

2001

Luther H. Thomas v. Glen Peterson : Brief of Respondent

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY
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IN THE SUPREME COURT

OF THE STATE OF UTAH

LUTHER H. THOMAS,

Plaintiff-Respondent,

vs.

GLEN PETERSON,

Defendant-Appellant.

14034
CASE NO. 13547

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE SEVENTH
DISTRICT COURT FOR EMERY COUNTY
THE HONORABLE EDWARD SHEYA, JUSTICE

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FILED
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Clerk, Supreme Court, Utah

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I N T H E S U P R E M E C O U R T
O F T H E S T A T E O F U T A H

LUTHER H. THOMAS,

Plaintiff-Respondent,

CASE NO. 13547

VS .

GLEN PETERSON,

Defendant-Appellant.

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action to forfeit and terminate the interest of the Defendant Joe's Valley, Inc. in and to the property known as Joe's Valley Marina by virtue of a sales agreement between Plaintiff and said Defendant, containing title retaining and forfeiture provisions and to quiet title to said property as against persons claiming through the Defendant Joe's Valley, Inc., including the Defendant Glen Peterson.

DISPOSITION IN LOWER COURT

The lower Court held that the interest of the Defendant Joe's Valley, Inc., in the property known as Joe's Valley Marina, acquired by reason of the sales agreement referred to repeatedly herein as Plaintiff's Exhibit No. 2, was forfeited and terminated and that all persons claiming by and through said Defendant, including the Defendant Glen Peterson had no right, title or interest therein and declared that Plaintiff was the owner thereof.

RELIEF SOUGHT ON APPEAL

Plaintiff, seeks to affirm the decision of the lower Court.

STATEMENT OF FACTS

Plaintiff does not agree with Appellant's Statement of Facts and herein recites said facts as he sees them. The specific differences regarding said facts are largely set out in Plaintiff's Argument No. V. Since the pages of the reporter's transcript and the record contain duplicate numbers, the pages of the reporters transcrip will be referred to herein by the designation "T" and the pages of the record by the designation "R"

Plaintiff-Respondent, Luther H. Thomas, an unsophisticated individual (He said that he had no knowledge of how to form a corporation and didn't know what an incorporator was although he was listed as one /T 42 & 43/. He referred to the Corporate Charter as it first set of By-Laws /T 101, 102, 110/ -- Counsel for Defendant was able to confuse him regarding his status as owner of the assets of the Marina vs. his status as the owner of stock of the corporation /T 46, 47, 48, 53, 64 & 65/) built the property known as Joe's Valley Marina (distinguished from Joe's Valley Marina, Inc., a corporation which later changed its name to Joe's Valley, Inc.) from scratch from his own savings (T 6) and with monies borrowed from his sister-in-law and her husband, the Falsones (T 23 & 66).

Because of his failing health (T 5 & 6), he wished to dispose of the Marina and agreed to sell it to a group of 11 men (T 7 & 8) who intended to operate it and other properties (a coal mine and concrete batch plant /T 19 & through a corporation which they then formed for that purpose --Joe's Valley Marina, Inc. (T 7) They apparently also intended to promote a public stock offering (T 62). Plaintiff

testified that he entered into a pre-incorporation agreement with those same men (T 7 & 8) which was later incorporated into the agreement between Plaintiff and the corporation, referred to in the transcript as Plaintiff's Exhibit No. 2, the admissability of which was the subject of much discussion at the trial. That agreement was signed by Julian R. Taylor, the President of the corporation from the time of its inception and the person whom all parties testified initiated or caused almost all of the corporate acts (he was the President from the beginning -- he carried most of the corporate papers in his briefcase and he obtained the services of the corporation attorney and accountant and dealt with them without the presence or advice of other members of the corporation. /T 12, 13, 17, 39, 44, 71, 73, 91/)

The execution of said agreement (Ex 2) was admitted by the Defendant Joe's Valley, Inc., the corporation that executed it, but was denied for lack of knowledge or information by the Defendant Glen Peterson. (R 52) The evidence was clear that Plaintiff had the entire interest in the Marina property prior to his entanglement with the

promoters of Joe's Valley, Inc. (T 45 & 47) and there was no evidence of Plaintiff's alienation of that interest other than by that agreement. The agreement was admitted in evidence by the Court and the Court specifically found, both in its Memorandum Decision and in its Findings of Fact (T 100, 101, 104 & 105), that it was the agreement of the Plaintiff and the Defendant Joe's Valley, Inc. The agreement (Ex. 2) provided for the sale of the Marina property for various considerations therein recited, including an agreement to pay the Plaintiff's debt to the Falsones in the sum of \$20,000.00 plus accrued interest, and for the immediate transfer without any kind of record encumbrance of the "use permit" which is the license agreement of the U. S. Forest Service to use the property in question, and can fairly be described as the cornerstone of the Marina property. The agreement further contained title retaining provisions and alternative forfeiture provisions in the event of default (Ex. 2).

Defendant, Joe's Valley, Inc. almost fully failed to perform said agreement (T 175 & 177) and the Plaintiff received no consideration for it. He eventually began the

instant action to declare the interest of the Defendant Joe's Valley, Inc. and all those claiming by or through it, including the Defendant Glen Peterson, forfeited and terminated and to regain possession of the Marina property (R1-12).

The Defendant Glen Peterson, who describes himself as a "promoter" (T 116) early in 1973, together with one Dave Parsons, sought to obtain an exchange of stock of Joe's Valley, Inc. for the stock of a corporation called Omega Silver Corporation (T 117, 120 - 121). In that connection he further attempted to obtain agreements to satisfy the debts of the Thomases and Falsones by paying them with Omega Silver Stock (T 121, 128). An agreement was apparently reached between Omega Silver Corporation and Joe's Valley, Inc. which was later abandoned or rescinded when an attorney for one of them pointed out a flaw in their scheme to sell stock to the public. At the time of the trial, less than one year later, the Defendant Peterson testified that Omega Silver Corporation was "pretty much defunct". (T 135) In connection with their efforts on behalf of Omega Silver Corporation,

Peterson and Parsons had many contacts with certain of the officers and directors of Joe's Valley, Inc., with the Plaintiff Thomas and with the Falsones, (T 120-130) as a result, of which they had full knowledge of the agreement between the Plaintiff Thomas and the Defendant Joe's Valley, Inc. They or the Defendant Glen Peterson, whose knowledge is pertinent hereto, were also aware that the agreement was in default because of the Defendant Joe's Valley, Inc.'s almost total failure to perform including their failure to pay the Falsones as they had agreed (T 130-131). In that connection Glen Peterson was advised in a meeting with this writer and the Falsones shortly before he claimed to have entered into the agreement with the defendant Joe's Valley, Inc. on which his claim herein is predicated, that it would be pointless for the Falsones to deal with them (Omega) unless provisions were made to pay the Thomases (which provisions had not been made) because absent such provision, the Thomases would take the Marina property back in accordance with their title retaining contract. He was further advised that the Thomases intended to wait until the failure of the September 1st payment to bring their action. (T130 - 131)

In that state of affairs, Defendant Peterson acting this time for himself personally, went to three of the Twelve Directors (By-Laws of Joe's Valley, Inc., Plaintiff's Exhibit 4, Article III, Section 1) and obtained an agreement to lease with an option to buy, the Marina property. (Ex. 10).

The agreement, a typical promoter designed contract, provided for a rent of 20% of the net income from the operation of the Marina. There was no undertaking to operate the Marina in accordance with any specified standard, or at all. The lease further provided that it was entered into subject to the written approval of the U. S. Department of Agriculture, Forest Service (Ex. 10), which approval was never obtained. (T 138)

Note that at the time three of twelve Directors of the Defendant Joe's Valley, Inc. entered into that Agreement, they were in default -- knew that the Marina property would be re-taken from them by the Thomases and therefore had nothing to lose and hopefully something to gain by acquiescing in the proposal of Peterson. Thereafter, one of those Directors, Robert Carnivali, who is also the Secretary-Treasurer of the corporation was able to locate almost no

records (see page 89 where he first denied knowledge of a notice of intent to Dissolve the Defendant Joe's Valley, Inc., filed prior to the execution of the Lease Agreement with Peterson and then when his signature on the Notice was pointed out to him, acknowledged that he had signed said Notice) or recall any act of the corporation (T 71, 75, 90) other than that transaction with the Defendant Peterson about which he had a clear recollection. He also acknowledged the reimbursement by Peterson for some expenses he claimed he had assumed just a few days before trial (T 96).

In May 1974, just prior to the onset of the 1974 marina season, Plaintiff brought a Motion for Summary Judgment. At the Hearing for said Motion, parties urged upon the Court the urgency as to time of determination as to who should have possession of the Marina property. The Court while denying the Motion for Summary Judgment offered and proposed a trial setting approximately 2-1/2 weeks hence, although no Notice of Readiness for Trial had been filed. All parties agreed and the matter was heard at that time.

At the trial, Plaintiff simply subpoenaed the Secretary-Treasurer of the corporation and his books and

records without benefit of a prior examination of records
or a prior conversation or deposition of the Secretary-Treasurer.

ARGUMENT

POINT I

PLAINTIFF'S TITLE RETAINING CONTRACT IS ENFORCEABLE
AGAINST THE DEFENDANT PETERSON BECAUSE HE HAD
PERSONAL KNOWLEDGE OF IT WHEN HE ACQUIRED THE
LEASE THROUGH WHICH HE NOW CLAIMS.

There is apparently no question but that there
was no performance by Joe's Valley, Inc. of its agreement
(T 175-177) and that Plaintiff was entitled to forfeit and
terminate the agreement and as between it and said Defendant,
regain possession and title to the Marina property. The
question is only whether the Defendant Peterson obtained an
interest that for some reason survived that forfeiture and
termination. This is the question argued extensively on
Plaintiff's Memorandum in Support thereof (R 87-92), and
the only real question in the lawsuit. The rest are in
reality afterthoughts thrown in, in a specious attempt to

either confuse the trial Court or avoid its decision.

Plaintiff admits that he did not file a copy of his Security Agreement with the Secretary of State as provided in UCH 70A-9-401 (1) (D) and as such (assuming the UCC is applicable) had only an unperfected Security Interest.

Plaintiff contends first that the Forest Service Use Permit is an interest in real property as set forth in UCA 70A-9-104 which provides:

"This Chapter does not apply:

(a--i) - not applicable

(j) except to the extent that provision is made for fixtures in section 70A-9-313, to the creation or transfer of an interest in or lien on real estate including a lease or rents thereunder;--"

Plaintiff points out that the instrument through which Defendant Peterson claims, is styled a "Lease" and describes a parcel of land in the North half of Section 6, Township 18 South, Range 6 East, (Ex. 9) etc. Plaintiff admittedly cannot find a case characterizing the application of that Section of UCC to a "use permit" and is therefore confined to a naked argument that the essential nature of

a "use permit" is an interest in real property that strongly resembles a lease of such real property. The permit itself (Ex. 9) provides:

"Permission is hereby granted -- to use subject to the following conditions set out below, the following conditions set out below, the following described lands and improvements for the period of 16 years,

The legal description is here set out. In the interest of space, it is not repeated herein, containing 10.4 acres"

It follows that the transaction is specifically excluded from the Uniform Commercial Code.

If it is included and Defendant-Petitioner is to avoid Plaintiff's security interest it must be pursuant to the provisions of UCA 70A-9-301 which provides:

"(1) Except as otherwise provided in Subsection (2) an unperfected security interest is subordinate to the rights of,

(a) - not applicable
(b) - not applicable
(c) - in the case of Goods instruments, documents, and chattel papers, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected; --- "

That section provides three criteria for priority.

The persons seeking such priority must,

(a) Receive delivery of the collateral.

In the instant case, Peterson acknowledged that he never obtained such possession.

(b) Receive such delivery without knowledge of the security interest. In that connection, Plaintiff's evidence indicates that the Plaintiff told Defendant Peterson about his sales contract and gave him a copy (T 21 & 22) Mrs. Thomas testified that she complained to him that they had an agreement; that they needed money and that the agreement had not been performed (T 157 - 159) Moreover, much of Defendant Peterson's activity -- his dealings with the Thomases and particularly his dealings with the Falsones, was obviously done to satisfy the requirements of that agreement (T 120-130).

Perhaps the most damning evidence of Defendant Peterson's knowledge is disclosed by the following questions asked him at trial and his answers thereto, at pages 130 and 131 of the transcript.

"Q. All right, then do you recall my telling you at that time that we could not enter into an agreement with you providing for payment out of the operation of the marina

because if you didn't take care of the obligation to the Thomas' they would take the marina away from both of us?

A. That's right, you did tell me that.

Q. And you told me that the obligation to the Thomas' had been paid, the Thomas' would --

A. That arrangements had been made.

Q. And I told you that the Thomas' and their attorney did not agree with that did I not?

A. You did. I would assume.

Q. I further told you that there was a twenty-two thousand dollar payment due September 1st that had to be paid or that, or the Thomas' would take the property back?

A. And I told you to show me documentation.

Q. Do you recall asking me to show you documentation?

A. I do absolutely.

Q. What did I say?

A. What?

Q. What do you claim I said?

A. You didn't show me any documentation.

Q. But I did tell you that Thomas' had a title

retaining contract?

A. Yes you did. You told me they had money coming, you didn't tell me, I don't recall title retaining contract. You may have said it, but I don't recall that in particular.

Q. But I did tell you that if the obligation to the Thomas' due in just a couple of months to pay twenty-two thousand wasn't paid that the Thomas' would be in position to take the marina away from both you and us?

A. That's right you did tell me that."

The Court found in its memorandum Decision, and in its Findings of Fact, that the Defendant Peterson had full knowledge of said sales agreement and that it was in default when he attempted to acquire an interest in the Marina property (R 105, para. 5 and R 100, beg. at top of page). Plaintiff urges that its findings were correct and required by the evidence.

Even if Defendant's knowledge was imperfect and Plaintiff contends the contrary, prior cases say that he had such notice as to excite his attention or put him on guard, he should be deemed conversant of such facts as a reasonable inquiry would lead him to. This Court in O'Reilly vs. McLean, 84 U. 551, 37 P. 2d 70 noted.

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything which inquiry might have led. When such a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

The Court in that case involving water rights concluded that the subsequent purchaser had a duty to inquire as to whether the transferee of a portion of the land to which they applied had acquired the water rights in question and charged said purchaser with notice of that party's right, in spite of the dissenting Judge's conclusion, that the record was clear that he had no actual notice.

The Court in Universal CIT Corporation vs. Courtesy Motors, 8 U. 2nd 275, 333 P. 2d 628, quoted the same language concluding that the purchaser of an automobile had a duty to inquire as to the contents of a missing portion of the Bill of Sale, when its torn condition put him on notice thereof. In Meager vs. Dean, 27 U. 173, 91 P. 2d 454, this Court held that notice of the possession of the tenant of real property was notice of possession of the landlord and imposed a duty to inquire as to the landlord's interest.

In the O'Reilly vs. McLean case, the Court held the purchaser of real property had a duty of inquiry as to the status of a mortgage which he knew existed even though it was not disclosed by the record, even though his landlord had mislead him as to its validity.

(c) The third criteria is that he gets priority only to the extent that he gives value. T 136 indicates the following question asked of the Defendant Peterson and the following answer given.

"Q But you have not paid anything to Joe's Valley, Inc. as a consideration for the lease that you claim?

A Well, not on that. No, I guess I haven't."

In summary, Plaintiff contends that the "use permit" is an interest in real estate within the meaning of UCA 70A-9-104 (j) and is therefore excluded from the provisions of UCC; That in any event the defendant Peterson is not a person who can take priority pursuant to UCA 70A-9-301 (c) because he did not take possession; did not get possession without knowledge and was in any event entitled to priority

only to the extend he gave consideration and he gave no consideration.

POINT II

THE DEFENDANT PETERSON NEVER ACQUIRED AN INTEREST IN THE MARINA PROPERTY BECAUSE THE LEASE - OPTION AGREEMENT THROUGH WHICH HE CLAIMS IS BY ITS OWN TERMS SUBJECT TO THE WRITTEN APPROVAL OF THE FOREST SERVICE WHICH WAS NEVER OBTAINED.

The lease-option agreement provides (Ex. 10) in paragraph 8,

"8. It is mutually understood and agreed that this lease and the agreements and provisions contained herein are entered into subject to the written approval of the United States Department of Agriculture, Forest Service."

That approval was never obtained. Defendant Appellant Peterson admits at page 27 of his brief that it was not obtained, but claims that it was not obtained by reason of the action of Plaintiff, the Defendant Joe's Valley, Inc. or unspecified third parties -- but he points

to no evidence that such approval was frustrated by anyone, nor does he explain why his failure to obtain such approval, it caused by Plaintiff or especially if caused by unspecified third parties, should avoid that term of his lease.

Plaintiff urges that even if Defendant Peterson was such a purchaser for value that his claim was entitled to priority over the title retaining forfeiture claim of Plaintiff, his failure to obtain possession or title by the terms of his own contract, while the right or power to transfer title or possession of the party with whom he contracted (Joe's Valley, Inc.) was terminated, frustrates his ability to obtain title of possession from the said Joe's Valley, Inc. now or at some future time. The party with whom he contracted no longer has the means of fulfilling the executory contract. If the Defendant Peterson has a remedy it is with the Defendant Joe's Valley, Inc., the party with whom he contracted.

POINT III

THE SALES CONTRACT WAS PROPERLY ADMITTED BY THE TRIAL COURT -- DEFENDANT PETERSON HAS NO STANDING TO OBJECT, SINCE THE DEFENDANT JOE'S VALLEY, INC. WITH WHOM THE CONTRACT WAS MADE, ADMITTED IT.

Plaintiff's principle action was against the Defendant Joe's Valley, Inc., to declare the contract with that Defendant forfeited and terminated. (see Prayer of Plaintiff's Complaint /R 6 & 7/). Paragraph 2 of Plaintiff's Complaint alleged the signing and execution of the sales contract in question on the 19th day of April, 1972 (R 12). Copy of the sales contract was annexed to the Complaint, Exhibit "A" (R 1 - 5). Joe's Valley, Inc. admitted the allegations of paragraph 2 of Plaintiff's Company (R 86).

29 Am Jur 740, Evidence, Section 687, states the general rule.

"It is one of the elementary rules of pleading that a party is not required to prove those allegations admitted by his adversary to be true."

See also annotations at 14 A.L.R. 87, Supplemented at 90 A.L.R. 1411 (an examination of the Blue Book Supplement by this writer did not locate a Utah case.)

In the instant case, Plaintiff contends that in as much as the contract was between Plaintiff and the Defendant Joe's Valley, Inc., it was necessary to construe it only as between those parties, and the Defendant Peterson was not competent to object to the introduction of it since the parties to the contract each relied on it and where one party claims by it in his complaint and the other admitted it in his answer. When the Court determined that the interest in the Marina property of the Defendant Joe's Valley, Inc. should be forfeited and terminated pursuant to the terms of the contract between those contracting parties, it had then only to further determine, whether other parties claiming through Joe's Valley, Inc. had for some reason obtained an interest in the property with a priority superior to that of Plaintiff's, and absent that, to conclude that said parties did not have an interest in the property, their remedy if any, being upon their contract with Defendant Joe's Valley, Inc. with whom they dealt. But the propriety of admitting said contract does not depend on the foregoing. Article IV, Section 7 of the By-Laws (Ex. 4) of the Defendant Joe's

Valley, Inc. which had been admitted in evidence, provides for the duties of the President, as follows:

"He shall sign and make all contracts and agreements in the name of the corporation, and see that they are properly carried out."

The provision relating to the duties of the Board of Directors, Article III, Section 9, say generally the directors shall have the control and general management of the affairs and business of the corporation; they shall fix compensation of the officers and sell shares of stock of the corporation. They did not provide that they shall authorize the execution of contracts entered into by the corporation directly or inferentially. Plaintiff contends the authority to make a contract by the President and in the absence of a delegation of authority to the Board of Directors to approve such contracts, renders the contract signed by the President binding against the corporation and consequently proof that it was signed by the President for the corporation proves that it was a contract of the corporation. It was competent for the By-Laws to provide that the President should make the contracts of the corporation.

In that regard UCA 16-10-25 provides in part:

"The By-Laws may contain any provision for the regulation and management of the affairs of the corporation not inconsistent with law or Articles of Incorporation."

It will be helpful to here review the evidence before the Court when it admitted the sales contract, (Ex. 2). Plaintiff testified the contract was signed by the President, Julian Taylor, at a meeting of the Board of Directors. He named seven of the Directors that were present at the meeting (T 10 & 11). (Article III, Section A of the By-Laws provides that a majority of the twelve Directors shall constitute a quorum) He further testified that he missed some of what went on in the meeting, as he was examining the contract (T 11). He testified that he had never transferred his interest in the property known as Joe's Valley Marina except by that contract (T 65 & 66) and a pre-corporation agreement by and between the same parties containing the same provisions as Ex. 2 (T 8), that was preliminary to and preceded said Ex. 2. There was abundant testimony that the

Defendant Joe's Valley, Inc. had taken possession and control of the Marina and there was no explanation of any authorization for their doing so, except the subject sales agreement.

Plaintiff could not testify as to the specific vote of the Board of Directors regarding the approval of the contract and he did not produce a minute record of the Board of Directors approving such authorization. In that regard the Secretary-Treasurer of the Corporation who had been subpoenaed by Plaintiff testified that he was aware of the sales agreement in question but did not have any of the minute records and he did not know what happened to them (T 75). The testimony of said Secretary - Treasurer was vague and Plaintiff contends and the Court held in its Memorandum Decision (para 2, R 101) that his testimony taken as a whole indicated that the books and records of the corporation were carelessly and imperfectly kept.

On that state of evidence of the Court admitted the sales agreement, Plaintiff's Exhibit 2 in evidence and in his Memorandum Decision and in his Findings of Fact held that it was the agreement of the parties.

In the 1961 case of Peterson vs. Holmgren Land & Livestock Company, 12 U 2nd 125, 363 P. 2d 786, this Court quoted with approval a rule stated in Am Jur as follows:

"If a corporate officer assumes or contracts on behalf of the corporation, at least one to whom authority to make such a contract may be given, a person dealing with him in good faith is not affected by the fact that the proper steps to clothe him with such authority were not taken."

It was contended as here, that there was no evidence of authorization by the Directors of the corporation for the execution of the contract. The Court pointed out that the Minutes were for the most part written in a brief and indefinite manner. Plaintiff urges that the ostensible authority relied on by the Court in Peterson case, is substantially less adequate than that shown in the instant case, where the By-Laws of which Plaintiff, the party entering into the contract, was aware, specifically stated that the President had authority to make contracts for the corporation.

Judge Sheya in his Memorandum Decision, found that the books and records of the corporation were so carelessly and imperfectly kept as to not show the acts of the corporation and cited 29 Am Jur 2nd 536 as authority for the proposition

that in such event such acts can be proved by parol, in the absence of statute to the contrary. Plaintiff believes that he cannot gainsay the Court's statement and merely endorses it.

The corporation Joe's Valley, Inc. accepted and retained the benefits of the sales contract in question.

(This action and appeal arises because of an alleged lease and sale of the property the corporation received from the Plaintiff through said sales contract.) 7 Fletcher

Encyclopedia corporations Section 3011 (1964 Revised)

Volume 7, Page 79, recites the rule as follows:

"In like manner a corporation which has received the consideration of a contract cannot defend against an action on the contract on the ground that the provisions of the Statute, Charter or By-Laws prescribing the form of the contract or the mode of executing it were not complied with by the officer acting for the corporation in the execution of the contract. In other words, any informality in executing a contract is waived, and cannot be set up as a defense where the corporation has accepted and obtained the benefits of the contract."

Cases from several different jurisdictions, not including Utah were cited in support of said rule.

In summary, Plaintiff contends:

A. The agreement was properly admitted because Defendant Joe's Valley, Inc. against whom it was being construed, admitted it and the Defendant Peterson was not competent to object to it.

B. Even if Joe's Valley, Inc. had not admitted it, and if they had in fact object to it, Plaintiff's string of proof is complete because the By-Laws gave the President the right to make contracts. And this contract was made by said President.

C. Absent such By-Laws, Plaintiff's string of proof is complete because of President Julian Taylor's ostensible authority to act for the corporation.

D. Even if the sales contract was otherwise inadmissible, it was admissible as an act of the corporation, because the corporation had the benefit of the contract and could not take such benefit and at the same time deny the contract.

E. Finally, it was competent to admit the contract, absent the minute entry authorizing the execution thereof, by the Board of Directors of the corporation because the records of the corporation were carelessly and imperfectly kept.

POINT IV

TO SUCCESSFULLY ASSERT HIS PROPERTY INTEREST IN THE MARINA PROPERTY, DEFENDANT PETERSON MUST ESTABLISH AND PROVE HIS OWN CHAIN OF TITLE OF WHICH THE SALES CONTRACT WITH PLAINTIFF IS AN ESSENTIAL LINK.

It is clear that Plaintiff is the original owner of the Marina property -- he obtained it from the government and built it with his own hands (T 6). He testified that except for the execution of the sales contract (Ex. 2) and his actions pursuant thereto, he never transferred it to Joe's Valley Marina, Inc. or Joe's Valley, Inc. and that he never received stock of the corporation by either name (T 64-65). There was no evidence introduced by Defendant Peterson or otherwise of a transfer out of Plaintiff to the corporation other than the execution of the sales contract and acts pursuant thereto. Inasmuch as the Defendant Peterson claims an interest in the property through an agreement with Defendant Joe's Valley, Inc. it would seem that he would be anxious to admit proof of the only channel through which that Defendant could have obtained title to it, to-wit: the sales agreement to which it objects so strenuously.

rule, that in an action to quiet title which this action, at least as between Plaintiff Thomas and Defendant Peterson, essentially is, that a Claimant must succeed by virtue of the strength of his own title rather than on the weakness of the competing claimant's title. Mercur Coalition Mining Company vs. Cannon 112 U 13, 184 P. 2d 341; Homeowners Loan Corporation vs Dudley, 105 U 208, 141 P. 2d 160.

Defendant Peterson has here attempted to parlay Plaintiff's failure to obtain the corporation minute records where the corporation Secretary did not have it nor know where it was, into an avoidance of the terms of the sales agreement where his own claim of title is dependent upon the corporation's title which in turn is dependent upon that self same sales agreement.

POINT V

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT
ARE PRESUMED CORRECT, IT HAVING HEARD ALL OF
THE EVIDENCE AND OBSERVED THE WITNESSES.

5 Am Jur 2nd 4 recites the rule generally as follows:

"The scope of appellate review is largely influenced by number of rebuttable presumptions, preiminent among which is that which, at least where the decision has been entered by a Court of general jurisdiction, assumes the correctness of the decision or ruling appealed from and the regularity of the proceedings below. Thus, every reasonable intendment favorable to a ruling of the Court below will be indulged, and in the absence of affirmative showing to the contrary, a ruling of the Court below will be presumed to have been properly made and for sound reasons."

Numerous Utah cases have observed the rule in one way or another. See the list at footnote 3, Utah vs One Porshe 526 P. 2d 918 (September 1974), (Utah report not yet cited), at page 918. This perhaps obvious rule is here stated to give Plaintiff an opportunity to note and discuss some of the facts claimed by Defendant Peterson in his brief with which Plaintiff does not agree and about which there is contrary evidence.

First Defendant Peterson claims that the corporation Joe's Valley, Marina, Inc. possessed the former assets of Joe's Valley Marina -- but that is not so. Plaintiff testified that he operated and had possession of it until the time that he executed the sales contract agreement; that

he never transferred the property except pursuant to the sales agreement and never received any of the stock of the corporation by either (T 115-116). Moreover the sales agreement (Ex. 2) with the Defendant Joe's Valley, Inc. is between Joe's Valley, Inc. and the Plaintiff personally and not between Joe's Valley, Inc. and Joe's Valley Marina, Inc.

Appellant Peterson asserts at page 3 of his brief and again at page 7 that new stock holders were taken into Joe's Valley Marina, Inc. and the capitalization was increased.-- While there may have been some minor changes in the personnel who made the corporate decisions, the fact is that no stock in the corporation was ever issued. (T 115-116). An examination of the Articles, including the amendments will disclose that the capitalization was not increased. (Ex. 3).

Appellant Peterson asserts that the Marina property which he incorrectly asserts was in Joe's Valley Marina, Inc. was transferred by revised Articles of the corporation. An examination of the Articles and Revised Articles (Ex. 3) will show that the revision merely changed the name to drop

"Marina", expanded the powers section and removed any preemptive rights.

At page 4 of Appellant's brief, he claims the Plaintiff claims the transfer by the sales agreement from Joe's Valley Marina, Inc. to Joe's Valley, Inc. which is simply not so. The sales agreement is from Plaintiff personally to the Defendant Joe's Valley, Inc. (Ex. 2).

Apparently his purpose was to visit some corporate rules regarding bulk sales on Joe's Valley Marina, Inc. because he then claims those rules were not observed. (page 7

Appellant's brief).

He attempts the same thing regarding purported rules regarding the sale of real estate at page 9 and 10 of his brief, but that attempt is specious for the same reason, to-wit: the sale was not from Joe's Valley Marina, Inc. but from Plaintiff personally.

At page 15 of his brief, Appellant refers to the corporation as Plaintiff's, but the Articles of Incorporation (Ex. 3) and By-Laws (Ex. 4) will show that the Plaintiff was only one of twelve Directors; he never had stock; he was not the President, and he did not choose or direct the

accountants or the attorneys for the corporation (T 17, 39, 44, 73) -- it seems less than fair to claim that he was dealing with the corporation as though it was his.

At page 16, he asserts that the corporation sought to set the sales contract aside -- but the corporation admitted the execution of the contract (R 86). It is only the Appellant Peterson who wishes to set the contract aside.

At page 17, Appellant Peterson alludes to the trial Courts Memorandum Decision that Plaintiff was a 100% stock holder of Joe's Valley Marina, Inc. As is clear from all of Plaintiff's testimony, he did not ever receive stock in the corporation, or transfer anything into it while it was Marina, Inc. (T 64-66). It is true that Plaintiff was the owner of the Marina property, which was an intended asset of the corporation and the subject of a pre-incorporation agreement (T 7, 6, 8). Plaintiff urges that that is the sense of Plaintiff's testimony, and the meaning of the Court's comment in the Memorandum Decision.

At page 17 of his brief, Appellant Peterson says,
"And it does not appear that the Plaintiff treated

the property as his own in his individual tax returns for 1971 and 1972."

That is a particularly devious statement since it is technically true, but terribly misleading. The truth is that the converse also does not appear -- in fact that is nothing in the record about how the Plaintiff treated the property on his tax returns.

Appellant Peterson asserts at page 19 of his brief that the Plaintiff allowed the corporation to carry on its existence as though it owned all of the referred to property, but that is neither true nor, except for Defendant Peterson's claim that he was misled, is not supported in the record. With respect to Peterson's being misled, the Court correctly found that Peterson had full knowledge of the contract as is more fully argued at another point herein. (Argument Point II at pages 13-15). Appellant Peterson seems to say at Page 27 of his brief that he was precluded from performing the conditions of his lease and that he failed to obtain the approval of the Forest Service by reason of the acts of Plaintiff or the Defendant Joe's Valley, Inc. or others -- but such assertion was not proved and is not supported in the record.

Appellant Peterson's points II, III and IV depend on the distortion of facts asserted by him. With respect to Point II, that the contract was voidable because Plaintiff breached his fiduciary duty, first, the corporation did not seek to avoid the contract -- see its answer (R 84-68). Second, the corporation was formed to take advantage of a pre-incorporation agreement regarding the sale of the Marina property -- the sales contract was only an affirmation by the corporation of the earlier agreement. Third, Plaintiff was in any event only one of twelve Directors of the corporation; and not the moving party in its corporate affairs and hardly in a position to self deal with the corporation.

With respect to Point III that the Marina property was already the property of Joe's Valley Marina, Inc. -- that is only a distortion of the facts. Plaintiff testified that he owned all of the Marina property personally; that he only transferred or agreed to transfer it by the sales agreement in question and the pre-incorporation agreement that preceded it. The change from Joe's Valley Marina, Inc. to Joe's Valley, Inc. was only a change of name and a small modification of the Articles of Incorporation.

With respect to Point IV which Plaintiff construes to be that Plaintiff allowed the corporation to carry on its existence as if it owned the Marina property and should therefore be estopped to deny it -- even if there was evidence in support of that claim, which Plaintiff denies, the only person to assert said estoppel is the Defendant Peterson who the evidence clearly shows was aware of the sales agreement. (Ex. 2).

CONCLUSION

Judge Sheya heard the testimony, observed the witnesses and decided the matter correctly. His decision should be affirmed.

Respectfully submitted:



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