2001

Gibbons and Reed Company v. City of Ogden, Utah, Utah State Road Commission, Oscar A. Robin, Hardy Scales Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GIBBONS AND REED COMPANY, a Utah corporation,

Plaintiff & Appellant,

vs.

Case No. 14030

CITY OF OGDEN, UTAH, a municipal corporation; UTAH STATE ROAD COMMISSION: OSCAR A. ROBIN; and HARDY SCALES CO., a corporation,

Defendants & Respondents.

BRIEF OF RESPONDENTS ROBIN AND HARDY SCALES CO.

Appeal from a Judgment of the District Court
of Weber County
Honorable Ronald O. Hyde, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF DEFENDANTS-RESPONDENTS ROBIN AND HARDY SCALES COMPANY

NATURE OF THE CASE

These respondents agree with the appellant's statement of the nature of the case.

DISPOSITION IN LOWER COURT

The trial court entered judgment in favor of all defendants and respondents, no cause of action.

RELIEF SOUGHT ON APPEAL

Defendant-Respondents Robin and Hardy Scales Company seek an affirmance of the trial court's judgment that plaintiff has no cause for action against them.

STATEMENT OF FACTS

While the appellant's statement of facts is generally

correct, these respondents must controvert the same in some particulars and it is necessary to supplement the same for a full and fair completeness, all as hereinafter specified. Let us start from the beginning.

The property in question was originally owned by the State of Utah. In 1949 the State Quitclaimed the property to Ogden City, but in its Quitclaim Deed it specifically reserved from the conveyance "all coal, oil, gas, mines, metals, gravel and other minerals of whatsoever kind or nature in the above land," with the right to enter upon the land and remove the same. (Exhibit B to the Pre-Trial Order, R. 355. (Emphasis Supplied.)

Next, in 1965, the Utah State Road Commission obtained from Ogden City the option in question, Exhibit A to the Pre-Trial Order. (R. 353-354). The option is correctly quoted on Pages 3 and 4 of the plaintiff-appellant's brief. The option was never acknowledged or recorded so as to give notice of its existence and contents to others who might become interested in the land.

The Trial Court found (Finding 1, R. 510) on the uncontradicted testimony of Richard N. Griffin, of the State Road Commission staff, that the option agreement was prepared and the wording thereof chosen by the representatives and employees of the Utah State Road Commission.

Richard N. Griffin, the State Road Commission employee who drafted the option agreement, called as a witness by the plaintiff, testified without any contradiction that the "special stipulations" inserted in the option agreement to the effect that the owner will be contacted and essential arrangements made "for each, or any, occupancy and removal of material," that all stipulations regarding work areas "and any other pertinent agreements" shall be made before entry on the property, and, particularly that "the removal of any material coming within the scope of this option must positively be removed to the owner's lines and grades," (Emphasis Supplied) were inserted for the protection of the property owner (R. 585). Whatever the custom of the Road Commission may have been in drafting such options to include a provision that any materials removed shall be strictly to the "owner's lines and grades," in this particular case, the city engineer, with whom Griffin discussed the matter, specifically requested that provision (R. 757, 758), obviously with the idea of of protecting his employer city and its successors in interest.

While Mr. Mike Gibbons, the plaintiff-appellant's officer in charge, discussed the option with Mr. Kimball, Assistant Ogden City Engineer, and received verification of its existence and saw a copy thereof, Mr. Kimball didn't recall even discussing the

quantities that might be removed (R. 787), and after hearing all of the evidence, the Honorable Trial Court found (Finding 3, R. 510) as a fact that the plaintiff had failed to prove by a preponderance of the evidence either that Kimball had any authority from Ogden City to specify or determine the amount of material available under the option, or that Kimball or any other officer of Ogden City agreed, stated or represented that plaintiff would have the right under the option to obtain Four Hundred Ninety Eight Thousand (498,000) cubic yards of materials (as claimed by plaintiff) or any other amount of materials from the site in question. In February of 1966, plaintiff-appellant signed its construction contract (Plaintiff's Exhibit M) with the State Road Commission. As conceded by plaintiff-appellant, the specifications forming a part of the construction contract referred to possible commission-held options to purchase materials and required the contractor, if he desired to obtain material pursuant to the options, to "comply with and fulfill all terms and conditions as may be stipulated in the option. . . . and shall notify the owner of the property of his intent to exercise the option before entering on the property." (Emphasis Supplied.)

There is no evidence in the record that plaintiff-appellant ever exercised or attempted to exercise the option.

In the spring of 1966, as stated by plaintiff-appellant, Ogden City entered into negotiations for the sale of the property to Mr. Oscar A. Robin, who was the president and sole stockholder of Hardy Scales Company.

Mr. Richard F. Reed, a Vice-President of the plaintiff-appellant, testified that in May of 1966 he learned by a telephone call from a local company employee (Mr. William Eccles) that the City was reportedly selling the optioned property (R. 629-630). Reed then called Mr. Kay, of the State Road Commission Staff, who suggested that he check with Hardy Scales. So, as Mr. Reed, testified, he arranged a visit with Clay Barnard, a local representative of Hardy Scales and inquired about the availability of materials. Reed further testified that Barnard told him that they planned on building on the site, but "that he could not give me an answer what could be done. . . . he would have to talk to his boss." (R. 631 & 647.)

Mr. Reed testified that he then attempted to arrange a meeting with Barnard and an architect, Mr. Piers, who was reported to be working on a project for plans for the proposed building, but Mr. Barnard did not come to that meeting. However, Reed indicated that from Mr. Piers he "got the feeling we were going to beat a dead horse on this property so far as Hardy Scales was concerned." (R. 631.)

However, instead of identifying and communicating with Mr. Barnard's "boss" as suggested, Mr. Reed, as he testified, met with the Ogden City Manager and some Counselmen at the Weber Club on May 17, 1966, where, as Reed testified, the Manager, Mr. Hood, told him that the city had made a deal with Hardy Scales and that the property would not be available. The city officials there apparently offered to find substitute materials. (R. 632 & 640). Reed then told the City Officials that there were two routes for the City: (1) The City could break the "lease" (apparently an accidential misnomer; the witness meant by this the deal with Hardy Scales (R. 653-654) and let Gibbons and Reed have the material or (2) the City could find other material (R.633). Reed himself testified that he made no demand for performance of the option by Ogden City (R. 640-641). Mr. Reed said that he made no threat of action on the option because the City, at that meeting undertook to get other materials (R. 641), and no demand was made on the City to produce the materials under the option (R. 645). Reed further testified that as soon as the City authorities told him there were other properties to get material from, his company didn't pursue the matter with Hardy Scales (R. 646-7). This was on May 17th.

On May 20th Mr. Robin came to town and purchased and

paid for the surface rights to the tract in question and the City executed and delivered to him its Warranty Deed conveying the surface rights to the property to "Oscar A. Robin, President of Hardy Scales Company" (Exhibit C to the Pre-Trial Order, R. 356A-357), and Robin, as part of the transaction executed and delivered to the City his covenant and agreement, (Plaintiff's Exhibit D to the Pre-Trial Order, R. 360-362). As both documents show, they were recorded in the office of the County Recorder of Weber County, Utah, on the same day, from which moment, under the law, plaintiff-appellant had notice of the contents of both documents.

The Deed to Robin from the City specifically and excepted and reserved from the property conveyed "all coal, oil, gas, mines, metals, gravel and all other material," and the right to prospect for and remove the same. Mr. Robin testified without contradiction, that it was his intent and purpose, in accordance with an established practice, to acquire ownership of the property personally, with the idea that, if the development proceeded, he would make improvements and then lease the improved property to Hardy Scales, the corporation. The court found that this was the intent of the parties, and that Robin personally became the owner of the property (Finding 5, R. 511).

It should be noted that the testimony of Mr. Reed with

respect to his communications with Clay Barnard were admitted over the objections that there was no proof that Barnard had any authority to speak or act for Mr. Robin, and that the court reserving its ruling. The plaintiff-appellant's statement on Page 9 of its brief that Barnard was "the only person in the State of Utah dealing for Mr. Robin prior to his appearance in Utah on May 19 and 20 to sign the contract," is inaccurate and misleading. And the only evidence in the case is the testimony of Mr. Robin that Barnard was an employee of Hardy Scales in charge of its local manufacturing and sales operation but never had any authority for that company with respect to any real property transaction and never had any authority to represent Robin in any matter and had never previously represented Robin in any matter (R. 720-723, & 727). Further, the architect Piers had no authority to represent Robin in any matters. Robin had never even met him (R. 727).

Further, the uncontradicted testimony of Mr. Robin is that when he acquired the property he had an open mind on the removal of some fill dirt, which could have improved his property. He did hear from Mr. Barnard that a Gibbons and Reed representative had approached him (Barnard), but that Barnard had told him that they had to get in touch with Mr. Robin. However Robin never

received any communications from Gibbons and Reed on the subject (R. 725-728). Upon this testimony and the testimony of Mr. Reed that he never pursued the matter of the option after the City authorities indicated that they would find substitute materials, the Trial Court found that Gibbons and Reed never communicated with Robin to exercise the option or to make arrangements to fix lines and grades for removal of material (R. 511, Finding 6).

While Mr. Robin knew that the City had a contract with the Road Commission concerning the removal of fill his only information concerning the same was received from Ogden City, which drew the COVENANT AND AGREEMENT (Plaintiff's Exhibit D to the Pre-Trial Order, R. 360 et seq.) in which he agreed that he would give the Road Commission first right to purchase fill on the same terms and conditions as the contract in the event he should within One (1) year after the date of his purchase decide to sell fill from the land. There is, however, no evidence that the City or anyone else told him that the contract amounted to anything more than the "first refusal" in the event he should decide to sell. Obviously the City authorities gave him their own interpretation of the option they had signed and that it did not obligate him to sell any fill, as he could fix the lines and grades, and the State or its successors had the burden of

approaching the owner to make all arrangements before anything could be taken. There is nothing in the record to indicate that he had any reason to distrust the adequacy of the information given him by the City Officials with respect to an unrecorded document and which would require him to make an affirmative investigation to ascertain the truth, the whole truth, and nothing but the truth about this unrecorded document. On Page 9 of the brief of plaintiff-appellant it is stated that as a result of the refusal of Mr. Barnard and an architect considering plans for building on the property to let Gibbons and Reed to remove fill (not true, as above noted) "Gibbons and Reed Company was forced to obtain fill material from other sources and incurred increased costs. . . ." It is respectfully submitted that this conclusion of fact is totally inaccurate and contrary to the evidence. The trial court, on the evidence, specifically found that plaintiff's damages were not caused by any breach of contract or any misrepresentation on the part of the defendants or any of them, but were caused and resulted from the misunderstanding and misapprehension of the plaintiff and its representatives with respect to the terms of the option agreement and the effect thereof and the failure of the plaintiff and its representatives to take reasonable and effective steps to exercise the option by notice

thereof to Robin and the negotiation of a essential arrangements for removal of material and the establishment of the owner's lines and grades (Finding 7, R. 512). As indicated, the evidence supports this finding of the Trial Court.

At the conclusion of the evidence, pursuant to Rule 15(b), URCP, defendants Robin and Hardy Scales Company moved the court for an order amending their answer and the Pre-Trial Order to state as additional defense and issue that the option, Exhibit A, was void under the Utah Statute of Frauds, Section 25-5-3, UCA, in that it failed to state the lines and grades for removal, the specific portions of the land and earth which could be removed, or to fix the quantity thereof by any other measure, and hence failed to describe the real property subject thereto on the grounds, contemplated by the Rule, that all of the facts necessary to the determination of such issues had been tried to and were then before the court. The court reserved judgment on the motions. (R. 793 & 796.) The court later concluded that its decision upon the grounds included in its findings and conclusions made it unnecessary to decide the other issues before it, and so it never decided the motions or the issue involved thereunder. (Conclusion of Law 5, R. 513.)

No action was commenced against defendant-respondents

Robin and Hardy Scales Company until plaintiff filed herein its Second Amended Complaint on October 1, 1970, naming them as defendants for the first time. Plaintiff then issued Summons against them and caused it to be served upon them in the State of California on November 20, 1970, (R. 59-66, & 67-72). The claim against Robin and Hardy Scales is set out in the THIRD CLAIM (R. 63-64) of the Second Amended Complaint. No where in plaintiff's pleading does it allege that any of the business done or acts performed upon which it bases its Third Claim were done or performed within the State of Utah, nor does it attempt to allege, even indirectly any other facts bringing its claim within the special scope or provisions of the Utah "Long-Arm" Statute, Section, 78-27-22, UCA, and following.

These defendants interposed as a defense the court's lack of jurisdiction of their persons (R.74). The plaintiff served these defendants with certain Interrogatories (R. 78 & following). These defendants objected thereto upon the ground that the Utah Court had not acquired and did not have jurisdiction of their persons so that they were not before the court, and until they were before the court as parties, they could not be required to answer Interrogatories to parties under Rule 33, URCP. The Honorable Ronald O. Hyde, District Judge, heard and sustained

these objections upon the grounds that the complaint failed to state on its face facts sufficient to invoke the Long-Arm Statute or to bring the defendants within the jurisdiction of process of the Utah Courts when served in the State of California (R. 104).

Thereafter plaintiff moved the Trial Court to determine before trial the issues of personal jurisdiction of Robin and Hardy Scales Company as raised by their first and second defenses (R. 74-75) attacking the sufficiency of service of summons outside the State of Utah and the court's jurisdiction of these California residents (R. 118-119). At the hearing on plaintiff's said motions, on January 12, 1972, these defendants moved for a dismissal for lack of jurisdiction (Court Minutes, R. 152). after extensive arguments and briefing before the Honorable Calvin Gould, District Judge, in which it was submitted, among other things, that the ruling of the Honorable Judge Hyde determined for the purpose of this action that the Utah District Court had not acquired jurisdiction, Judge Gould denied these defendants' motions for dismissal, but in his order specified that the question of in personam jurisdiction over these defendants was to be determined at the trial on the merits.

The question of jurisdiction over their persons and the

question of the validity of the option agreement under the Utah Statute of Frauds were reserved in the court's Pre-Trial Orders and the amendments thereof.

As above indicated, the Honorable Trial Judge who heard the case on the merits, having ruled that the option was void for indefiniteness and that plaintiff had never effectively exercised the same, and that these defendants had never interfered with performance thereof, found it unnecessary to rule on these issues, on the ground that they were rendered moot by the court's decision on the merits.

ARGUMENT

I

THE OPTION AGREEMENT MUST BE STRICTLY CONSTRUED AGAINST THE OPTIONEE-DRAFTER THEREOF.

It is elementary and general law, followed in Utah, that an option agreement for the purchase of land or any interest therein is to be construed strictly against the optionee and liberally in favor of the optionor, and this is particularly true where the agreement is prepared by the optionee, as in the case at bar. 91 C.J.S. VENDOR AND PURCHASER, Section 8; Jensen v. Anderson, 24 Utah 2nd 191, 468 P. 2nd 366; RESTATEMENT OF THE LAW: CONTRACTS, Section 236(d); 17A C.J.S. CONTRACTS, Section

324, Note 98; and Seal v. Tayco, Inc., 16 Utah 2nd 323, 400 P. 2nd 503.

Accordingly, the "option" before the court must be construed most strictly against the State Road Commission and its contractor, Gibbons and Reed Company.

II

THE OPTION AGREEMENT UNDER WHICH PLAINTIFF CLAIMS IS VOID AND UNENFORCEABLE, (A) FOR LACK OF CERTAINTY AS TO THE SUBJECT MATTER, AND (B) FOR FAILURE TO MEET THE REQUIREMENTS OF THE UTAH STATUTE OF FRAUDS.

Upon inspection of the alleged "option" it is at once apparent (as it was to the learned Trial Court) that there is nothing contained in the option which fixes either the quantity of material to be taken from the property or the location either horizontally or vertically, of the portion of the overall property from which such material, if any, may be taken. It is no more than an agreement to the effect that the parties will thereafter agree upon the quantity of materials and the location within the three-dimensional boundaries of the Twenty (20) acre tract from which such materials, if any, may be taken.

Paragraph One provides a specific price per yard for materials which may be taken "if and when this option is

exercised." (Emphasis Supplied.) That an affirmative act manifesting the optionee's exercise is made clear by the "special provisions" and by a provision of the plaintiff's Exhibit M (the plaintiff's construction contract) which requires that if the contractor desires to obtain materials thereunder he shall "notify the owner of the property of his intent to exercise the option before entering on the property." And in Paragraph Four of the "option," consisting of special provisions, specially typed into the Road Commission's mimeographed form, it is provided that "This option is for the purpose of establishing the price" at which materials will be available to the commission. (Emphasis Supplied.) It is also provided that "it (the option)" shall also cover special conditions affecting the availability and removal. It shall not be construed to mean that the Road Commission shall have a sole or prior right to all the materials on the above described property. . . .The owner or his authorized representative will be contacted and essential arrangements for each, OR ANY, occupation and removal of materials. . . .The removal of any material coming within the scope of this option must positively be removed to the owner's lines and grades." (Emphasis Supplied.) Of course the word "lines" refers to the horizontal boundary lines of the area from which the owner may permit

materials to be taken, and the word "grades" refers to the vertical boundaries, or distance below the surface below which no materials may be taken. And these words, as the Road Commission's official, Mr. Griffin, testified, were intended to protect the interests of the owner.

Inasmuch as the option specifically declares that it does not mean that the optionee has a right to all materials, down to the center of the earth, the question immediately arises as to how much material is covered by the option. The only answer given to this is the special provision that the owner will be contacted and essential arrangements made for each or any removal of materials and that stipulations regarding work areas, residual condition of the property "and any other pertinent agreements" shall be made before entry for removal of building material, and that the removal of the material must positively be to the owner's lines and grades. It is submitted that it is, under the circumstances, really too clear for argument that the location and the quantity of materials to be removed was, by the terms of the contract, left to the absolute and uncontrolled discretion of the owner.

The plaintiff-appellant's argument that the court should construe the contract as if it provided for the removal of

a "reasonable amount" of materials, to be fixed by the Court, is clearly invalid and unsupportable. It invites the Court to substitute a new and different contract for the one written by the parties, by striking therefrom the clear and unequivocal provision that the removal of any material must positively be to the owner's lines and grades, and to substitute for it a provision to the effect that the material to be removed "shall be in a reasonable amount to be fixed by the court." Can the Court imagine that if such a change in wording had been suggested to the parties when the option was being drawn that they would have accepted the suggested substitute? Of course not!

And the evidence is that the requirement for removal to the owner's lines and grades was inserted, not only pursuant to custom, but because of a demand by the City Engineer, Mr. Kelly, for the protection of the property owner. It clearly expressed the intention of the parties. As this court has had more than one occasion to observe, it is not the function of the Court to rewrite the contracts of the parties who come before it. Valcarce v. Bitters, 12 Utah 2nd 61, 362 P. 2nd 427.

In the second place, even if the argument of plaintiff-appellant as to a "reasonable quantity" could be adopted, it still leaves unresolved the equally insurmountable problem of

determining the location and the area of the particular portion or portions of the Twenty (20) acre tract from which Gibbons and Reed would be permitted to take materials if and when the quantities of materials have been fixed by the owner.

It is abundantly clear that the Honorable Trial Court was correct in concluding that the porported option is void for uncertainty, as there are no standards whatsoever by which the intention of the parties as to the quantity or place of removal can be determined, both of these necessary factors being left for future determination by the owner at his uncontrolled discretion or whim. See 17 CJS Contracts, Section 36(2)e and 17 Am Jur. 2nd, Contracts, Section 81. See also the annotation at 21 ALR 2nd 1066, Section 5. And it is the accepted rule in Utah that a contract is unenforceable where the particular portion of a larger tract of land, which portion is to be the subject of a contract, is not definitely ascertainable, and that a contract is equally void and unenforceable where the quantity of subject matter cannot be definitely ascertained from the contract. Pitcher v. Lauritzen, 18 Utah 2nd 368, 423 Pac. 2nd 491, and Owyhee, Inc., v. Robins Marco Polo, 17 Utah 2nd 181, 407 Pac. 2nd 565. See also Davis v. Flagstaff Silver Mining Company, 2 Utah 74, 92, holding a contract unenforceable where it binds one party, but not

the other party, who could ignore it at his pleasure.

The so-called option is also void and unenforceable because it fails to satisfy the requirements of Utah's Statute of Frauds, Sections 25-5-1 and 25-5-3, UCA.

It is established in Utah, as elsewhere, that an option to purchase is an interest in real estate and within the Statute of Frauds. Coombs v. Ouzounian, 24 Utah 2nd 39, 465 Pac. 2nd 356, and Knight v. Chamberlain, 6 Utah 2nd 394, 315 Pac. 2nd 273, 275.

Perhaps it should also be noted that the right purported to be granted in the option to remove soil, sand and gravel from the city's land is an interest in real property, a "profit a prendre," and within the scope of the Statute of Frauds. Ballentine's Law Dictionary, 3rd Edition, Page 1005; 72 Am Jur 2nd, Statute of Frauds, Section 51; and 34 Words & Phrases, Permanent Edition, Profit a prendre, Page 441. It is the established law in Utah, as elsewhere, that a written memorandum of a contract for the sale of any interest in lands, in order to satisfy the Statute of Frauds, must contain "a definite agreement as to the extent and boundaries of the property" subject to the contract. (Emphasis Supplied). See Birdzell v. Utah Oil Refining Company, 121 Utah

412, 242 P. 2nd 578, approved and followed in a damage action based on the alleged contract in Baugh v. Logan City, 27 Utah 2nd 291, 495 P. 2nd 814. In Birdzell the court held that a memorandum of an alleged lease of land was void because it did not describe specifically and definitely the precise portion of the leasor's lands which was to be the subject of the lease. In the case at bar it is clear that the material to be removed was not all the land owned by the City, to the center of the earth, and the uncertainty is therefore three-dimensional rather than merely two dimensional as to the description.

If there were any previous doubts as to this proposition it was laid to rest by the very recent decision of this Honorable Court in Davison v. Robins, 30 Utah 2nd 338, 517 P. 2nd 1026. In that case the seller signed a contract on a prepared printed short form which recited that the legal description was to be prepared by a licensed engineer after survey, and that "Land being sold consists of approximately One Hundred Fifty (150) acres. . . ." It also provided that "property in question is briefly described in preliminary title report number U-102434. . . ., less any acreage reserved by seller. Offer contingent upon buyer's approval of net acreage

description. . . ." (Emphasis by the Court.) This Court ruled that the description of the subject matter was insufficient to constitute a binding and enforceable contract, as the seller had a right to reserve any acreage out of the described tract, and then the contract would be contingent upon the buyer's willingness to accept the acreage which the vendor subsequently determined he was willing to sell. The Court distinquished an earlier case where the vendee had been granted power to make the determination of the land which he wished to buy. The case at bar is clearly subject to the rule of Davison, because here, as in Davison, it is the vendor (city and its successors) which has the right to determine the lines and grades, that is, the location, portion and quantity of the land affected thereby. It is respectfully submitted that the purported option agreement is totally void and ineffective for lack of sufficient certainty to be enforceable and for failure to specify the location and quantity of land and material to be taken as required by the Statute of Frauds, and that the careful decision and judgment of the Honorable Trial Court should be affirmed.

III

THE OPTION, EVEN IF VALID, WAS NEVER EFFECTIVELY EXERCISED AND NEVER BECAME A BINDING CONTRACT TO SELL MATERIALS FROM THE LANDS.

It is, of course, an elementary rule of law, followed in Utah, that while an option to purchase, if based upon a sufficient consideration, binds the Grantor, it is not a contract of purchase until the option is accepted and performed, but is simply a contract granting the holder the privilege of forming a binding contract of sale and purchase by proper acceptance in time. Tilton v. Sterling Coal & Coke Company, 28 Utah 173, 77 P. 758; Williams v. Espey, 11 Utah 2nd 317, 358 P. 2nd, 903. The trial court found (Finding 7, R. 512) that plaintiff's damages were not caused by any breach of contract or misrepresentations on the part of any of the defendants, but were caused and naturally resulted from a misunderstanding and misapprehension of the plaintiff and its representatives with respect to the terms of the option agreement and the effect thereof, and the failure of the plaintiff and its representatives to take reasonable and effective steps to exercise the option by notice thereof to defendant Robin and the negotiation of essential arrangements for the occupancy of the property, removal of materials and the

establishment of the owner's lines and grades to which the materials might be removed. This finding of the Trial Court, is amply supported in the evidence.

Of course, the appellant and its representatives, are bound to know the established law of contract and operate within its purview just as much as Mr. Robin, or the City Counselmen or any other citizen, but notwithstanding that fact and notwithstandin the clear statement of the purported option that materials, if any, must be removed positively to the owner's lines and grades, it merely made inquiries of unauthorized personnel in the City Engineering Department and wishfully thought that they had an oral resolution of the uncertainties as to quantity (but not as to location) of the materials wished for.

The burden, of course, was on plaintiff to prove all of the elements of its claimed contract, but it produced no evidence that it ever exercised the option by notice as required by the option and by its contract with the Road Commission, Exhibit M. Plaintiff-appellant argues in its brief that the option was exercised on May 17th at the meeting of its Vice-President, Richar Reed, with the Ogden City Manager and some Counselmen. However, as hereinbefore noted, Reed's own testimony is only to the effect that the manager confirmed that a deal had been made to sell the

property to Hardy Scales, and offered to find substitute materials. Reed testified that then, instead of demanding performance of the option, he accepted the City's offer to find other material. In effect it was an accord and satisfaction of any claim plaintiff might have had under the purported option, and a release of rights under the option rather than an exercise thereof.

Further, Mr. Reed testified that after receiving the City's proposal to look for other sources, nothing was done by Gibbons and Reed to pursue Hardy Scales or Mr. Robin any further. These matters, be it remembered, took place Three (3) days before May 20th when the sale of the surface rights in the land to Mr. Robin was consummated and the Deed to him, with his agreement to give the Road Commission first refusal as to fill materials on the land, were recorded, giving notice to plaintiff of Robin's willingness to sell some fill materials if the option were exercised.

And it should be noted in passing that nothing done by any of the defendants in any way hindered or prevented plaintiff from exercising the option at or after the time of this meeting by saying or writing to the City and to Robin, as required by the option and construction contract that the company exercise the

option and request that the owner fix the lines and grades, which would determine the quantities, to be removed. Notwithstanding the rumors it heard about a deal with Hardy Scales, it could still have complied with the necessary legal formality of notifying the owner and/or the owner's successor that the option was exercised. Whether through negligence, ignorance or inattention it failed to do so and as a result at best had an uncertain option and not a contract formed by the required acceptance of the option-offer. And it has no one to blame but itself for this neglect. Even if the conveyance to Robin were a repudiation by the City, there is no excuse whatsoever for failing to communicate with Robin and notify him, as the successor with notice of the alleged option, that the existing option on the land purchased is exercised.

IV

NEITHER ROBIN NOR HARDY SCALES COMPANY IS LIABLE TO PLAINTIFF FOR TORTIOUS INTERFERENCE WITH THE ALLEGED OPTION AGREEMENT.

The Gravamen of plaintiff-appellant's claim against Robin and Hardy Scales is set out in "plaintiff's claims" in the Pre-Trial Order as drafted by counsel for plaintiff-appellant, on Page 3 thereof:

> Defendants Robin and Hardy Scales intentionally and willfully interferred with plaintiff's rights under the option agreement, when, with knowledge of its existence, they induced defendant Ogden City to sell them the subject property under a contract by the terms of which said defendants were obligated only to offer road building materials to plaintiff if they decided to sell such materials.

However, the UNCONTROVERTED FACTS established by the Pre-Trial Order (Paragraphs 3.d. & 3.e.) show that when Ogden City acquired title the State of Utah reserved "all coal, oil, gas, mines, metals, gravel and all other minerals," and the right to prospect for and remove the same. (Emphasis Supplied.) And the Deed of May 20, 1966, from the City to Mr. Robin accepted and reserved "all coal, oil, gas, mines, metals, gravel and all other materials" and the right to prospect for and remove the same. (Emphasis Supplied.)

It is further uncontroverted that, so far as known, the land in question consists of fine and coarse sand with some gravel. Sand, of course, is basically the same material as gravel, the only distinction being that the sand comes in substantially smaller units or particles. Ballentine's Law Dictionary, 3rd Edition, defines "gravel" as "a mixture of sand and small rocks." (Page 534.) It also defines "sand" as "A species of stone. . . . Disintegrated rock." (Page 1138.) And Webster's Seventh New

Collegiate Dictionary, 1970 Edition, defines "sand" as "a loose granular material resulting from the disintegration of rock that is used in mortar, glasss, abrasives, and foundry molds." Again Ballentine's Law Dictionary, 3rd Edition, says of "mineral": "Broadly, a natural inorganic substance forming a part of the soil or crust of the earth." It supplements its definition with a quotation from Jeffrey v. Spruce - Boone Land Company (West Virginia) 164 SE 292 as follows "In its ordinary and common meaning, the word is a comprehensive one and includes every description of stone and rock deposit, whether containing metallic or nonmetallic substances; and where minerals are reserved in a conveyance, if the ordinary meaning of the word is to be changed or restricted, the language used must be reasonably clear to show that intent." There is, of course, nothing in these conveyances to show that the word was used in any restrictive sense, but on the contrary the language clearly indicates and intent to use it in the broadest possible sense, as it is explained that the substances excepted were minerals or materials "of whatsoever kind or nature."

Accordingly, it is clear that Mr. Robin bought only surface rights and that all substances beneath the surface were reserved to the State of Utah and Ogden City never acquired title

thereto and never conveyed title thereto to Mr. Robin. And the option is indeed reduced to an absuridty: It purports to be an agreement by the City to sell to a State Agency materials which the State reserved and still owns! If Gibbons and Reed had paid attention to the public records, with which they were charged with knowledge, they would have realized that neither Ogden City nor defendants Robin nor Hardy Scales Company owned any interest in the fill materials in which plaintiffs were interested, no matter what they might assume. And it must be remembered that defendants Robin and Hardy Scales Company never signed any contract to sell these materials to the Road Commission or its contractor; if they are chargeable with an contractual obligation it is because they acquired the subject of the contract with knowledge of the encumbrance - and now it is clear that they never did acquire title to the subject of the contract, that is, to the sand and gravel constituting the fill material. If Mr. Robin had acquired it he would have been willing to sell the same in reasonable quantities, as he testified, but he was never approached or asked to do so. Nor did his purchase of the material make it impossible for Ogden City to perform: after Robin had purchased the surface rights, the City was in as good a position as it ever was to sell the subsurface material. Robin had no responsibility whatsoever

for plaintiff's failure to check the record title to the land and so learn that the State, and not Ogden City or Robin, was the owner of the subsurface material it wanted.

In the light of the uncontroverted facts the Trial Court's findings to the effect that plaintiff's damages, if any, was not caused by any breach of contract or any misrepresentation by defendants, but was caused by the misapprehension and misunderstanding of plainiff's representatives, who never bothered to ascertain the facts behind or the legal meaning of the "option," is eminently correct.

As above outlined, Mr. Robin reasonably and justifiably relied upon the representations of the City authorities regarding the contents and effect of the outstanding option. Indeed, the uncontradicted evidence discloses, and the Trial Court found, tha the information they furnished Robin upon the alleged contract was accurate, and that the so-called option merely fixed the price at which materials, if any, would be sold, and did not bin the City or its successors to sell any materials. And even if Mr. Robin could be held to be negligent in proceeding to buy the property without further inquiry as to details, he would not be liable to the plaintiff under the principles on which the plaint relies. The plaintiff cites and relies upon 86 CJS TORTS Sectic 43 & 44. And yet that authority itself states positively that

"Mere negligent interference with a contract. . . . will not subject a person to liability. . . . Similarly, one does not induce another to commit a breach of contract with a third person when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person. . . ." Ibid., Section 44, Notes 4 & 7.

The same work states:

> "In order that the interference may constitute a tort, the contract must be valid, and contracts void for illegallity, or by reason of repugnance to public policy, have been held not to be within the rule extending protection against interference with existing contractual rights." Ibid., Notes 13 & 14.

In Soter v. Wasatch Development Corporation, 21 Utah 2nd 224, 443 P. 2nd 663, this Honorable Court adopted the general rule as to the necessary elements of a cause of action for interference with a contract. The court said:

> "In order to establish a right to recover on such a cause of action the plaintiffs would have to show that the defendants, without justification, by some wrongful and malicious act, interferred with the plaintiffs' right of contract and that actual damage resulted. (Emphasis Supplied.)

Here there is no allegation and no proof that either Robin or Hardy Scales acted wrongfully or maliciously; on the contrary all of the evidence is that they acted in entire good

faith and with the intention of according to the Road Commission and its successors any and all rights they might have. Even if it should be considered that malice should be inferred from an intentional interference with a contract right without justification or excuse, here there is no proof whatever that Mr. Robin or his company intended by the purchase of an interest in the land to interfere with the option contract. The evidence is to the contrary, and the plaintiff caused its own damages by walking away from the option, even when told by Clay Barnard that plaintiff should see his boss (Mr. Robin) about materials.

Neither is there sufficient, or any evidence that Robin acted with knowledge that there was an effective option contract. In order to charge Robin with a tort, it must be proven that he had actual knowledge of the contract, and the proof is only that he had knowledge there was some contract, relating to the materials, and that he should give the Commission the first refusal on any materials sold.

Finally, as the Trial Court properly concluded, there was no valid contract in existence and no rights based thereon with which Mr. Robin could have interferred. And Robin never acquired title to the materials in question and hence he could not have sold them even if he had been asked to sell them and had

wanted to sell them. For him to sell them would have been a conversion of property reserved and belonging to the State of Utah.

And, of course, equity cannot and will not impose upon Mr. Robin the obligation to sell materials he never contracted to sell and which he never owned or acquired. It is respectfully submitted that under the evidence and the law the plaintiff has failed to prove a valid option contract for the sale of the materials, that the obligations of such contract were imposed upon Robin or Hardy Scales, that they or either of them breached the contract, or that they or either of them induced Ogden City to breach the contract.

It is respectfully submitted that the Findings of Fact, Conclusions of Law and Judgment in favor of defendants, on the merits, is correct and should be affirmed.

V

THE TRIAL COURT IN UTAH NEVER ACQUIRED JURISDICTION OVER ROBINS AND HARDY SCALES COMPANY.

The summons upon defendant-respondents Robin and Hardy Scales Company in this case was served upon them outside the territorial limits of the State of Utah and in the State of California. Plaintiff claims personal jurisdiction over them by

virtue of Utah's "Long-Arm Statute," Sections 78-27-22, and following, UCA. No where in its complaint against these defendants does the plaintiff plead or attempt to plead that these defendants did any of the acts enumerated in the Statute by which they would submit themselves to the jurisdiction of the courts of Utah, as set out in Section 78-27-24, UCA, notwithstanding the provision of Section 78-27-26, UCA, that "Only claims arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this act." In other words, the plaintiff has failed to plead the facts which it apparently claims would, under the law, vest the Utah Trial Court with the extraordinary power and authority of obtaining personal jurisdiction by service of process upon a defendant outside the State of Utah and within territory over which the Utah Court has no jurisdiction.

Appearing specially, these defendants objected to plaintiff's Interrogatories propounded to them as parties defenda upon the ground that, without pleading the jurisdictional facts justifying extraterritorial service of process, the service was a nullity, and the court had no jurisdiction over the persons of these defendants to require answer to the interrogatories. Judge Hyde sustained these objections upon the grounds stated (R. 104).

These defendants then raised the same defenses of invalid service of summons and of lack of jurisdiction over their persons in the first two defenses set out in their answer. Of course these defenses were not waived because joined with other defenses in the action. Rule 12(b), URCP.

On plaintiff's motion to determine these defenses in advance of the other issues, Judge Gould, in effect reversing his fellow Judge Hyde, overruled these defenses and denied the defendants motions for dismissal for lack of jurisdiction of the person, specifying however that this question was reserved and should be determined at the trial on the merits. As hereinbefore indicated, it never was fully determined.

Generally service of process outside of the territorial jurisdiction of the issuing court is a nullity, for the process of a court ordinarily has no force outside its jurisdiction, and the sovereignty of the state itself does not embrace authority to control the manner of executing process to the extent of making lawful any service against a person without the jurisdiction of the state's court as a basis for a personal judgment. 21 CJS COURTS, Section 83, Page 125, & Section 91.

It is axiomatic that where the jurisdiction of a court is limited in any way, the burden is upon the one invoking the

jurisdiction to plead and to prove the facts which will bring the case within the limits. This is true, for instance of Federal Courts (32 Am Jur 2nd FEDERAL PRACTICE, Section 168; and McNutt v. General Motors Acceptance Corporation, 298 U.S. 178, 80 L.Ed. 1135) and in the City Courts of the State of Utah (Hardy v. Meadows, 71 Utah 255, 264, P. 968, and Mathison v. Poultry & Stock Mineral Mining Company, 85 Utah 74, 38 P. 2nd 741).

As indicated, it is also axiomatic that the jurisdiction of a State Court is limited to the state boundary, absent special circumstances which might extend that jurisdiction into another state. Accordingly, as the Long-Arm Statute under certain particularized and limited circumstances specified in the act extends the authority of the court's process beyond the place where it has general jurisdiction, the burden is on the plaintiff here to plead in its complaint (which it has not done), and to prove that these defendants did acts within the State of Utah which bring them within the limited purview of the Long-Arm Statute. McKanna v. Edgar (1965, Texas) 388 SW 2nd 927; Taylor v. Portland Paramount Corporation (CA 9th) 383 F. 2nd 634; and Lebensfeld v. Tuch, 252 NYS 2nd 594.

It is respectfully submitted that the order of Judge

Hyde, ruling that the service of summons upon these defendants in California without pleading the facts bringing the case within the Long-Arm Statute was void and ineffective and that the Court had no jurisdiction over the persons of these defendants, was correct and established the law of the case so far as the District Court is concerned, and that it was error for his brother, Judge Gould, thereafter effectively to overrule and set aside the decision of Judge Hyde (Peterson v. Peterson, (December 27, 1974) _____ Utah _____, 530 P. 2nd 821).

And to compel these defendants, over whom the court actually had no jurisdiction, as above demonstrated, to go to the great trouble and expense of coming to Utah to try issues with respect to which they were not before the court, and then to defend an appeal upon the Trial Court's decision of those issues, thus burdening the courts with unnecessary and ineffective proceedings, was even greater error, which should be corrected.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below dismissing plaintiff's action as to these defendants should be affirmed, and/or should be extended

to dismiss the action for lack of jurisdiction over these defendants personally.

Respectfully submitted,

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