

1955

State of Utah et al v. Fred Tedesco et al : Brief of Plaintiff and Petitioner on Intermediate Appeal

Utah Supreme Court

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Recommended Citation

Reply Brief, *State v. Tedesco*, No. 8274 (Utah Supreme Court, 1955).
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In the
Supreme Court of the State of Utah

STATE OF UTAH, by and through its
ROAD COMMISSION; D. H. WHIT-
TENBURG, Chairman, and LAY-
TON MAXFIELD and LORENZO
J. BOTT, members of the State Road
Commission,
Plaintiff and Petitioner,

vs.

BOLEY, INCORPORATED, a corpora-
tion, et al.,
Defendants,
and

BOYD W. CALTON and MARY CAL-
TON,
Intervenors.

Case No.
8274

BRIEF OF PLAINTIFF AND PETITIONER
ON INTERMEDIATE APPEAL

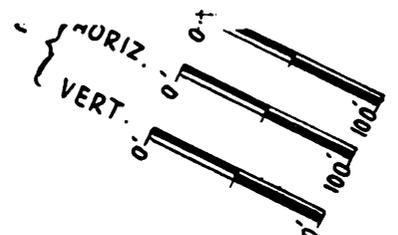
STATEMENT OF FACTS

This is an interlocutory appeal from an order per-
mitting intervention by respondents in a condemnation pro-

ceedings. The State of Utah by and through its Road Commission commenced condemnation proceedings in the Fourth Judicial District Court and sought to condemn certain property of the defendants, *Boley, Incorporated*, a corporation; *Phillip Green and Leah Green*; *Julia Fox Hunter*; *Orville Vibbert and Rowene Russon*; *Mark Vibbert*, for highway construction purposes. The intervenors were the lessees of one *C. G. Wilson Helm*, the record owner of a parcel of land adjacent to the highway but *not a part of any of the lands*, owned by the above named defendants, *which the State sought to condemn in this proceeding*. By amicable settlement and through warranty deed, the State had secured from the said *C. G. Wilson Helm* a strip of land for right-of-way purposes which was a portion of the premises that *C. G. Wilson Helm* had leased to the intervenors and of which the intervenors were in possession. We are not here in any way concerned with the rights of the intervenors under their lease agreement. The specific question here is:

“Can a landowner [lessee] claiming a trespass by the State maintain an action on such a claim by intervening in a condemnation proceeding not involving the claimant’s [lessee’s] lands allegedly trespassed upon?”

The following map shows the proximity of the lands of the defendants to the condemnation proceedings with relation to the location of the leasehold of the intervenors.



MILES
MILES

(0+00.0 BEG. S.P. NO 1505 =
(80+99.4 F.A.P. 124 · H (1))

BOLEY, INCORPORATED
PHILLIP GREEN, ETUX.

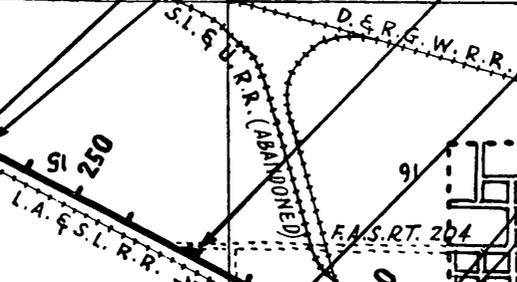
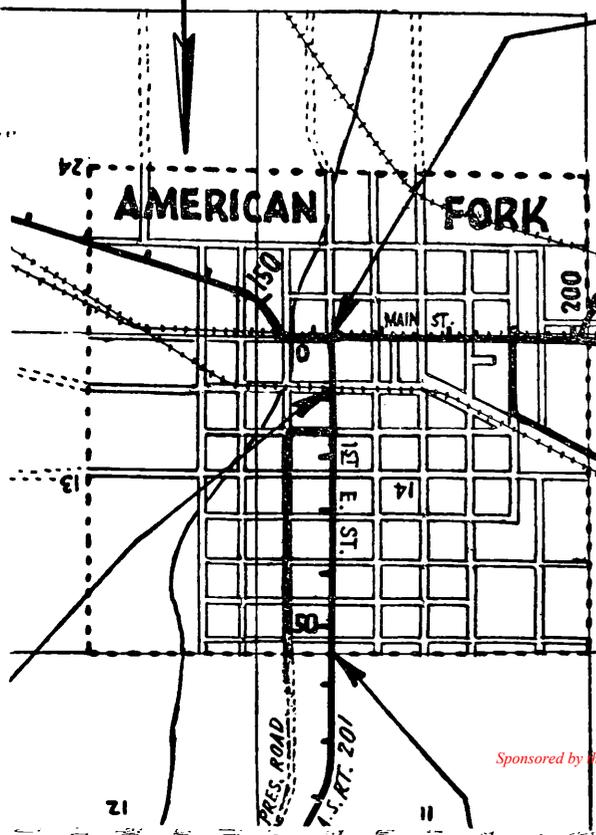
C.G. WILSON HELM

JULIA FOX HUNTER
ORVILLE VIBBERT, ETUX.
ROWENE R.M. VIBBERT

JANE ST. JEOR

27-26
29.A
29.B
29.C
1-
X-

201+00 END S.P. 1467
201+00 BEG. S.P. 1524



F.A.S. RT. 204

F.A.S. RT. 204
S.R. 68

TO CEDAR FOR BLUFFDAL

LEHI

STATEMENT OF POINTS

POINT I.

THE CLAIM IS NOT PROPERLY AN INTERVENTION.

POINT II.

INTERVENORS HAD NO INTERVENTION OF RIGHT.

POINT III.

INTERVENORS' CLAIM SHOULD PROPERLY BE PRESENTED TO THE BOARD OF EXAMINERS.

ARGUMENT

POINT I.

THE CLAIM IS NOT PROPERLY AN INTERVENTION.

Intervenors' motion suggests as its basis “* * * that the intervenors' defense and the main action herein have questions of law and fact in common and that the representation of the intervenors' interest by existing parties may be inadequate.”

An analysis of the main action, and of intervenors' claim, shows that there is no common question of law or fact. The issues of the main case are the invariable issues of condemnation: (1) the public necessity of the taking; (2) value of property taken; and (3) severance damage.

Issues presented by intervenors' claim are: (1) whether the Road Commission's entry was privileged and if not (2) what damage was done the leasehold interest. It must be remembered that intervenors' leased land is in no way the subject of the main condemnation action; it is a different, unrelated tract. The issues of the two cases are most dissimilar. It is plain that the trial of intervenors' claim will have to be severed from the trial (or separate trials) of the main case. A jury could not conceivably handle both cases at once. Thus, the intervention is nothing but a new, unrelated claim sought to be thrust into a pending action with which it has nothing in common. There is as much reason for an intervention into a pending criminal case, or water case, to which the State is a party.

Intervenors also assert that the representation of their interest in the main case by the named parties may be inadequate. The plain answer is that intervenors have no interest in the main case. The leased premises are not sought to be taken; the landlord is not named a party; the intervenors do not allege an interest in any land belonging to any named party.

POINT II.

INTERVENORS HAD NO INTERVENTION OF RIGHT.

Rule 24(a), Rules of Civil Procedure, U. C. A. 1953, provides:

“(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an uncondi-

tional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

In resisting the State's "Petition for Intermediate Appeal," heretofore granted, the intervenors say only that their motion to intervene was allowed by the trial court under Rule 24. They do not allege, nor can they, that they meet any of the requirements of said rule. (1) What statute affords intervenors an unconditional right to intervene? (2) Wherein do the existing parties even remotely, or at all, propose to represent the applicant's interest; how can the applicant be bound by a judgment in this cause? (3) What property is in the custody or subject to the control or disposition of the court below that could adversely affect any interest of the applicant in his leasehold interest?

Under this rule this Court has said:

"The question to be answered, * * * is * * * has B [the intervenors] such an interest in the subject-matter in dispute between A [the State] and C [the defendants] that entitled him to intervene."

Dayton v. Free, et al., 49 Utah 221, 224, 162 P. 614.

We here respectfully contend that intervenors are clearly without interest in the subject-matter of this cause.

Nor is there a right of "Permissive Intervention" under Rule 24(b) for: (1) There is no statute conferring a

conditional right; (2) we contend that the applicants' claim has no question of law or fact in common with that of the defendants to the State's cause; (3) it is clear that applicants cannot intervene as governmental officers or agents.

The majority rule is, we think, that: *The interest which entitles a person to intervene in a suit between other parties must be direct and immediate in character, and not consequential; and the intervenor must stand to either gain or lose by direct legal operation and effect of the judgment. Utah Power and Light Co. v. Ogden, 95 Utah 161, 79 P. 2d 61; City of Alhambra v. Jacob Bean Realty Co., (Graves, Intervenor) (Cal.) 31 P. 2d 1052; City of Burlingame v. County of San Mateo, (Cal.) 230 P. 2d 375, and cases there cited. See generally "Parties" Key No. 40(2), American Digest System.*

POINT III.

INTERVENORS' CLAIM SHOULD PROPERLY BE PRESENTED TO THE BOARD OF EXAMINERS.

Intervenors seek to employ the intervention process of Rule 24, U. R. C. P., to bring a civil suit against the State of Utah. The law is clear that this cannot be done. The question is settled by *Hjorth v. Whittenburg*, . . . Utah . . . , 241 P. 2d 907, a factually similar case. See also *Campbell Bldg. Co. v. State Road Commission*, 95 Utah 242, 70 P. 2d 857.

The correct forum to determine this claim is the Board of Examiners, and not the courts. Intervenors apparently fear that this remedy is not an adequate remedy. The theoretical answer is that the courts cannot presume that the executive and legislative departments will fail in their duty. The practical answer is that the plaintiffs in the *Hjorth* case apparently had similar fears. They were adequately compensated. See Item 1, Sec. 18, Ch. 134, Laws of Utah 1953.

CONCLUSION

The order of the court below permitting intervention should be set aside.

Respectfully submitted,

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Counsel for Plaintiff and Petitioner.