

1978

Tim themy v. Seagull Enterprises, Inc., A Utah Corporation, Shirley K. Watson, United Bank, A Utah Corporation, Zions First National Bank and Murray Broadcasting Company, . Inc : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

TIM THEM,)
)
Plaintiff-Respondent)

vs.)

CASE NO.
15641

SEAGULL ENTERPRISES, INC.,)
a Utah Corporation, SHIRLEY)
K. WATSON, UNITED BANK, a)
Utah Corporation, ZIONS FIRST)
NATIONAL BANK and MURRAY)
BROADCASTING COMPANY, INC.,)
)
Defendants-Appellants)

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Summary Judgment granted by the Honorable David B. Dee, Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah, and entered in the above entitled matter on the 2nd day of November, 1977.

RELIEF SOUGHT ON APPEAL

Appellant Seagull Enterprises, Inc., a Utah corporation, hereinafter referred to as "Seagull", Shirley K. Waton, hereinafter

referred to as "Watson", and Murray Broadcasting Company, Inc., hereinafter referred to as "MBC", seek a reversal of the Summary Judgment and a remand of the above entitled matter to the Third Judicial District Court, in and for Salt Lake County, State of Utah for a full trial on the merits.

STATEMENT OF FACTS

In February of 1974, Mr. Jay Gardner, hereinafter referred to as "Gardner", as the General Manager of radio station KMOR, hereinafter referred to as the "Station", located in Salt Lake County, Utah, met in California with Mr. Charles R. Sadler to discuss the possible acquisition by Mr. Sadler of certain properties of the Station (R.296). After Mr. Sadler's initial indication of interest to Gardner, a meeting was arranged between Mr. Sadler and the owner of the station properties, Mr. O. J. Wilkinson (R.297).

After the proposed purchase negotiations had proceeded to a point where the acquisition seemed imminent, in March of 1974, Seagull Enterprises, Inc., hereinafter "Seagull" was incorporated to acquire from Mr. O. J. Wilkinson certain real property and broadcast equipment together with the Federal Communication Commission broadcasting license and operate the Station (R.297). Mr. Sadler was president and majority stockholder of Seagull, and Mr. Gardner was to serve as vice president and general manager (R.294, 295).

On the 26th day of June, 1974, two agreements were

executed by and between O.J. Wilkinson, d/b/a KMOR Radio and Seagull. The first Purchase Agreement related to certain real property located in Salt Lake County and provided for a purchase price of \$250,000.00 with a \$5,000.00 down payment to be paid at the time the Federal Communications Commission, hereinafter "Commission", approved the transfer of the broadcasting license from Mr. Wilkinson to Seagull with the balance of \$245,000.00 to be paid in monthly installments of \$2,484.96 commencing the first day of the second month following said Commission approval. (R.9-14). The other Purchase Agreement related to the broadcasting license identified as FCC File No. BR2198, together with certain broadcasting equipment and provided for a total consideration of \$250,000.00 with \$74,000.00 to be placed in escrow and payable to the seller fifteen days after Commission approval of the agreement, and transfer of the broadcasting license from Mr. O.J. Wilkinson to Seagull with the balance of \$176,000.00 to be paid in monthly installments of \$1,785.11 commencing on the first day of the sixth month following said Commission approval. (R. 15-21).

An application for approval of the assignment and transfer of the broadcast license from Mr. O.J. Wilkinson to Seagull was prepared and filed with the Commission and, on December 13, 1974, the Commission approved the transfer (R. 301) whereupon Seagull paid to Mr. O.J. Wilkinson the sum of \$5,000.00 as required by the Purchase Agreement relating to the real property and the sum of \$74,000.00 that was being held in escrow pending

Commission approval was released from and paid by the escrow to Mr. Wilkinson (R.301).

Because of certain financial difficulties, Seagull was unable to comply with the monthly installment payment provisions of either agreement and on the 4th day of September, 1975, Mr. O. J. Wilkinson caused to be served on Gardner two documents, each entitled Notice, whereby Mr. Wilkinson sought to declare a forfeiture by Seagull in and to both agreements (R.311 R.358-362). Shortly thereafter, Gardner left the station and took employment in Wyoming (R.310). However, in January of 1976 Gardner had several telephone conversations with both Mr. Wilkinson and Mr. Sadler, each of whom assured Gardner that Seagull was going forward and that the contractual obligations would be met (R.310). Based on these assurances and representations, Gardner returned as general manager of radio station KMOR on January 29, 1976 (R.311).

Financial problems continued to plague Seagull and in February, March and April of 1976, Mr. Sadler, for and on behalf of Seagull, attempted to negotiate a transfer of the broadcast license from Seagull to the respondent herein Mr. Tim Themy. The transfer price was to be \$13,000.00 but the negotiations were never consummated (R.332).

Meanwhile, on March 1, 1976, Mr. O. J. Wilkinson executed a promissory note in favor of Zions First National Bank in the amount of \$250,000.00 (R.92). To secure payment thereof, Mr. Wilkinson signed and delivered to Zions First National Bank

Deed of Trust in and to the same real property subject to the Wilkinson-Seagull Purchase Agreement together with an Assignment of Wilkinson's seller's interest in said Purchase Agreement (R.48,49). It may be noted that the broadcasting equipment conveyed by Mr. O. J. Wilkinson to Seagull had been pledged as security to United Bank to secure a loan in the amount of \$90,000.00 which \$90,000.00 was distributed as follows: \$5,000.00 to Mr. Wilkinson as down payment for the real property, \$74,000.00 distributed by United Bank, as escrow, to Mr. Wilkinson on the approval of the Commission of the transfer of the broadcast license from Mr. Wilkinson to Seagull, and the amount of \$11,000.00 as operating capital for Seagull (R.302). Both Mr. Sadler and Gardner personally guaranteed the United Bank loan to Seagull (R.302).

On or about the 26th day of May, 1976, Mr. Wilkinson purportedly assigned his seller's interest in each of the agreements by and between Mr. Wilkinson and Seagull to the respondent herein, Mr. Tim Themy.

Thereafter, Seagull transferred and assigned to Shirley K. Watson d/b/a Murray Broadcasting Company, the broadcasting equipment together with the subject broadcasting license. An appropriate assignment application was submitted to the Commission and accepted for filing by the Commission on July 9, 1976. Pursuant to 47 USCA Section 309(b)(1), an application may not be granted earlier than thirty (30) days following the issuance of public notice of the acceptance of the Commission

of the application for filing. This allows an interested party thirty (30) days in which to file objections to the proposed transfer or assignment. Respondent herein, Mr. Tim Themy, did file a Petition to Deny the assignment on November 16, 1976, and although the petition was not timely filed, respondent's pleading was treated by the Commission as an informal objection to the application and considered on its merits (R.265). Notwithstanding respondent's objections, the assignment of the subject broadcasting license from Seagull to Shirley K. Watson d/b/a Murray Broadcasting Company was approved by the Commission on the 4th day of March, 1977 (R.267, 267A).

Subsequently, Shirley K. Watson d/b/a Murray Broadcasting Company transferred the broadcasting equipment and assigned the subject broadcasting license to Murray Broadcasting Company, Inc. This assignment of the broadcasting license was approved by the Commission on the 14th day of June, 1977 (R.266).

An application was submitted to the Commission on the 31st day of May, 1977, for authority to relocate the broadcast site of the station from the facilities originally conveyed by Mr. O. J. Wilkinson to Seagull to the station's present broadcast site located at 4874 South State Street, Murray, Utah. Temporary authority for the relocation was granted by the Commission on the 1st day of July, 1977.

On the 15th day of August, 1977, authority was granted by the Commission to change the call letters of the station from KMOR to KPRQ and the broadcasting license of Murray Broadcasting

Company, Inc., was renewed by the Commission for a three year period on the 13th day of January, 1978.

Presently, Murray Broadcasting Company, Inc. operates radio station KPRQ pursuant to a valid license duly approved and renewed by the Commission on a relocated broadcasting site and with independently obtained broadcasting equipment, and neither the real property nor the broadcast equipment originally conveyed by Mr. O. J. Wilkinson to Seagull is occupied or utilized by Murray Broadcasting Company, Inc.

Because of the nature of this proceeding, to wit: an appeal from the grant of a Summary Judgment, appellants respectfully submit that a brief outline of the pleadings would be beneficial to this Court. Respondent's Verified Complaint naming Seagull, Shirley K. Watson and United Bank, a Utah Corporation as party defendants, was initially filed on the 1st day of October, 1976 (R.2-21). At that time, respondent also sought the appointment of a receiver (R.22). Answers to the Verified Complaint were duly filed by the defendants United Bank (R.32,33), Shirley K. Watson (R.36,37) and Seagull (R.40,41). Additionally, a Motion to Intervene and Answer was filed by Zions First National Bank (R.42-49) and this motion was granted on the 24th day of February, 1977 (R.55).

Pursuant to the leave of court granted on the 21st day of July, 1977 (R.84), respondent filed an Amended Complaint naming Seagull, Shirley K. Watson, United Bank, Zions First National Bank and Murray Broadcasting Company, Inc., as party defendants

(R.70-80). By his Amended Complaint, respondent sought a judgment of forfeiture of Seagull and its successors in interest in and to the agreement relating to the real property (R.72) or, in the alternative, for a judgment treating the Agreement, as a note and mortgage with foreclosure thereof (R.73,74). With respect to the Agreement relating to the broadcasting equipment and broadcasting license, respondent sought a declaratory judgment that plaintiff was the equitable owner of the broadcasting equipment and license (R.75), or, in the alternative, for a judgment treating the Agreement relating to the broadcasting equipment and license as a note and mortgage with foreclosure against the same (R.76). Additionally, plaintiff claimed a security interest in the broadcast equipment and license and, after alleging a delinquent balance of \$45,736.98, sought possession thereof pursuant to Article 9 of the Utah Commercial Code (R.77). Finally, respondent sought relief pursuant to the Utah Fraudulent Conveyance Act (R.79).

Answers to respondent's Amended Complaint were filed by the defendants Shirley K. Watson and Murray Broadcasting Company, Inc. (R.87-90), Zions First National Bank (R.91-94), Seagull (R.99-101), and United Bank (R.130-133).

On the 21st day of September, 1977, respondent filed a Motion for Summary Judgment (R.134) with the same being argued and taken under advisement by the Court on the 3rd day of October, 1977 (R.136). By Memorandum Decision under date of October 10, 1977 (R.158), the Court granted respondent's Motion for Summary Judgment.

Judgment and on the 2nd day of November, 1977, a formal Summary Judgment was entered (172,173).

Appellants Seagull, Shirley K. Watson and Murray Broadcasting Company, Inc., petitioned the lower Court for a reformation of the Summary Judgment (R.174-178; R.181,182), and on the 5th day of January, 1978, an Order Denying Petition to Reform Memorandum Decision and Summary Judgment was entered (R.191-193).

The Notice of Appeal herein was filed on the 24th day of January, 1978 (R.202,203), and on the 6th day of March, 1978, respondent's Motion to Dismiss appellants' appeal was denied.

Pursuant to leave of this Court granted April 17, 1978, appellants filed an Amended Notice of Appeal and an Amended Designation of Record on Appeal to include that certain Order Appointing Receiver Or In The Alternative, Setting Supersedeas Bond, entered in the above entitled matter on or about the 17th day of March, 1978 (R.

On the 17th day of April, 1978, this Court continued in force and effect the stay against the Order Appointing Receiver Or In The Alternative, Setting Supersedeas Bond, conditioned on the lower court fixing an appropriate supersedeas bond. The hearing before the lower Court to establish an appropriate supersedeas bond is pending at the present time. However, the propriety of the lower Court's action in appointing a receiver with full authority to take possession of the real and personal property and the broadcasting license and sell or transfer the

same together with the authority of the receiver to manage radio station KPRQ remain within the scope of this appeal

ARGUMENT

POINT I

THE LOWER COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTED GENUINE DISPUTES AS TO MATERIAL ISSUES OF FACT

- A. A GENUINE DISPUTE EXISTED BETWEEN THE PARTIES AS TO WHETHER RESPONDENT WAS THE SUCCESSOR IN INTEREST OF MR. O. J. WILKINSON IN AND TO THE TWO AGREEMENTS THAT CONSTITUTED THE SUBJECT MATTER OF RESPONDENT'S AMENDED COMPLAINT.

It is elementary that, "Rule 56, U.R.C.P., should not be used where there are issues of fact in dispute". Hatch vs. Sugarhouse Finance Company, 20 Utah 2d 156, 434 P2d 758 (1967) at 20 Utah 2d 157.

In Holbrook Company vs. Adams, 542 P2d 191, this Court stated at 542 P2d 193:

"It is not the purpose of the summary judgment procedure to judge the creditability of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail. Only when it so appears, is the court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views. Conversely, if there is any dispute as to any issue, material to the settlement of the controversy, the summary judgment should not be granted".

The above announcement relating to the applicability

of Rule 56 of the Utah Rules of Civil Procedure does not constitute a new announcement by this Court as to the rules governing disposition of proceedings filed pursuant to said rule, but merely constitutes a reiteration of the established guide lines. In re Williamses Estates, 10 Utah 2d 83, 348 P2d 683. This Court has further stated that a Summary Judgment is appropriate only where the favored party makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party. Tanner vs. Utah Poultry and Farmers Co-op, 11 Utah 2d 353, 359 P2d 18, and Bullock vs. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P2d 559.

On review, this Court is, "...obliged to consider the evidence in the light most favorable to the (losing parties)". Whitman vs. W. T. Grant Co., 16 Utah 2d 81, 395 P2d 918.

When viewed against the standard of appellate review, it becomes apparent that respondent's standing as the proper party plaintiff was a material fact as to which there was a genuine dispute between the parties. By his Verified Complaint, respondent alleged that he had been assigned by agreement under date of May 26, 1976, the seller's interest in and to the two Purchase Agreements by and between O. J. Wilkinson and Seagull (R.2); and, this allegation was renewed by respondent in his Amended Complaint (R.71). Appellants Seagull, Shirley K. Watson and Murray Broadcasting Company, Inc. alleged that they were without sufficient information on which to form a belief as to the truthfulness of respondent's allegation and, accordingly, denied the same (R.87; R.99).

Rule 17(a) of the Utah Rules of Civil Procedure, requires that "(e)very action shall be prosecuted in the name of the real party in interest." While an action may not be dismissed until a reasonable time has been allowed for ratification, joinder or substitution, appellants submit that the standing of the plaintiff as the real party in interest or successor in interest to a contractual right or obligation constitutes a significant material fact that a dispute with respect thereto would preclude the grant of a Summary Judgment. In Disabled American Veterans vs. Hendrickson, 9 Utah 2d 152, 340 P2d 416, plaintiff alleged that it was a duly authorized state chapter of the Disabled American Veterans, a national organization, and as such, was vested with the rights granted to that corporation. By its answer, the defendant challenged plaintiff's capacity as a corporation in its right to sue. In reiterating that Summary Judgment, "...can properly be rendered against a defendant only if, on the undisputed facts, the defendant has no valid defense (9 Utah 2d 154), this Court held that the issue presented a genuine dispute as to material issue of fact that precluded Summary Judgment.

The materiality of this disputed issue of fact is emphasized by the uncontested consideration that prior to the purported assignment by Mr. O. J. Wilkinson of his seller's interest in and to the two Purchase Agreements to respondent herein on May 26, 1976, Mr. Wilkinson had executed and delivered to Zion First National Bank a Deed of Trust and Assignment in and to real property and the Purchase Agreement between Mr. Wilkinson

and Seagull. Accordingly, as the same related to the real property and the Purchase Agreement with respect thereto, Mr. Wilkinson had no assignable interest in May of 1976.

A further complication presented by this issue is whether Mr. O. J. Wilkinson retained an assignable interest in the agreement and remedies included therein, including forfeiture, relating to the broadcasting license after the transfer from Mr. Wilkinson to Seagull was approved by the Commission on the 13th day of December, 1974. The Purchase Agreement relating to the broadcasting license specifically provided, "...that consummation of this deal shall be and is dependent upon the Buyer applying for and obtaining approval from the FCC of the transfer of all of seller's right, title, and interest in the FCC broadcast license granted to seller," (R.18), and the record is clear that Commission approval was granted(R.301).

Respondent has and continues to misconstrue the nature of the broadcasting license duly issued and approved by the Commission. A license to broadcast is not a chattel or piece of personal property that may be bought and sold subject to a seller's security interest or lien. Rather, the utilization of the public airways is a privilege, the use of which is subject to the exclusive regulation and control of the Commission. This was recognized in American Broadcasting Company vs. F.C.C., 191 F2d 493 (Ct of App., District of Columbia Circuit 1951), wherein it was stated:

"...it is well to emphasize certain fundamentals. 'the policy of the (Communications) Act is clear that no person is to have anything in the nature of a property right as a result of the grant of a license'. F.C.C. vs. Sanders Brothers Radio Station. 309 U.S. 470, 475 S.Ct.693, 697, 84 L Ed 869."

This was further illustrated in F. L. Crowder vs. F.C. 399 F2d 569 (Ct. of App. District of Columbia Circuit, 1968), wherein it is stated at 399 F2d 571:

"...a broadcast frequency is not a homestead which after five years belongs to the settler for whatever use he desires. Rather it belongs to the public who through the Commission awards its use to a license to operate consistent with the public interest."

It is clear that when Mr. O. J. Wilkinson conditioned consummation of the transfer of the broadcasting license to Seagull on Commission approval, Mr. Wilkinson relinquished, by operation of law, any security interest or lien in or to the broadcasting license. Having done so, Mr. Wilkinson could not subsequently assign to respondent an interest that he did not have.

On further consideration illustrating the impropriety of allowing either Mr. Wilkinson or his purported successor in interest to invoke a remedy of forfeiture against the broadcaster, the Commission's opinion states that under the subject agreement (R.15-21) an enforceable forfeiture releases the seller from any and all obligations "...to convey said property..." (R.17). In the context of this proceeding, O. J. Wilkinson assigned and transferred the broadcasting license to Seagull subject to approval by the Commission.

When this approval was granted, the assignment and transfer were accomplished and Mr. Wilkinson retained no further obligation or interest to be conveyed and accordingly, could not assign an enforceable forfeiture remedy.

Appellants respectfully submit that the issue relating to respondent as the real party in interest together with the issue of respondent's standing to obtain the relief requested in the respondent's Amended Complaint constituted genuine disputes as to material issues of fact that would in and of themselves preclude Summary Judgment against appellant.

B. NEITHER RESPONDENT NOR HIS PREDECESSOR IN
INTEREST PROPERLY INVOKED THE REMEDIAL
PROVISIONS OF THE SUBJECT PURCHASE AGREEMENTS.

The remedial provisions of both Purchase Agreements including the agreement relating to the broadcasting equipment and license, draw heavily in form and substance on the standard form Uniform Real Estate Contract. Each agreement provides for a ninety (90) day grace period (R.10; R.17) and three alternative remedies in the event of default, to wit: (1) Forfeiture if the buyer fails to remedy the purported default within five days after written notice from the seller; (2) Suit to recover delinquent installments, including costs and attorney fees; and (3) Upon written notice to the buyer, a treatment by the seller of the agreement as a note and mortgage and foreclosure thereon (R.10, 11; R.17).

In this proceeding, the lower Court by summary Judgment declared that appellants had forfeited their interest in the

real property, broadcasting equipment and other tangible personal property and the broadcasting license (R.172,173). Appellants respectfully submit that the lower Court erred in declaring a forfeiture by appellants because a genuine dispute as to material fact existed as to whether respondent or his predecessor in interest properly invoked the remedial requirements of the subject agreements.

There is no allegation in respondent's Amended Complaint (R.70-80) that respondent gave prior written notice to appellants or any of them of an intent to declare a forfeiture. The only reference to a notice purportedly complying with the requirements of each Purchase Agreement is that Notice served on Gardner on the 4th day of September, 1975 (R.358-362). However, after the service of these documents and Gardner's departure for employment in Wyoming, Mr. O. J. Wilkinson, the seller and individual responsible for the service of the purported notices, represented and advised Gardner that Seagull would go forward with the subject Purchase Agreements. Accordingly, Gardner returned to the station and no further notices were served by Mr. O. J. Wilkinson. Based on the evidence, the lower Court should have found that a genuine dispute as to material issue of fact existed, i.e. whether Mr. O. J. Wilkinson by his conduct after the service of the purported notice, waived any contractual right to declare or proceed with forfeiture without the giving of another notice to appellants.

Additionally, respondent's Amended Complaint, while alleging respondent's predecessor in interest served Seagull

with notices of forfeiture, further alleges that respondent "...has provided Seagull with written notice of (respondent's) intention to treat the Agreement (relating to the real property) as a note and mortgage and to foreclose the same". (R.72). This allegation by respondent to the effect that respondent elected to treat the agreement relating to the real property as a note and mortgage and foreclose the same after the service of the Notice relating to forfeiture, negates the prior forfeiture notice and a Summary Judgment of forfeiture is inappropriate because respondent has not complied with the Notice provisions required to invoke that remedy.

The same is true of the agreement relating to the broadcasting equipment and license. The only notice referred to by respondent is that served by respondent's predecessor in interest in September of 1974. The factual issue relating to a waiver of this notice by virtue of the subsequent conduct of Mr. O. J. Wilkinson has been previously discussed and it is sufficient to note that appellants denied in their responsive pleadings the receipt of any notice by respondent or his predecessor in interest that would invoke the remedial provisions of the broadcasting equipment and license agreement.

After respondent's initial complaint (R.2-21) had been filed October 12, 1976 and the Amended Complaint (R.70-80) filed on the 13th day of July, 1977, respondent's legal counsel served Gardner with a letter under date of September 1, 1977 and attachments (R.). This letter attempted to invoke, on respondent's

behalf, the forfeiture provisions of the subject agreements; however, the same is totally defective for several reasons, including the following: (1) The purported notice was given after the institution of the proceedings in the lower Court wherein respondent sought forfeiture or, in the alternative, foreclosure of mortgage; (2) The purported notice is addressed to Seagull and there is no verification of service on either or Murray Broadcasting Co., Inc.; (3) The purported notice fails to advise the purchaser that unless the alleged default is rectified within five (5) days, the seller intends to be released from all obligations to convey the property and that all previous payments will be forfeited; (4) The purported notice fails to advise the purchaser has become a tenant at will of the seller; and, (5) The purported notice reconfirms the earlier notice allegedly given by respondent to treat the agreements as a mortgage and foreclose thereon. For these reasons, the letter of September 1977, may not be used by respondent to pull himself by his own bootstraps into compliance with the conditions precedent to the invocation of the remedy of forfeiture. As to a foreclosure proceeding, the record is clear that no timely notice was served on appellants prior to the institution of these proceedings.

It is clear that a genuine dispute as to a material fact of fact relating to respondent's compliance with the remedial conditions of the Purchase Agreements existed between the parties. As stated in Russell vs. Park City Utah Corporation, 29 Utah 2d 184, 506 P2d 1274 (1973) of 506 P2d 1276:

"...one who seeks to invoke a forfeiture must strictly comply with the prerequisites thereof because forfeitures are not favored in the law. It should be obvious that there is a disputed material issue upon which the defendant is entitled to a trial."

POINT II

THE LOWER COURT ERRONEOUSLY FORFEITED APPELLANTS' INTEREST IN AND TO THE PRIOR PAYMENTS MADE PURSUANT TO THE PURCHASE AGREEMENTS AND THIS ENFORCEMENT AGAINST APPELLANTS CONSTITUTED AN UNCONSCIONABLE PENALTY.

Respondent freely admits that appellants had paid to respondent's predecessor in interest the sum of \$5,000.00 against the real property agreement (R.73) together with the sum of \$74,000.00 against the broadcasting equipment and license agreement (R.74). However, by its Summary Judgment, the lower Court forfeited appellants' interest in and to all amounts previously paid.

A contractual provision providing for the seller's retention of previously paid amounts may be enforceable as liquidated damages or equitably unenforceable as a penalty depending on whether the forfeited amount is reasonably related to the actual damages sustained by the aggrieved party.

This Court stated in Russell vs. Ogden Union Ry. and Depot Company, 122 Utah 107, 247 P2d 257 (1952) at 247 P2d 263:

"It is well settled that a provision in a contract between private individuals for a penalty in case of a breach of such contract is unenforceable in the courts".

Applying the principle that penalties will not be enforced

this Court, in Perkins et al vs. Spencer et al, 121 Utah 468, 243 P2d 446 (1952), stated at 121 Utah 474, 475:

"It will be observed that in all cases where the stipulation for liquidated damages was enforced it bore some reasonable relation to the actual damages which could reasonably be anticipated at the time the contract was made and was not a forfeiture which would allow an unconscionable and exorbitant recovery.

* * *

"...where enforcement of the forfeiture provision would allow an unconscionable and exorbitant recovery bearing no reasonable relationship to the actual damages suffered, we have uniformly held it to be very unenforceable."

The agreement relating to the broadcasting equipment and broadcast license provided that the first monthly installment payment after the payment of the amount of \$74,000.00 was released and paid to Mr. Wilkinson by the escrow after Commission approval of the subject transfer, would be the first day of the sixth month following Commission approval (R.15). Accordingly, the first installment was due on June 1, 1975; however, the agreement further provided for a ninety (90) day grace period within which payment could be made after the same became due (R.17). On September 4, 1975, five days after the expiration of the grace period, Mr. Wilkinson served Seagull with the Notice purporting to invoke the forfeiture remedy of the subject agreement (R.35). The existence of a genuine dispute as to material issue of fact relating to whether Mr. Wilkinson's subsequent conduct waived or negated the notice of September 4, 1975, has been previously discussed and its present relevance is to illustrate the inequity

of declaring a forfeiture of \$74,000.00 by Seagull and its successors in interest for a five day delinquency.

This Court may review both the facts and the law in equity proceedings. Article VII, Section 9 of the Constitution of the State of Utah. When so reviewed, it is clear that a genuine dispute exists as to material issue of fact so as to preclude a summary judgment that forfeits appellants' prior payments to respondent and his predecessor in interest.

POINT III

THE SUMMARY JUDGMENT DECLARING A FORFEITURE OF APPELLANTS' INTEREST IN AND TO THE BROADCASTING LICENSE EXCEEDS THE SCOPE OF RELIEF DEMANDED IN RESPONDENT'S AMENDED COMPLAINT.

Respondent's Amended Complaint, while seeking a forfeiture and/or mortgage foreclosure of the agreement relating to the real property (R.71-74), tracks a different course with respect to the agreement relating to the broadcasting equipment and broadcast license. With respect to the second agreement, respondent demands "...a declaratory injunction determining plaintiff to be the equitable owner of the license and equipment..." and further, the "...issuance of a mandatory injunction...requiring defendants to assist plaintiff in obtaining transfer of the F.C.C. license into plaintiff's name" (R.75); or, alternatively, for a judgment treatment the agreement as a note and mortgage and foreclosing the same (R.76,77); or, in the alternative, a judgment under Article IX of the Utah Commercial Code allowing respondent possession of the property, including the broadcasting license, and the sale thereof (R.77,78); or, in the alternative, an action

under the Utah Fraudulent Conveyance Act (R.79).

Appellants submit that the Summary Judgment entered by the lower Court exceeded the scope of the alternative relief sought by the respondent in his Amended Complaint to the surprise and prejudice of appellants. In Taylor vs. E.M. Royle Corp., 1 Utah 2d 175, 264 P2d 279 (1953), this Court stated at 264 P2d 280:

"It is true that our new rules should be 'liberally construed' to secure a 'just***determination of every action', but they do not represent a one way street down which but one litigant may travel. The rules allow locomotion in both directions by all interested travelers. They allow plaintiffs considerable latitude in pleading and proof, to the point where some people have expressed the opinion that careless legal craftsmanship has been invited rather than discouraged. Be that as it may, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions,--else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees."

This proceeding does not present a situation where a party has been allowed to amend his pleadings to conform to the proof presented at a trial on the merits, rather, it is a summary judgment based on the pleadings. In this latter situation the judgment should be within the scope of the pleadings; otherwise the judgment may be predicated on an issue a party was never upon to meet. In recognition of this possible adversity, Rule of the Utah Rules of Civil Procedure specifically limits the judgment to the, "...pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits

It is clear that with respect to the agreement relating to the broadcasting equipment and broadcasting license, appellants met and defended the issues as raised by respondent's Amended Complaint. By his Third Claim for Relief respondent sought a declaratory injunction determining respondent to be the equitable owner of the broadcast license and requiring appellants to assist respondent in obtaining Commission approval of a transfer of the license of appellants to respondent (R.75).

In Radio Station WOW, Inc. vs. Johnson, 325 US 120, 89 L Ed 2092, The United States Supreme Court addressed itself to the issue of the power of a state to adjudicate conflicting claims to property used by a licensed radio station. The Supreme Court of the State of Nebraska had voided a lease of the physical properties utilized by radio station on the grounds of fraud and ordered the parties, "to do all things necessary" to secure a return of the broadcast license to the defrauded party. The United States Supreme Court concluded at 89 L Ed 2101:

"...we think the court went outside its bounds when it ordered the parties 'to do all things necessary' to secure a return of the license".

It was further noted at 89 L Ed 2102:

"We think that State power is amply respected if it is qualified merely to the extent of requiring it to uphold execution of that portion of its decree requiring a retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable to Commission to deal with new application in connection with the station."

Subsequent holdings from other jurisdictions recognize the separability of the jurisdiction of the state court to deal

with the physical properties of the broadcast station as distinguished from the broadcasting license issued by the Commission to operate such a station. In Big League Broadcasting Company vs. Shedd-Agard Broadcasting, Inc. and Womack, 101 So. 2d 247 (La. App., 1975), the court stated:

"We agree with that portion of the trial judges reasoning recognizing that only the F.C.C. could determine the validity of the license transfer and that state courts are without jurisdiction in that respect. However...the F.C.C.'s jurisdiction is limited merely to control of the license and... there can be a separation of the license from the facility which that license gives one the privilege of operating."

Additionally, in Southern Broadcasting Corporation vs. Carlson, 197 La. 823, 175 So. 587 (1937), the court stated:

"Of course, a state court could not, without approval of the Communication Commission, order a transfer of a license, or of any right granted thereunder."

It is well established that a state court may not interfere with or compel the transfer of a duly issued and approved broadcasting license and respondent's efforts to accomplish this objective by a declaratory judgment were appropriately met and countered by appellants. However, the entry of the Summary Judgment declaring appellants' interest in and to the broadcasting equipment and broadcast license forfeited erroneously allowed respondent to accomplish indirectly what he could not accomplish directly to the prejudice of the appellants. Had respondent pleaded a cause of action for forfeiture of the agreement relating to the equipment and license, appellants'

and would have properly presented their position to the lower Court.

The grant of a summary judgment that exceeded the scope of the pleadings prejudicially denied appellants the opportunity to properly prepare and present their defenses and allowed a disposition of the case on an issue defendants were never called upon to meet. Taylor vs. E. M. Royle Corp. supra.

POINT IV

THE LOWER COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR APPOINTMENT OF A RECEIVER, OR, IN THE ALTERNATIVE, FOR SETTING OF SUPERSEDEAS BOND.

By its Order Appointing Receiver or in the Alternative Setting Supersedeas Bond, under date of March 16, 1978, the lower Court appointed a receiver of the real and personal property and the broadcasting license that constituted the subject matter of the proceeding. Additionally, the order authorized the receiver to sell said property, seek Commission approval for the retransfer of the broadcasting license from Murray Broadcasting Company, Inc. to respondent or a third party purchaser obtained by the receiver and, authorized the receiver to take over the management of radio station KPRQ.

As previously noted, the real property and broadcast equipment originally transferred by O. J. Wilkinson to Seagull are no longer being occupied or utilized by the present broadcasting license operator, Murray Broadcasting Company, Inc. Accordingly, the appointment of a receiver with respect to these properties would be unnecessary and inappropriate. Respondent candidly concedes

that:

"(t)he reason why (respondent) seeks this receivership is that (respondent) has been informed by co-counsel in Washington D.C. specializing in FCC practice that FCC rules do not permit direct transfer of the FCC license to plaintiff, and that such transfer can only be accomplished by means of the appointment of a receiver." (R.215).

Respondent predicated the appointment of a receiver in Rule 66 of the Utah Rules of Civil Procedure, which provides in part:

"(a) receiver may be appointed by the court in which an action is pending or has passed to judgment:

* * *

"(3) After judgment, to carry the judgment into effect."

However, it is clear that with respect to the real property and broadcasting equipment, a receiver was not necessary to carry the judgment into effect because the real property is no longer occupied by appellants and the broadcasting equipment is no longer utilized by appellants. As the same relates to the broadcasting license, a receiver is not necessary to carry the summary judgment of forfeiture into effect because respondent in his own name and on his own behalf, may apply to the Commission for retransfer of the subject broadcasting license without the intervention of a third party receiver. For this reason alone the appointment of a post judgment receiver is not sanctioned by practical necessity or the applicable rules of civil procedure.

Additionally, the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond, far exceeds the scope of the summary judgment of forfeiture in that the same allows an

authorizes the receiver to assume the control and management of radio station KPRQ. There is no arguable premise on which it may be argued that control and management of the radio station itself is necessary to effectuate the summary judgment of forfeiture. Respondent may apply to the Commission for approval of an involuntary transfer of the broadcasting license from Murray Broadcasting Company, Inc. to respondent without the necessity of assuming present control and management of the radio station. The operation of the station is pursuant to Commission rules and regulations and violative conduct by the license holder would render the license subject to revocation by the Commission. See 47 USCA, Section 312. There is nothing in the record before this Court to indicate or imply that continued management of the station by Murray Broadcasting Company, Inc. would jeopardize or impair respondent's position and to now allow respondent the operation and management of the station would far exceed the scope of the summary judgment presently under appeal.

One final observation must be noted with respect to the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond. While it appears that a state court may adjudicate certain issues of private dispute relating to the physical properties of an entity controlled and licensed by the Commission, it is without authority to invalidate an operating license or compel execution against the same. Radio Station WOW, Inc. vs. Johnson, supra.

The accomodation between the power of a state court as against the exclusive jurisdiction of the Commission, was further

defined in RCA Communications, Inc. vs. Patchogue Broadcasting Company, 198 NYS 2d 459, reversed on other grounds at 204 NYS 2d 900, as:

"...an accomodation between a State and Federal authority under which the State courts decree would remain unexecuted until the license transfer is properly accomplished, thus leaving with the State the power to pass upon State issues involved in Federal litigation without intruding on the Federal issues."

It is well established that state court may not interfere with or compel the transfer of a duly issued and approved broadcasting license or authorize execution against the same, and the lower Court improperly intruded into the exclusive jurisdiction of the Commission.

CONCLUSION

Appellants respectfully submit that the lower Court erred in granting summary judgment of forfeiture against appellants, and that the above entitled matter should be remanded to the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, for a full trial on the merits.

Respectfully submitted this 7th day of July, 1978.

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