of moving the material would be approxiamtely 75¢ on the average per cubic yard, and that multiplied by the yardage of 143,326 cubic yards is the projected cost for reshaping the ground. (T. 216-217)

Mr. Guy Michael Alder, President of Native Plants, Inc., a licensed nurseryman, landscape contractor, and holding an undergraduate degree in botany, a master's degree in biological science, specializing in plant ecology, who had just returned from Colorado after having received a Rocky Mountain Center Environment Industry Award was called to testify as to the needs for rehabilitation of the property.

Mr. Alder testified that where there had been no reshaping of the slopes and terracing during the course of the excavation, that would be necessary prior to revegetation. In Transcript page 233, he further testified how it could have been accomplished during the excavation with minimal effort. (T. 234) He stated that whatever the degree of slope, it may or may

not check erosion, but the checking of erosion is the main purpose behind rehabilitation of property after mining and excavation. (T. 235)

He then testified concerning materials needed and used to check erosion. He used a process which was less expensive in that there was no spreading of soil. In place of soil there would be mulch and tacking material. (T. 237) The estimated cost for the revegetation was $2,960 per acre and this multiplied by 29+ acres would be the total rehabilita costs of the revegetation, and this would be separate and apart from the reshaping costs. (T. 241) Whatever the case, the reshaping alone would not accomplish the task without revegetation. (T. 242)

Mr. Burke O. Clegg, a real estate appraiser with an SRA professional designation, was called to testify, who did a "check feasability study." (T. 261) He analyzed all of plaintiff's property, including the lower portion (westerly) and the higher impacted gravel pit area (easterly) and described the effects of the eastern gravel pit area on the western property, stating that the higher property would have an adverse effect on the marketability of the lower area simply because of its condition.

It was his opinion that parcel 1 was affected as follows: (i) If it remained as it was, it would be worth approximately $3000 per acre; (ii) If the above eastern portion were improv and in a better condition, it would increase the value of the western lower property, making it worth approximately

$10,000 per acre, and there being 35 acres, it would be a difference between $350,000 and $35,000 (See T. 267 and 276).

After hearing the testimony of Mr. Smith, who was purported to have done the rehabilitation work for the 3 days referred to above, Mr. Alder retook the witness stand as a rebuttal witness and testified that the procedures followed could not have possibly done the job. (T. 394 and 395)

Counsel for the plaintiff, realizing that one last detail should be provided for the court, i.e. the standard that was required of Davis County Planning Commission of excavating by gravel pit operators on or about May 18, 1975, attempted to call Mr. Joseph Moore back to the witness stand as a rebuttal witness but was unable to do so in that Mr. Moore was not available. Plaintiff asked that a deposition of Mr. Moore be admitted into evidence, which would accomplish the testimony and Mr. King objected to the deposition on the grounds that there is no showing the witness was outside the jurisdiction of the court or otherwise unavailable within the meaning of the Utah Rules of Civil Procedure, which objection was sustained.

Thereafter, the Court issued its judgment and its memorandum decision (R. 28) finding no cause of action in favor of both Kenneth Walton and Fife Rock Products and Construction Company. Thereafter, plaintiff filed his Motion for a New Trial and for an opportunity to rebut the facts as found by the Court pursuant to Rule 59, Utah Rules of

Civil Procedure, but that motion was denied. (R. 44 and R. 47) The motion was brought as it states because the Court had found,

> "This ordinance (Excavation Ordinance of 1960) was never enforced so far as the provisions "rehabilitation of land" were involved, but was enforced as to dust noise, and other factors."

The Court further found,

> "The Planning Commission has never, during the period of time in question requested the submission of a rehabilitation plan of any gravel mine except the defendant Fife in this case, and this request was made at plaintiff Walton's insistence."

The intent behind putting Mr. Moore back on the witness stand as a rebuttal witness had been to rebut that position that had been advanced by the defendant. Being unable to do so during trial, plaintiff moved for an opportunity to rebut under Rule 59 of the Utah Rules of Civil Procedure. Having denied the motion, the Court turned its back on further facts which could have aided in overcoming those assumptions upon which the Court had made its findings.

ARGUMENT

POINT I

THE TRIAL COURTS' JUDGMENT IS FATALLY DEFECTIVE BECAUSE IT IS BASED UPON A THEORY OF ESTOPPEL OF A GOVERNMENTAL AGENCY WHICH IS NOT POSSIBLE UNDER THE LAW.

The Court made reference to the provision in judgment of October 23, 1969 (P. 1, page 2) under paragraph 1(g) wherein the Court held that Kenneth Walton was, upon terminati

of said lease obligated to "comply with requirements of Davis County Planning Commission with respect to terracing" and to see to it that there are no large caverns or holes left upon the premises. The Court stated that that particular provision was a judgment which continued on the relationship that started in 1955 and

> ". . .that the obligation of terracing, etc. would affect not only the diggings taking place after 1967 when the stipulation was made or 1969 when the judgment was entered, but also dates back to 1955 when the digging was first begun in so far as Kenneth F. Walton is concerned." (R. 38)

These provisions in the judgment together with the ordinance (P. 3) as well as the defendants themselves always look to the future at the end of the excavation to determine their obligations and to plan out the rehabilitation of the gravel pit.

The Court, however, in its Memorandum Decision and Findings of Fact and Conclusions of Law stated that:

> (5) This ordinance (Excavation Ordinance of 1960) was never enforced insofar as the provisions "rehabilitation of lands" were involved, but was enforced as to dust, noise, and other factors.
>
> (7) The request was made by the former Director of the Davis County Planning Commission, now deceased, for "something to be put in the file" and was not carefully examined or considered by the Davis County Planning Commission, and no action was taken by the Davis County Planning Commission within the thirty (30) days allowed by the ordinance to disapprove such a plan, and therefore the submitted rehabilitation plan by letter of Fife Rock Products Company of October 7, 1971 and material subsequently submitted in connection therewith must be deemed to have been accepted by the Davis County Planning Commission as a "rehabilitation plan."

(8) The Fife "rehabilitation plan" referred to above did satisfy the then existing standards and was accepted by the Davis County Planning Commissions lack of action after the period of time required by the Ordinance as referred to above.

(11) The Court finds that the mining in question was done in accordance with the then prevailing customs and usage in the mining field and that there is no waste per se proven in this case.

(14) * * * . . . Such a theory of action requires that a scar on the surface of the mountain be left in violation of the law as the law then existed and also in violation of the prevailing general then in existence. The Court, however, in this case does not find that such was proven, but does, in fact, find that the rehabilitation of lands were in accordance with the then prevailing standards of 1975 in Davis County area and throughout the general area of the Wasatch front and, therefore, also in accordance with the judgment of October 23, 1969.

The Court is outlining by the above reference statements, the theory of estoppel, which, in essence states that Davis County Planning Commission is estopped in 1975 to demand rehabilitation of the property because they have, prior to that time, through their inaction, lulled the defendant, Fife, into believing that their conduct was acceptable and that the defendant, Fife, thereby relied upon said inaction and therefore, Davis County Planning Commission is now estopped to demand performance under the Davis County Excavation Ordinance.

> Estoppels against the public are little favored. They should not be invoked except in rare and unusual circumstances, and may not be invoked where they will operate to defeat the effective operation of the policies adopted to protect the public. (31 C.J.S. Estoppel, Sec. 138, p. 675)

If estoppel is permitted at any time against a governmenta

agency, it would be in respect to matters which are proprietary or private enterprise types of matters as opposed to governmental or public matters. There is no question but what the Davis County Planning Commission was not the owner of any property from which it could be concluded they were acting in a proprietary function, but were, in fact, using mere police powers.

> As is sometimes stated, equitable estoppel may be invoked against the United States, a state, a municipal corporation, or other governmental agency or instrumentality in respect to acts done in its proprietary or private capacity, as is distinguished from its governmental or public capacity in its strict scope of which it cannot be estopped . . . (31 C.J.S. Sec. 138, p.676-677)

If the Court found that this was the proprietary function, it would still not constitute estoppel under the circumstances and the facts in this case. The defendants could not be said to have relied upon any representation action or inaction of the agency, especially under the circumstances where the ordinance clearly describes what their duties and responsibilities are and further where the ordinance stated under Chapter 2, Enforcement 1-2-2:

> Where it is determined by the zoning and building inspector that excavation is proceeding not in compliance with the provisions of this ordinance, he shall enforce the provisions of this ordinance, and in performance of his duty, may enter actions in the court, where necessary and his failure to do so shall not legalize any violations of such provisions. (P. 3, page 2) (Emphasis added)

Nor is there any estoppel against a governmental agency notwithstanding the proprietary finding where:

> . . .such agencies lack the essential knowledge or intent or where the person claiming estoppel did not rely, or should not have relied, upon the representation action or inaction of the agency as where the person asserting the estoppel was not misled, or where he could have learned the facts by the exercise of reasonable diligence, or where he was not injured as a result of the act or statement of the government body. Furthermore, there can no estoppel where the person setting it up failed to act in good faith; and no amount of representation can prevent the government from asserting as illegal that which the law declares to be such. (31 C.J.S. Sec. 138 p. 683-685)

So it is that estoppel is not a proper theory to bring against the government or its agencies in failing to act or to enforce the law or in any way to void the law in its effect and sancion upon any person. The Supreme Court of the State of Utah has by their decisions supported this view that where city officials or governmental officials failed to act as they should in their position estoppel would not serve as a defense to any rights and powers exercised. We find the exact same situation as is being charged by the Defendant-Respondents in this case. In the case of Tooele City vs. Elkington, 100 Utah 485, 116 P.2d 406, the city of Tooele, State of Utah, sought to quiet title to a strip of land alleged to have been dedicated as an alley. There were a number of conveyances in reference to said property, beginning in July of 1872 and continuing on to March of 1938. In each and every conveyance, the city plat was recognized as the legal description of the property. The defendants and appellants based their titles of property upon two grounds, (1) the city had deeded them the property of the quick claim deed and thereby relinquished all right

the city might have had in the property and (2) the property was never owned nor dedicated as an alley by the city and if it did have any rights in the property they have long since been waived and lost. The alley or property had never been open to the public as a public thoroughfare. The Court held that the property had been dedicated as a street and therefore could not have been conveyed in 1938 to the defendants and also the mere failure to have implemented the use of the said alleyway as a street by officers who should act within the authority granted could not be reasons for abrogating the community interest. For those reasons, the argument of estoppel in pais could not be claimed as against the city. (Ibid. page 410)

A similar case arose in the case of Cox vs. Carlisle. (369 P.2d 1049) Plaintiff-Appellant claimed to have acquired title over the many many years from the date the said property, a 66-foot strip of land was deeded to the city of Manti on September 2, 1872. Since that year, plaintiff and her predecessor had made improvements in connection with the area. Notwithstanding, these improvements and the use of the property the court held that the mere fact that the government over the many years permitted plaintiff the use thereof did not work as an estoppel against the government in claiming the interest and ownership of said property. There were various reasons given, including the fact that neither plaintiff nor others had ever paid any taxes on the property

since or before 1831 and Manti has claimed no taxes thereon. In this particular case, silence and inaction by the city of Manti did not abrogate its right and claims to said property and therefore the estoppel argument did not lie against the City of Manti.

In the case of Morgan vs. Board of State Lands, (549 P.2d 695) (1976) Morgan had an oil shale land lease for a period of ten years and at the expiration of the ten years received another rent notice and paid the same. The Board of State Lands thereafter attempted to terminate the lease or claim or treat it as terminated and the Utah Supreme Court held that, notwithstanding the Board's mistake in issuing the rental notice and their failure to publish the regulations pertaining to the renewal of leases and their otherwise negligent acquiescence or inaction and notwithstanding the lessee relied thereon, the said Board of State Lands is not estopped from denying extension of the said lease for another ten years. Again this case stands for the proposition that public officials may not perform their duty and responsibility. Notwithstanding that inaction of failure, it cannot be held that said government body is estopped from enforcing the regulations or laws which they are entitled to enforce. These arguments and theories have been clearly set out in 31 C.J.S. Sec. 138, p. 686-688.

> Mere acquiescence, laches, lapse of time, or nonaction on the part of the public or the public agent or officer does not ordinarily work an estoppel. No

estoppel ordinarily results from acquiescence in the violation of law and it has been held that no estoppel results ordinarily from the failure to collect fees or from delay in bringing suit.

POINT II

AN ESTOPPEL AGAINST A THIRD PERSON FOR INACTION OR ACQUIESCENCE MAY NOT WORK AS AN ESTOPPEL UPON THE PARTY PLAINTIFF IN HIS ACTION AGAINST THE DEFENDANT.

It is indeed a peculiar doctrine that Mr. Paul Walton must be held to have his rights of action rise or fall upon the conduct of a third party over whom he has no control. Paul Walton, never at any time by his own contact led the defendant, Fife or Kenneth Walton to believe that they could sit back and fail to comply with the ordinance. The court should look to the myriads of correspondence surrounding the termination of the lease and the demands and requirements imposed by Davis County Planning Commission. Mr. Joseph Moore stated that his action in this case was due to other pressures beyond the case involving Mr. Walton's property and that he was in fact imposing the same controls and requirements upon all excavations throughout the county. (T. 66 lines 10-14, page 93, line 24 through page 94 line 7) So it is that Mr. Walton did not play any part in the inaction on the part of Davis County Planning Commission, their enforcement of the Ordinance at the time nor any detriment which may have worked upon Defendant-Respondent.

The most important factor, however, is that estoppel

which the Court has obviously imposed upon Davis County Planning Commission is working to the detriment of the Plaintiff-Appellant, who was not a party to the conduct or to any inaction of the part of the Planning Commission. As stated, it seems improbable that the evidence will indicate that Mr. Paul F. Walton at any time ratified the action of Davis County Planning Commission when, in fact, the judgment itself speaks of a time at the termination of the lease as of May 18, 1975 when the property is to be surfaced and terraced in compliance with Davis County Planning Commission requirements. Mr. Walton was not in a position to police and control what went on with regard to the gravel pit and was otherwise entitled himself to rely upon the Ordinance and its enforcement.

Otherwise, the Davis County Planning Commission stands between Mr. Walton and Fife Rock Products and Kenneth F. Walton and the only way that estoppel could operate between Kenneth F. Walton, Fife Rock Products and the plaintiff would be by some notion of a "third party beneficiary estoppel" which is a notion totally foreign or alien to the law.

> Persons to whom representatives are directed and whose conduct thay are intended to, and do, influence may take advantage of a plea of estoppel.
>
> * * *
>
> Estoppels operate as to or between, and as to or between the parties to the subject matter or transaction which is the basis of the estoppel and their privies, either in blood, in estate, or in law. (31 C.J.S. EStoppel, sec. 130, p. 661-662)

> Estoppels in pais are available against parties in privity, whether the privity be by blood, by estate, or by contract, provided the privity is created after the event out of which the estoppel arises. (31 C.J.S. Estoppel, Sec. 131, p. 665-666)

There is no privity of contract or privity of relationship out of which an estoppel may arise between Paul F. Walton and the defendants herein because of the intervening relationship of Davis County Planning Commission. If there were a possible law of estoppel against the governmental agency (which there is not) or if the courts should by some notion find there was a proprietary function or some legal basis upon which estoppel could be asserted against Davis County Planning Commission, it would still be defective because there exists no relationship out of which the said estoppel arose between Plaintiff-Appellant herein and Defendants-Respondent.

POINT III

DEFENDANTS HAVE WAIVED THEIR RIGHT TO ASSERT DEFENSE OF ESTOPPEL BY FAILING TO PLEAD ESTOPPEL UNDER RULE 8 OF THE UTAH RULES OF CIVIL PROCEDURE OR TO MOVE AFFIRMATIVELY UPON THE SAID DEFENSE PRIOR TO TRIAL. AS A RESULT THE SAID DEFENSE WAS NOT BEFORE THE COURT, AND THE COURT SHOULD NOT ON ITS OWN CREATE SUCH A DEFENSE IN ITS JUDGMENT.

If the court were able to suppress the above referred to points of law and find that estoppel was available as a defense, said estoppel is an affirmative defense and should have been pleaded affirmatively under Rule 8 of the Utah Rules of Civil Procedure which reads:

> (c) Affirmative Defenses. In pleading to a preceeding pleading, the parties shall set forth affirmatively accord and satisfaction arbitration award, assumption of risk, contributory negligence, discharge and bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of fraud, statute of limitations, waiver, and any other matter constituting avoidance or affirmative defense. (Emphasis added)

This was not alleged affirmatively and therefore, was not a matter before the Court, nor did this defense arise as a result of any defense under Rule 12 of the Utah Rules of Civil Procedure.

> Every defense in law or fact, to claim full relief in any pleading, whether a claim, counter claim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required. . .
>
> (h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as herein before provided or if he has made no motion in his answer or reply . . .

Having not either pleaded the theory of estoppel as an affirmative defense or having entered into a motion to assert that evidence said defense was waived.

POINT IV

TRIAL COURT MUST LOOK TO THE DEMANDS OF DAVIS COUNTY PLANNING COMMISSION SUBSEQUENT TO MAY 18, 1975 BECAUSE THIS IS THE TIME SET AS NEW CONSIDERATION ON OR ABOUT JULY 7, 1967 IN THE ORAL STIPULATION WHICH WAS REDUCED TO JUDGMENT ON OCTOBER 23, 1969 AND AS NEW CONSIDERATION THE ORIGINAL OBLIGATIONS OF THE PARTIES WERE CHANGED.

It should be noted at this point that whether or not a rehabilitation plan was submitted is really irrelevant

in that it is not probative as to the requirements imposed upon the defendant to rehabilitate under the stipulation and judgment. At most, it is only probative of the issue whether or not the defendants were negligent or were of a state of mind not to perform as they were supposed to under the Excavation Ordinance of 1960 and/or obey the Planning Commission requirements as they were made or demanded during the years. One must consider the intent or purpose of the rehabilitation plan to aid both the defendants and the Davis County Planning Commission in determining what the outcome of the excavation would be and to guide the said parties to a proper and agreeable conclusion.

New consideration amounted to a 10-year extension of the existing lease to the benefit of defendants. New consideration accruing to plaintiff's benefit was and is set forth in the following language:

FROM THE ORAL STIPULATION OF JULY 7, 1967:

> MR. FORBES: That when the lease terminates, that he so surface and terrace the land to comply with the requirements of the Davis County Planning Commission, but specifically that there be left no large caverns or holes.

FROM THE JUDGMENT OF OCTOBER 23, 1969:

> 1.(g) that upon the termination of said lease, Defendant shall comply with the requirements of the Davis County Planning Commission with respect to terracing and will specifically see to it that there are no large caverns or holes left upon the premises.

Included within the new consideration established in the July 7, 1967 oral stipulation would be all the

demands or requirements imposed by the Davis County Planning Commission in terracing and surfacing and filling in all large holes and caverns as those needs may be discovered following May 18, 1975.

POINT V

THE DEFENDANT FIFE ROCK PRODUCTS CONSTRUCTION COMPANY IS ALSO LIABLE UNDER THE LEASE AS IT WAS MODIFIED BY THE ORAL STIPULATION OF JULY 7, 1967 AND THE OCTOBER 23, 1969 JUDGMENT BECAUSE THE RELATIONSHIP BETWEEN THE DEFENDANTS HEREIN WAS THAT OF ASSIGNOR AND ASSIGNEE INSTEAD OF THAT OF A SUBLESSOR AND SUBLESSEE.

Where (a) a tenant sublets all of his interest to his subtenant, or (b) by his conduct transfers all of his interest to a subtenant and (c) the sublease terminates at the same time as the original lease with no reversion back to the tenant, the legal relationship between the tenant and the subtenant is assignment instead of a sublease which will establish obligations and privity of contract between a landlord and assignee or subtenant.

> It is generally recognized that an assignment of a term for years occurs where the lessee transfers his entire interest therein without retaining any reversionary interest. If an instrument so transfers the lessee's interest, it constitutes an assignment, regardless of its character and form; and it is frequently been so held where the instrument of transfer is in the form of a lease, a sublease or a conveyance by the lessee of the premises by deed and fee, or by a quick claim deed, or by delivery of the lease to the past signee, duly endorsed to him, the endorsement reciting the transfer of all the lessee's right, title, and interest in the lease. Nevertheless,

in order to constitute an assignment, the lessee must part with his entire interest in the whole or in part of the premises. (51 C.J.S. Landlord and Tenants, Sec. 31(1) p. 103-104)

It is further an estoppel to deny assignment when the conduct of the parties is such that it constitutes an assignment instead of a lease.

Estoppel to Deny Assignment. Conduct inconsistent with another relation may estop a person to deny that there has been an assignment of the terms. (P. 104)

An example of the existence of an assignment of a lease rather than a sublease is demonstrated by the situation which the third party, sublessee, undertakes the rights and obligations of the original lease with the consent of the lessor. In the case of Ernst vs. Conditt 54 Tenn. App. 328, 390 S.W. 2d 703, the third party undertook rights and obligations under the lease with the consent of the lessor, and the Court held that the agreement constituted and assignment of the lease, rather than a sublease, notwithstanding the lessee agreed to remain personally liable for performance of covenant and the lessor consented to the agreement. In the case at bar, the evidence showed that Fife undertook to discharge all the obligations of Kenneth F. Walton by even taking upon himself the requirement to fill the Court's order as set forth in the Judgment of October 23, 1969. In so doing, they wrote a letter to Davis County Planning Commission in which they recognized the judgment and the terms of the judgment as they related Kenneth F. Walton and themselves stated that this was

their committment. (P.21)

POINT VI

THE DEFENDANT, FIFE ROCK PRODUCTS CONSTRUCTION COMPANY, COMMITTED WASTE PER SE AGAINST THE PLAINTIFF BY VIOLATING A MUNICIPAL ORDINANCE AND/OR REQUIREMENTS OF DAVIS COUNTY PLANNING COMMISSION

WASTE DEFINED

The elements essential to a cause of action for waste are as follows:

1. The waste statute creates for the Plaintiff-Appellant herein his cause of action in tort. The duty established is one of due care not to injure the property of any person who has a legal interest in property legally in the possession of the tortfeasor.

> If a guardian, tenant for life or years, joint tenant or tenant in common of real property commits waste thereon, any person aggrieved by the waste may bring an action against him therefore, in which action there may be a judgment for treble damages. (Emphasis added) (U.C.A. 78-28-2 (1953)

This particular provision falls under Chapter 28 of Title 78 of the Utah Code Annotated which deals with Torts to Real Property and is entitled "Nuisance, Waste, and Other Damage." There are only four verses to this Chapter 38, the title of Verse 1 is "Nuisance". The title of the second one is "Waste". The title of the third is "Injury to Trees-Damage", and the fourth is "Limited Damages in Certain Cases". These three sections use common phrases. For example, in 78-38-1 we read "any person whose property

is injuriously affected" and 78-38-2 "any person aggrieved by the waste", and in 78-38-3 "any person . . . is liable to the owner of such land. . ." It is noted from these sections and particular section 78-28-2 that the tort against property does not depend upon a prior existing legal relationship but is like any other tort action in which the cause of action arises due to the conduct of the one party which is negligent or intentional or in other words breaches some duty due and owing to the owner of the property which results in injury to the said property. So it is in nuisance that the action is based upon smell, escapage of water, and myriad of other kinds of noxious, indecent or offensive acts which any person in use of their own property adjacent or nearby the property of the complainant which results in damage or injury to the said complainant's property. The question of privity of contract is an irrelevant principle to the concept of torts.

2. The act constituting waste must have been done by one legally in possession, and that act must be to the prejudice of the estate or interest therein of another. (Jody vs. Guerdin 10 Ariz. App. 205, 457 P.2d 45 (1969)

> . . .it may be defined to be an unlawful act or an admission of duty on the part of the tenant which results in a permanent injury to the interitance. It is a violation of an obligation to treat the premises in such a manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act. (93 C.J.S. Waste Sec. 1, p. 559-560; Dorsey vs. Speelman, 1 Wash. App. 85, 459 P.2d 416 (1969).

LANDLORD VS. SUBTENANT

The proposition that waste is a cause of action which may be brought against the subtenant by the plaintiff, Paul F. Walton, who is the remainder-man, who currently owns the property as a result of its reversion to him is further supported by 93 C.J.S. Waste, Sec. 11 wherein we read

> Waste by Assignee, Subtenant, or Licensee. Thus one who enters by authority or permission of or under a contract with, the tenant, is liable to the remainderman for waste, and may be enjoined on his petition. (P. 567)

The United States District Court, for the Southern District of Mississippi held in an action by a remainderman against a lessee, Humble Oil and Refining Company, the defendant as a purchaser from the life tenant or trustee, was charged with knowledge about the powers of the remainderman and his interest and the plaintiff was held to have the right of action against said subtenant for the value of all minerals and properties extracted from the property. (Martin vs. Humble Oil and Refining Company 199 Fed. Sup. 648 (1960) p. 651) The Court said:

> ". . .a life tenant is charged with notice of the extent of the life tenancy and of the right of the tenant to deal with the property, and if the life tenant exceeds his authority the one purchasing from him is not relieved from the obligation to respond to damages to the remainderman for waste . . ."

This was a case in which the defendant, Humble Oil and Refining Company, was being sued and the relationship with the remainderman Martin was only that of a tortfeasor

and the duty arose under a theory of tort since Humble Oil and Refining Company was a subtenant under the life tenant with no privy of contract with the remainderman.

WASTE PER SE

It is further obvious that the defendants have committed waste per se against the plaintiff. In order to prove a case on waste per se the plaintiff must (i) show the damage to the plaintiff was caused by negligence in failing to obey an ordinance which was created for the purpose of protecting individuals like the plaintiff and (ii) that the said violation was the cause of plaintiff's injury or damage. It must (iii) further show that the conduct of the defendant, Fife Rock Products Construction Company was such that it could not be excused or justified. (Christensen vs. Lelas Automatic Transmission Service, Inc., 24 Utah 2d 165, 467 P.2d 605 (1970); Klafta vs. Smith, 17 Utah 2d 65, 404 P.2d 659 (1965); Thompson vs. Ford Motor Company, 16 Utah 2d 30, 395 P.2d 62 (1964); Ellis vs. Hale, 13 Utah 2d 279, 373 P.2d 382 (1962); Arbuckle vs. Wasatch Land and Improvement Company, 120 Utah 338, 234 P.2d 697 (1951); Hidalgo vs. Cochise County, 13 Ariz. App. 27, 474 P.2d 34 (1970); Routh vs. Quinn, 20 C. 2d 488 127 P.2d 1 (1942); Curtis vs. O.R.S. Neon Corporation, 147 C.A. 2d 186, 305 P.2d 294 (1957); Landbought vs. Payton, 147 Colo. 207, 363 P.2d 167 (1961); Stachniewicz vs. Mar-Cam Corporation, 259 Or. 583, 488 P.2d 436 (1971)

ORDINANCE PROVISIONS VIOLATED

The careful reading of the Ordinance of 1960 controlling excavation will provide an indication of what the Ordinance was attempting to accomplish. Under 1-1-1, entitle "Purpose", we read that the purpose of the Ordinance is to

> "establish. . .safeguards and controls on excavation within the unincorporated areas of Davis County, and to insure the excavation operations will be rehabilitated to a condition of practical usefulness and reasonable physical attractiveness. . .(and to provide protection of the tax base, provide for the economical use of vital materials necessary for economy and give due consideration to the present and future use of the land) in the interest of promoting the public health, safety, and general welfare. (Emphasis added)

It is obvious that the user of this land will be Mr. Paul F. Walton, the individual to whom the land has reverted. (P. 3, p. 1) Under the Chapter 5 of that ordinance, designated as 1-5-1 and subparagraph (at end) "Excavation and Backfilling":

> (1) Where backfilling is required, the excavation shall be graded or backfilled with non-noxious, non-flammable, non-compustible solids. The materials used or the method of fill shall not be such as to create a health hazard or which would be objectionable because of odor or unsightliness.
>
> (2) The graded or backfilled area shall not collect and permit stagnant water to remain thereon.
>
> (3) The peaks and depressions of the excavation area shall be reduced to a surface which will result in level or gently sloping topography in substantial conformity to the land area immediately surrounding and which will minimize erosion due to rain fall.
>
> (4) In any rehabilitation procedure which takes place in sand and gravel pits or on other sites where the material is of loose or friable nature, no slope shall be left which is steeper than a ratio of 1 1/2 horizontal

to 1 vertical. In no case shall any slope exceed the normal angle of repose of the material involved. (P. 3, p. 4-5) (Emphasis added)

VIOLATIONS CAUSED PLAINTIFF APPELLANTS DAMAGES

The evidence overwhelmingly establishes as a matter of law that the basic objectives of this Excavation Ordinance were not achieved by Defendants upon the termination of the lease.

SLOPES TOO STEEP TO STABILIZE

Glenn Austin, Davis County Engineer, after visiting the site, May 28, 1976, made a report which indicated that there was a sand hill upon which the sand was sliding down, considerable erosion was taking place, there were places in which there was no vegetation, a general need for storm drainage control to prevent erosion, and a general need of regrading and revegetation. (P.23, See also the testimony of the Davis County Planning Commission Director, Joseph Moore, T. 102 and the testimony of Glenn Austin, the Davis County Engineer, T. 134-135, Herb Schreiter, T. 184, 192 and Guy Alder, T. 243 lines 17-22, See also photographs P-38, P-39, and P-48)

EROSION PROBLEMS

After Mr. Austin's review of the property, and his findings as indicated above a rather comprehensive study was undertaken by Plaintiff-Appellant using professional land design planners, vegetation experts and engineers. Mr. Herbert Schreiter, duly qualified in the field of

land planning, and designing, made a study of the sight and took picture of the conditions of the property. He discovered enormous erosion problems, (See photographs P-37, P-40, P-41, P-42, P-43, P-46, and P-50, Also see T. 180, 182, 183, and 189) Mr. Guy Alder, an eminent authority in the State of Utah on excavation rehabilitation, and the President of Native Plants, Incorporated, also employed as an expert to study the conditions on the site summarized the erosion problem, stating,

> "In my estimation, the complete revegetation of this site would probably not occur within the duration that we could predict, because of the erosive forces that have begun to undercut the natural revegetation that has occurred. So it would be very difficult for us to ever assume that the site by itself could control the erosion that is now undercutting." (T.243)

That which one needs to look to determine if the Excavation Ordinance of 1960 has been complied with or violated is whether "the excavation operations (have been rehabilitated) to a condition of practical usefulness and reasonable physical attractiveness. . .(providing) protection of the tax base. . .(giving) due consideration the present and future use of the land." (P.3 Chapter 1, Sec. 1-1-1 Purpose)

More specifically this Honorable Court needs to determine if the backfilling and "terracing" and "surfacing" (P.1 and P.2) was accomplished by defendants of whether the property was left in a condition that was:

(1) "objectionable. . .(as unsightly)" and whether

"The graded or backfilled area (was such as to) collect and permit stagnant water to remain thereon."

(2) The peaks and depressions of the excavation area (were) reduced to a surface which will result in level or gently sloping topography in conformity to the land area immediately surrounding and which will minimize erosion due to rain fall.

(3) . . .(the slopes exceeded) the normal angle of repose of the material involved. (P. 3, p. 4-5)

If they were not, the Ordinance was violated. If the Ordinance was violated, Defendant-Respondents committed waste per se.

In determining whether there has been such violation of a statute or ordinance as may constitute negligence, regard must be had to the purpose of the enactment, the dangers or hazards against which it was intended to afford protection, and the harm or injuries which it was intended to prevent or guard against.

INCIDENTAL PURPOSES. In order that one may be entitled to the benefit of a statute or ordinance imposing a duty, it is not necessary that the primary purpose of the enactment should have been to protect him, but it is sufficient that his protection was one of the purposes intended. (65 C.J.S. Negligence Sec. 19 (5) pp. 632-633)

The language of the Ordinance contemplates the protection of the user of the land or the "future use" of the land, and therefore should protect Plaintiff-Appellant herein. If defendant did commit waste per se, the customs and usage in the industry will not shelter Defendant-Respondents from liability under the law.

CUSTOM AND USAGE AS EXCUSE OR JUSTIFICATION

Custom and usage in the industry is specifically excluded as a defense of excuse or justification for violating an ordinance. The District Court in its Findings of Fact

and Conclusions of Law, on page 4, beginning with item 11 and continuing on through item 14 on page 5, states the following:

> 11. The Court finds that the mining in question was done in accordance with the then prevailing customs and usage in the mining field and that there is no waste per se proven in this case. (Emphasis added)
>
> 12. The Court finds that the mining was lawfully done and that while the area left is unpleasant in appearance and might by some future standards be deemed to be a nuisance if created at a future date, that the standards at the time the mining was done and rehabilitation completed were in accordance with the then existing law and Judgment of October 23, 1969. (Emphasis added)
>
> 13. The Court recognizes and finds that in a proper case, there is a possible cause of action in the hands of a remainderman for waste committed by a sub-tenant. However, in this case the Court does not find the facts supporting such a cause of action.
>
> 14. The Court recognizes and finds that in a proper case, a remainderman of even an adjoining landowner might bring a successful action against a person who created unsightly scars on a mountain-side and did not rehabilitate the area so as to comply with the requirements of law, and thereby might be guilty of the creation of a nuisance which had a tendency to suppress local land values of not only the remainderman but adjoining land users and might be declared an unlawful nuisance. Of course, such a theory of action requires that the scar on the surface of the mountain be left in violation of law as the law then existed and also in violation of the prevailing general standards then in existence. The Court, however, in this case does not find that such has been proven, but does in fact find that the rehabilitation of the lands in this case was in accordance with the then prevailing standards of 1975 in the Davis County area and throughout the general area of the Wasatch Front and, therefore, also in accordance with the Judgment of October 23, 1969. (Emphasis added) (R. 39-40

It is obvious from the Court Findings of Fact that the Court is heavily relying upon what the customs and usages

are in the industry at the time. This is not a proper justification or excuse from a negligence per se finding. A survey of Court decisions will show that they tend to turn on whether or not the violation of the statute was something that was necessary under the circumstances or that the circumstances were beyond the control of the violator in order to excuse said violator from the obligations and duties imposed by the statute or ordinance.

Custom and usage, however, is nowhere accepted as an excuse from the obligations and duties imposed by a statute or ordinance.

> Effective Custom. Effective violation of a statute or ordinance as negligent, or negligence per se, is not changed by the fact that the acts complained of were done in accordance with the custom or practice of persons engaged in the same line or work. Evidence of custom and practice may not be used to contravene a statutory duty of care. (65 C.J.S. Negligence, Sec. 19 (8) p. 641, Hom vs. Clark, 23 Cal. Rptr. 11, 221 C.A. 2d 255, McDonald vs. Foster Memorial Hospital, 170 C.A. 2d 85, 338 P.2d 607 (1959); Sanchez vs. J. Baron Rice, Inc., 77 N.M. 717, 427 P.2d 240 (1967)

POINT VII

THE COURT COMMITTED A PREJUDICIAL ERROR BY ADMITTING IN HEARSAY STATEMENTS AND STATEMENTS THAT WERE INADMISSABLE UNDER THE STATUTE OF FRAUDS.

The Court committed prejudicial error in admitting the testimony of Mr. Clifford Woodland when during the second day of trial he testified concerning a telephone conversation with Mr. Sutton, the previous director of the Davis County Planning Commission as follows:

". . .he still insisted that he have a plan of some sort, so I told him that at that time that I would submit to him a sketch indicating the general contours that I felt might be usable, and allowed that to be submitted to his file."

Q. What did he say?

A. In substance, he said, "That ought to do; that's okay." (T. 300)

This statement was a preface to the admission of Exhibit No. 4 by the defendants which was a sketch of contours submitted apparently pursuant to that conversation. Thereafter, inaction of Davis County Planning Commission in failing to require a rehabilitation plan together with the issuance of an occupation permit on or about December, 1971 became a prejudicial error in that it was supportive of the fact that the defendants in fact had submitted an acceptable rehabilitation plan. Plaintiff objected to the submission of this tesimony as hearsay and also inadmissible under the Statute of Frauds. (T. 296, 298)

Thereafter a statement by a Mr. Smith pertaining to an alleged conversation in which Mr. Walton, who was purported to have said that their excavation efforts to rehabilitate were not to destroy the road into the gravel pit. The use of this testimony was to describe that the Plaintiff-Appellant had himself obstructed the rehabilitation effort. A caterpillar operator, Mr. Ewing, was purported to have been approached by Mr. Paul F. Walton and instructed not to destroy the road. The statement of Mr. Walton was then told to Mr. Smith and Mr. Smith told Mr. Woodland.

In other words, it was a statement purported to have been made by Mr. Walton to a Mr. Ewing who told Mr. Smith who told Mr. Woodland. Counsel for the plaintiff objected to the statement (T. 310) on the grounds that it was hearsay and further that it was inadmissible under the Statute of Frauds.(T. 311) Notwithstanding these objections, Mr. Woodland testified, "Why didn't you have the road reduced to 1 1/2:1?" Answer: "My superintendant told me that they were told to leave the road as it was. It constituted an access to a spring in the area." (T. 312)

ON SITE CONVERSATION WITH PLAINTIFF-APPELLANT

Rule 63 of the Rules of Evidence states:

> Evidence of a statement that is made other than by witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

Thereafter there are exceptions listed to this rule. A review of those exceptions reveal that there is in fact no exception to cover this particular situation especially where it is hearsay on hearsay. Upon cross examination, Mr. Woodland admitted that the statement originated from Mr. Ewing who was not in the courtroom and had not been called as a witness. Nor did Mr. Woodland himself hear the statement made by Mr. Ewing. Mr. Woodland had sat through the deposition of Mr. Ewing on an earlier date and the statements of Mr. Ewing were read by Counsel to the plaintiff to Mr. Woodland. Mr. Ewing had said:

Q. In fact you couldn't identify this man, Mr. Walton, (pointing) as being the one who came up?

A. No.

The hearsay on hearsay nature is borne out by the following testimony:

Q. Now, you've got. . .this is supposed to have come from a statement from Mr. Ewing from . . .the man sitting on the cat operating at the time?

A. I got the statement from Mr. Smith.

Q. Then Mr. Smith is supposed to have told you. That is, what one of the cat operators told you, is that right?

A. Yes, I believe he did tell me that.

(T. 331)

The transcript continues to refer to the testimony of Mr. Ewing wherein he describes an individual who approached him driving a green pickup truck or other vehicle. (T. 331) The statement becomes less credible when one analyzes the fact that Mr. Ewing was not during the deposition able to recognize Mr. Walton as the individual that came up to the site and made the statement to leave the roads as they were (T. 332, line 9-18). This was hearsay on hearsay in that the statement was supposed to have been made by Mr. Walton to Mr. Ewing who made the statement to Mr. Smith who in turn made it to Mr. Woodland, the one who was testifying in the trial. (T. 333, line 13-18)

It is apparent that the defendants did not call Mr. Ewing as a witness because he was so confused and his testimony was absolutely worthless. However, they were able to, over the plaintiff's objection, obtain a clear statement from Mr. Woodland which was a self-serving statement and a highly prejudicial statement being made by an individual who was not the recipient of the conversation. This is the rankest kind of hearsay which is not subject to cross examination or impeachment and therefore was not admissible.

On direct examination of Mr. Woodland, an objection was also raised by the plaintiff as to the Statute of Frauds (T. 311) wherein the provisions and terms of the Statute were enumerated. The testimony referred to above of Mr. Woodland would have the effect of vitiating the claims that the plaintiff has upon the property and the performance of the defendants pursuant thereto upon the termination of the lease. The following provision of the Statute of Frauds applies:

> (U.C.A. 25-5-1) An Estate or Interest in Real Property. No estate or interest in real property, other than leases for term not exceeding one year, or any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered, or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.
>
> (U.C.A. 25-5-3) Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void

> unless the contract, or some note or a memorandum thereof is in writing subscribed by the party when a lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

It is obvious from these provisions that testimony concerning or relating to the alteration of the obligations of parties under a lease, the Judgment of October 23, 1969, and the Stipulation of July 7, 1967 is not properly admissible unless in writing. This is because the lease was for a term exceeding one year, it was concerning real property, ("in any manner relating thereto") and pertained to the "surrender" of the said premises.

CONCLUSION

The Trial Court's decision tends to protect the defendants herein from any liability due to acts or the inaction of Davis County Planning Commission in their failure to enforce the Excavation Ordinance of 1960. The effect of that kind of decision is to leave the Plaintiff-Appellant herein helpless in that he has been stripped of all rights to which he was entitled under the Judgment of October 23, 1967 and the remedies under the Law of Waste.

Whether or not the Court is willing to admit it, he has by such a decision established an equitable theory of estoppel, stating in essence that since the Davis County Planning Commission failed to enforce the Ordinance, they cannot now come forth and enforce it because to do so would in some way place the defendants in some disadvantage

or in some detriment. Such a theory may be a viable and acceptable theory when private parties are involved, but becomes an invalid theory of law when applied against government agencies. The law is very clear on the fact that the governmental agency may not be estopped in enforcing an ordinance.

Should the Court find that through some notion of proprietary function, Davis County Planning Commission does, in fact, have a property interest in the property in question, herein, and therefore estoppel is effective as against the Davis County Planning Commission, it is not available as against this Plaintiff-Appellant, who was not a party to any action, conduct, or inaction which went toward setting up the estoppel. To hold otherwise would be to establish a theory which reasonably punishes an individual for something of which he is not responsible.

The Judgment of October 23, 1969 and/or the oral stipulation of an open court of July 7, 1967 looked to a time in the future wherein both parties to the action were given certain considerations not previously created. On the one hand, the defendants herein were able to achieve an extension of a lease for another ten years, dating from 1965 to 1975. In consideration for that extension, on the other hand, the Plaintiff-Appellant and/or his successors in interest acquired a guarantee or that the property would be returned to a usable state and that the arbitor would be the Davis

County Planning Commission as of the termination date, May 18, 1975.

The arbitor, Davis County Planning Commission, did, following the termination of the lease, attempt to arbitrate the situation. Careful studies were made, using experts, mainly the Davis County Engineer, Glen Austin, who together with other individuals made a field study and determined that the property was left in a condition which would cause wasting and would cause serious damage. There were already signs of serious erosion of the sluffing of the sidehills, of no vegetation, or anything to stabilize the soils. That these conditions were extant was verified by the expert studies made by engineering firm of Byrd Engineering, using other experts, including Herb Schrieter, the Land Planner and Designer and Guy Alder, the Vegetation Expert. All of these individuals, experts in their field, emphatically described to the Court serious failures on the part of the defendants to comply with Davis County Planning Commission requirements.

While no decision was made regarding the question of defendant Fife's liability under the lease, nevertheless, the form of the lease and the obligations assumed by Fife as is apparent in their correspondence with Davis County Planning Commission, all point to the fact that Fife, rather than having a sublease under Kenneth F. Walton, in fact had an assignment of all rights of Kenneth F. Walton.

It is apparent that they considered the Judgment of October 23, 1969 to be their own obligation, and it is further apparent that their lease terminated coincident and on the same date as the lease with Kenneth F. Walton. Under the law that constitutes an assignment instead of a sublease and consequently all rights and claims which the plaintiff may have against Kenneth F. Walton he now has and would have against Fife Construction Company.

It is true that the defendants never at any time filed a rehabilitation plan which is of little probative value to the central issue of whether they complied with Davis County Planning Commission requirements with respect to terracing and surfacing. The evidence of their failure to file such a plan or to comply with the requirements of Planning Directors in the past could only be probative of the issue of whether or not they intended to do anything to rehabilitate the property or return it to a usable state. One of the rather blatant and apparent deficiencies in the pleadings on file herein is the defendant's failure to file any Motion to Dismiss the case under the theory of estoppel nor is said theory affirmatively pled in the Answers as is necessary under Rule 8 of the Utah Rules of Civil Procedure. Consequently, the issue of estoppel is not before the Court and the Court was not at liberty to issue its decision based upon such a theory. Notwithstanding this void in the defendants pleadings and prior pretrial

litigation, the Court went ahead on its own to establi such a defense for the defendant using as it did the u legal theories described herein.

The Court also decided there was no waste per se u the Statute or under the Davis County Excavation Ordina or under U.C.A. 78-28-2 (1953) because Fife was merely following the customs and usage in the trade at the tim of the termination of the lease and that they followed this back through 1969. No where in the law is there a provision or any common law principle which would estab for the defendants a legal "excuse" or "justification" sufficient to relieve them from liability under waste pri principles.

In order to establish waste per se, it must be pro 1. That the ordinance or statute was violated. It is that under subsections 1-1-1 "Purpose" and subsection 1- "Excavation and Backfilling" that the Ordinance was viol 2. It must be shown that the defendant committed or omitted some action which would depreciate the value of the property as it would return to the remainderman. The evidence is overwhelming as provided in trial that t property had been wasted and there is enormous erosion a wasting of the property. 3. It must be shown that ther is no excuse or justification for having violated the or While a person may find legal excuse or justification he of the urgency of the moment "custom and usage" in the i

is explicitly and expressly excluded from the legal categories of excuse or justification.

It is apparent that there was prejudicial error committed against the Plaintiff-Appellant by the Court in admitting hearsay statements and statements that were inadmissible under the Statute of Frauds. Nor were these statements such as would have been defined as harmless error. The statement of the former deceased Davis County Planning Commission Director, Mr. Rodney Sutton, wherein he was purported to have accepted defendant Fife's letter of October 7, 1971 and the sketches associated therewith as the proper and acceptable rehabilitation plan of said defendant under the Ordinance was an example of prejudicial admission of a hearsay statement. This was further a prejudicial inadmissible statement in that it would in effect alter or change the obligation due and owing by the defendants in reference to real property.

The second error of the Court was admitting the statement of Mr. Clifford Woodland of Fife Construction Company wherein he is purported heard Mr. Smith, who in turn heard Mr. Ewing, a caterpillar operator, who is purported to have heard Plaintiff-Appellant herein, Mr. Walton, say that the rehabilitation excavations made by the defendant was not to, in any way, affect the road up to the gravel pit. Based upon these claims, the defendants were attempting to establish that the Plaintiff-Appellant somehow obstructed their

rehabilitation efforts and thereby they are relieved from a performance thereunder.

Such a statement is a self-serving statement and is further subject to the rankest kind of hearsay objections in that it is a statement made by an individual outside of Court used to prove the truth of the matter asserted which was passed from one person to another until it was finally provided in open Court by Mr. Clifford Woodland.

This particular statement is further objectionable in that it is a violation of the Statute of Frauds in that it is a statement which would alter the obligations of the party under the original lease and would, in effect, relieve defendants of their obligations to perform under the Judgment of 1969. In those terms and under those circumstances it was admitted illegally and in violation of the Rules of Evidence. There is no way under those circumstances for the Plaintiff-Appellant to cross-examine or to impeach the statement made or otherwise prove that it was not made. Plaintiff-Appellant's Counsel, however, effectively impeached it by use of the deposition of Mr. Ewing, the purported party to whom such a statement was given. From the said deposition, it is obvious that the said declarant, Mr. Ewing, could not even recognize Mr. Walton as the individual who came to talk to him on that day, nor could he remember the car or the exact statement being made. He does, however, remember that his foreman had instructed him not to disturb the roads.

It is apparent from what has been described in this brief that the decision of the Court was not legally sound and that the decision should be overruled and returned to the Court for proper disposition in consonance with the principles herein set forth, and further that the Plaintiff-Appellant should have a Judgment in his favor against the Defendant-Respondent.

Respectfully submitted this _____ day of March, 1978.

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CERTIFICATION OF MAILING

I certify two copies of the foregoing Brief of Plaintiff and Appellant, Paul F. Walton, were mailed this _____ day of March, 1978, to Felshaw King, Attorney for Defendant-Respondant, 251 East 200 South, Clearfield, Utah 84015.