

1957

# Spencer Van Noy v. Richard Gibbs : Brief of Plaintiff and Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Jed W. Shields; Attorney for Plaintiff and Respondent;

---

## Recommended Citation

Brief of Respondent, *Noy v. Gibbs*, No. 8627 (Utah Supreme Court, 1957).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2762](https://digitalcommons.law.byu.edu/uofu_sc1/2762)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

NOV 1 1957

LAW LIBRARY

# In the Supreme Court of the State of Utah

SPENCER VAN NOY,

*Plaintiff and Respondent,*

—VS—

RICHARD GIBBS,

*Defendant and Appellant.*

Case No. 8627

FILED

NOV 1 - 1957

Clerk, Supreme Court, Utah

## Brief of Plaintiff and Respondent, Spencer Van Noy

JED W. SHIELDS

*Attorney for Plaintiff and Respondent,**Spencer Van Noy*

53 East 4th South

Salt Lake City, Utah

# INDEX

	<i>Page</i>
Statement of Facts .....	1
Statement of Points .....	3
Point I	
A stockholder may sell or assign his interest in a corporation without the formal execution and tender of a share certificate .....	4
Point II	
Defendant is precluded from asserting the non-existence of a so-called leasehold at 3793 South State Street in Salt Lake County; there was no mutual mistake of fact as to the existence of the so-called leasehold and even if there were a mutual mistake of fact as to the existence of the leasehold it is not material because the leasehold was not the subject matter of the bargain between plaintiff and defendant.....	9
Point III	
There was no failure of consideration and defendant is not entitled to restitution of the amount originally paid over to plaintiff. ....	12
Argument .....	4
Cases Cited:	
Robey vs. Hardy, 63 Utah 231, 224 P. 889.....	5
Makris vs. Melis, 50 Utah 544, 167 P. 802-04.....	7
Rock vs. Gustaveson Oil Co., 204 P. 96.....	8
Statutes:	
16-3-1, Utah Code Annotated 1953.....	6
16-3-10, Utah Code Annotated 1953.....	6

## INDEX (Continued)

16-3-21, Utah Code Annotated 1953.....	6
16-3-20 (1) Utah Code Annotated 1953.....	7
16-2-34, Utah Code Annotated 1953.....	7
Title 14 Compiled Laws of Utah 1907, Paragraph 330.....	7

### Authorities:

18 Corpus Juris Secundum 721 Paragraph 258.....	5
Fletcher Cyclopedia Corporations Volume 11 Page 65, Paragraph 5094.....	4
Fletcher Cyclopedia Corporations Volume 11 Page 60, Paragraph 5092.....	5
Fletcher Cyclopedia Corporations Volume 12a Page 25, Paragraph 5574.....	13
2 Am. Jur. 294, Paragraph 376.....	11

# In the Supreme Court of the State of Utah

---

SPENCER VAN NOY,

*Plaintiff and Respondent,*

—vs—

RICHARD GIBBS,

*Defendant and Appellant.*

Case No. 8627

---

## Brief of Plaintiff and Respondent, Spencer Van Noy

---

### STATEMENT OF FACTS

Plaintiff and Respondent Spencer Van Noy will be hereinafter referred to as Plaintiff and Defendant and Appellant Richard Worthen Gibbs will be hereinafter referred to as Defendant.

November 18, 1954, Plaintiff Spencer Van Noy and Defendant, Richard Worthen Gibbs, and certain other persons executed articles of incorporation for a Utah corporation called Valley Amusement Enterprises Incorporated. (R 89-96). Plaintiff and Defendant each subscribed for stock in the corporation in an identical amount — 1950 shares. (R-89). Each appears

in the articles of incorporation as an officer and as a member of the Board of Directors. (R-92). The shares of plaintiff and the defendant were fully paid. The Plaintiff and Defendant each attested to that fact. (R-96). No stock certificates were issued at the time of incorporation. (R-61).

A few weeks after the corporation was organized internal difficulties arose among the incorporators. (R-12, 13). At one time or another the plaintiff and the defendant exchanged words and each offered to buy the other out. (R-12, 13, 44, 67). Thereafter a Mr. McDermond, (Referred to as McDermaid in the transcript) one of the incorporators, negotiated with plaintiff on behalf of defendant Gibbs for the purchase by Gibbs of plaintiff's interest in Valley Amusement Enterprises Incorporated. (R-12, 35). Defendant Gibbs knew what the corporate interest of plaintiff was. (R-14, 26). Sometime prior to January 24, 1955, an instrument (Exhibit 1) was prepared by Mr. McDermond and the sister of the defendant Gibbs. (R-71). January 24, 1955, exhibit 1 was presented to plaintiff by Mr. McDermond acting for defendant Gibbs. (R-12).

The instrument states:

#### ASSIGNMENT

"For and in consideration of the sum of \$2,000.00 payable \$750.00 down, receipt of which is hereby acknowledged, and the balance of \$1,200.00 payable within ninety (90) days from date, I hereby sell, transfer and assign all my right, title and interest to the shares of Capital Stock in the Valley Amusement Enterprises, Inc., and do hereby appoint Richard Gibbs owner with full power of substitution in the premises."

Dated this 24th day of January, 1955."

/s/ Spencer Van Noy

.....  
Witness

"A note payable and replacing this release will be issued with other legal papers within (5) five days from date above."

/s/ Spencer Van Noy

Exhibit 1 was then executed by plaintiff and he was then given a check by McDermond in the sum of \$750.00 as is recited in the instrument. (R-39). A copy of exhibit 1 was returned to McDermond and was subsequently delivered to Dr. Gibbs who "accepted" or ratified the deal. (R-73). Plaintiff then ceased participating in the activities of the corporation. Dr. Gibbs carried on the activities of the corporation. About April 24, 1955, plaintiff made demand upon defendant for payment of the remaining amount due to him under exhibit 1. (R-39, 20). Defendant indicated that he did not have the money; that he fully intended to pay it; that plaintiff should call him back in a week or so. (R-20, 39-40). During the time when demand was made defendant at no time denied owing the sum sought. (R-40). Defendant testified that he discovered there was no written lease on the premises at 3793 South State Street. (R-30). Defendant finally refused to make payment on the amount due to plaintiff and plaintiff then filed action July 13, 1955 to collect the amount due. (R-1, 2).

## STATEMENT OF POINTS

### POINT I.

A STOCKHOLDER MAY SELL OR ASSIGN HIS INTEREST IN A CORPORATION WITHOUT THE FORMAL EXECUTION AND TENDER OF A SHARE CERTIFICATE.

### POINT II.

DEFENDANT IS PRECLUDED FROM ASSERTING THE NON-EXISTENCE OF A SO-CALLED LEASEHOLD

AT 3793 SOUTH STATE STREET IN SALT LAKE COUNTY; THERE WAS NO MUTUAL MISTAKE OF FACT AS TO THE EXISTENCE OF THE SO-CALLED LEASEHOLD AND EVEN IF THERE WERE A MUTUAL MISTAKE OF FACT AS TO THE EXISTENCE OF THE LEASEHOLD IT IS NOT MATERIAL BECAUSE THE LEASEHOLD WAS NOT THE SUBJECT MATTER OF THE BARGAIN BETWEEN PLAINTIFF AND DEFENDANT.

### POINT III.

THERE WAS NO FAILURE OF CONSIDERATION AND DEFENDANT IS NOT ENTITLED TO RESTITUTION OF THE AMOUNT ORIGINALLY PAID OVER TO PLAINTIFF.

### ARGUMENT

#### POINT I.

A STOCKHOLDER MAY SELL OR ASSIGN HIS INTEREST IN A CORPORATION WITHOUT THE FORMAL EXECUTION AND TENDER OF A SHARE CERTIFICATE.

Though no certificates were issued evidencing their interest, both plaintiff and defendant were stockholders in Valley Amusement Enterprises Incorporated. Each originally subscribed and paid for 1950 shares. (R-89, 96). Each owned stock in the corporation, though apparently neither had a certificate evidencing such stock ownership. (R-61). A stockholder is one who owns stock in a corporation. (See Fletcher Cyclopedia Corporations Vol. 11, Page 65, paragraph 5094).

A certificate of stock is not the stock itself. It is merely written evidence of the ownership thereof and of the rights

and liabilities resulting from such ownership. It is merely the paper representative of incorporeal rights and stands on a footing similar to other muniments of title. (See 18 C.J.S. 721, paragraph 258).

Issuance of a certificate is not necessary to make one a stockholder. The fact that plaintiff did not have physical possession of a certificate "in no manner affects his ownership of the stock." See Robey vs. Hardy, 63 Utah 231, 224 P. 889 at 892, also Fletcher Cyclopedia Corporations Volume 11, Page 60, Paragraph 5092.

As is pointed out in the factual narrative, because of internal difficulties in corporate affairs, plaintiff and defendant exchanged words and each offered to buy the other out. Thereafter an agent of defendant Gibbs negotiated with plaintiff for the sale to Gibbs of plaintiff's interest in the Valley Amusement Enterprises Incorporated. Gibbs knew what the corporate interest of plaintiff was. (R-14, 21). Exhibit 1 was prepared by McDermond, an agent of Gibbs, and by the sister of Gibbs, and was presented to plaintiff for execution. The language is the language of those acting for and on behalf of Gibbs, Plaintiff executed the instrument and was then given a check for \$750.00 as part payment for his interest.

The intent of the parties is clearly and plainly expressed by the instrument, Exhibit 1. (R-87). It is clear that plaintiff sold and defendant purchased plaintiff's interest in Valley Amusement Enterprises Incorporated as of January 24, 1955. The language used is used in the present tense. The instrument states in part, ". . . I hereby sell, transfer and assign . . . , and do hereby appoint Richard Gibbs owner. . . ." Exhibit 1 is the instrument of sale, transfer and assignment. This is obvious from the use of the words "sell, transfer and assign,"

the use of the term “hereby” as well as the use of the word “owner.” Gibbs is not called the purchaser but is called “owner.” Defendant, in Paragraph 3 of his answer, admits as much. (R-3). The subject matter of the sale, transfer and assignment, namely that which plaintiff had and that of which Gibbs became “owner” is clearly spelled out in the instrument as all of plaintiff’s “. . . right, title and interest to the shares of capital stock in the Valley Amusement Enterprises Inc. . . .”

Some months after the transfer to Gibbs of plaintiff’s interest in Valley Amusement Enterprises Incorporated, defendant Gibbs decided that he did not want to pay for what he had purchased and now claims that the instrument drawn by his agent and his sister, which he had “accepted” (R-72) does not meet the technical requirements of the law.

Defendant erroneously asserts that the Uniform Stock transfer act is applicable to this fact situation and erroneously asserts that 16-3-1 Utah Code Annotated 1953 provides the exclusive manner for the transfer of shares of stock in a corporation.

16-3-1 Utah Code Annotated 1953 states in part:

“Title to a certificate and to the shares represented thereby . . .

16-3-10 Utah Code Annotated 1953 states in part:

“An attempted transfer of title to a certificate or to the shares represented thereby . . .”

16-3-21 Utah Code Annotated 1953 states in part:

“‘Title’ means legal title and does not include a merely equitable or beneficial ownership or interest.”

16-3-21 Utah Code Annotated 1953 states in part:

“ . . . The provisions of this chapter apply to certificates heretofore issued or hereafter to be issued . . . ”

The uniform stock transfer act assumes the existence of a certificate representing shares in a corporation. The act was designed to give such certificates certain attributes of negotiability. Each of the provisions referred to by the defendant is applicable only where there is a certificate in existence. In this instance there is no such certificate because a certificate was never issued. Certainly the uniform stock transfer act does not say that all corporations must issue certificates. It merely says that if certificates are issued which represent shares in a corporation then certain formalities must be complied with in transferring those certificates or the shares represented thereby. Clearly it does not prohibit a stockholder in a corporation which has not issued certificates from selling, transferring or assigning his interest in that corporation in a manner other than by certificate transfer.

The case of Markis vs. Melis, 50 Utah 544, 167 P. 802-04, relied on by defendant is clearly distinguishable from the instant fact situation. That case was decided prior to the enactment of the uniform stock transfer act and construed a portion of the transfer law then in effect. The statute therein construed has been somewhat modified and is now set forth at 16-2-34 Utah Code Annotated 1953. The court in that case held that under Title 14 C. L. Utah 1907 at 330 a purchaser of stock was entitled to a stock certificate when such a certificate had been issued, was in existence and in the possession of the seller. In the instant case no stock certificate was ever issued. There is nothing in 16-2-34 which prohibits the transfer or assign-

ment of a stock interest in a corporation in the manner used in the present case.

Under the terms of Exhibit 1, defendant was the "owner" and was granted "full power of substitution in the premises." If he desired a certificate he could compel the corporation to issue him one.

The case of *Rock vs. Gustavson Oil Co.*, 204 P. 96 cited by the defendant is distinguishable from the case before the court. The instant case is not one of the "ordinary" cases the court there is talking about. In that case plaintiff acquired from a defendant corporation, an option to purchase certain stock, said option to be exercised within ten days after the happening of a condition, namely the discovery of oil at a certain drilling site. The purchaser exercised the option, made payment to the corporation for 50,000 shares of stock, the defendant to deliver the certificates within a reasonable length of time, the purchaser and the defendant corporation each being aware that the stock was being acquired for purposes of "resale." The stock certificates were not delivered within a reasonable time and the public market price of the stock went down. Plaintiff claims he was damaged because of the inability to deliver certificates to his purchasers at the high market price. No efforts were made in any fashion to transfer the shares.

Plaintiff in the instant case was an individual stockholder to whom a certificate had not been issued by the corporation; defendant was aware no certificate had been issued; defendant was not acquiring the corporate interest of plaintiff for "resale" to the public; plaintiff transferred to defendant by written instrument prepared by defendant's agent and defendant's sister all his right, title and interest to shares in Valley Amusement

Enterprises Incorporated; plaintiff's duties were all performed under the contract, the only executory duty remaining being that of the defendant to pay the amount due; defendant has at no time made demand upon plaintiff for the delivery to him of a stock certificate.

We submit that plaintiff performed all he was duty bound to perform under Exhibit 1 and that defendant is duty bound to pay the remaining amount due under the instrument. We feel that in the light of the argument outlined above that the court incorrectly ordered that a stock certificate be delivered to defendant by plaintiff and that that portion of his judgment was in error and should be modified and that plaintiff's judgment for \$1350.00, interest and costs should be affirmed.

## POINT II.

DEFENDANT IS PRECLUDED FROM ASSERTING THE NON-EXISTENCE OF A SO-CALLED LEASEHOLD AT 3793 SOUTH STATE STREET; THERE WAS NO MUTUAL MISTAKE OF FACT AS TO THE EXISTENCE OF THE SO-CALLED LEASEHOLD AND EVEN IF THERE WERE A MUTUAL MISTAKE OF FACT AS TO THE EXISTENCE OF THE LEASEHOLD IT IS NOT MATERIAL BECAUSE THE LEASEHOLD WAS NOT THE SUBJECT MATTER OF THE BARGAIN BETWEEN PLAINTIFF AND DEFENDANT.

There is recited in the articles of incorporation that a lease was transferred to the corporation by a Mr. McDermond in return for shares in the corporation. Both plaintiff and defendant were apparently satisfied that such a lease existed because each attested to the fact that the leasehold given to the corporation was reasonably worth the amount allowed by

the corporation and each attested as of their own knowledge that the capital stock subscribed for by each of the incorporators including that subscribed for by Mr. McDermond was paid for. (R-95, 96).)

Defendant testified that the leasehold does not in fact exist; that he learned of this fact sometime after January 24 though the record is somewhat confused as to the exact time when this purportedly was learned by defendant; that a Mr. Hong returned to the leasehold and occupied a part thereof in April of 1955; that the leasehold was not on the whole building but just on the back end. (R-21, 22); that he went to see the property owner sometime in May after a demand had been made for more rent. (R-22); that the Club opened in June (R-19); that the Club ran during the 90 day period. (R-24).

The record is in a state of confusion as to just when defendant learned there was no lease on the premises occupied by Valley Amusement. There is some confusion as to whether the so-called lease was on the whole premises at 3793 South State Street or merely on the back portion of the premises. It appears to be clear, however, that he learned of the fact at least one and one-half to two months prior to the time plaintiff filed his lawsuit and that during that time defendant attempted to negotiate a written lease with the landlord and that the corporate activities were carried on at the building during this period. (R-30).

Plaintiff asserts that defendant is now precluded from denying the existence of a lease that defendant had previously acknowledged existed when he attested as to its value; that he is precluded from averring the non-existence of a lease which, through his acts and deeds he maintained existed at the time of corporate organization. As a matter of policy,

the law should not now allow this defendant to aver the non-existence of a lease he solemnly and under oath proclaimed existed. (R-95, 96).

The articles of incorporation recite that Mr. McDermond transferred the lease to the corporation. If, as defendant claims, there was in fact, no lease than one may reasonably infer that Mr. McDermond knew there was no lease. McDermond represented defendant Gibbs in acquiring for Gibbs plaintiff's interest in Valley Amusement Enterprises Inc. If defendant's agent, McDermond knew there was no lease, then such knowledge is attributable to his principal Gibbs, and Gibbs cannot now complain he was laboring under a mistake of fact. The general rule is stated at 2 AM. Jur. 294, Paragraph 376, as follows:

“According to the majority view which is based upon the theory of a presumption that that agent performs the duties of his agency by disclosing to the principal any knowledge which he may possess necessary or material to the protection of the principal's interests, the fact that the knowledge with which the principal is sought to be charged was acquired by his agent prior to his agency does not prevent the application of the general rule charging the principal with the knowledge of his agent.”

A review of the whole record, the nature of defendant's testimony, the usual confusion of his testimony as to his relation with McDermond and his understanding in relation to the lease support the assertion that not only did his agent, McDermond, know of the status of the lease but that the defendant himself knew.

Defendant argues as if he were purchasing a leasehold from plaintiff rather than an interest in a corporation. Defendant

himself testified (R-15) that no conversations were had concerning a lease when discussing their bargain. Defendant's testimony shows that internal corporate difficulties prompted his purchase of plaintiff's interest. The record is barren of any evidence that defendant would have acquired control of the corporation even with the purchase of plaintiff's interest so as to control the leasehold if one existed. Defendant himself testified that there were assets other than the leasehold at the time of his purchase of plaintiff's interest. (R-75). Defendant acquired plaintiff's interest in whatever there was. Defendant testified he knew what plaintiff's interest was. (R-14).

### POINT III.

THERE WAS NO FAILURE OF CONSIDERATION AND DEFENDANT IS NOT ENTITLED TO RESTITUTION OF THE AMOUNT PAID OVER TO PLAINTIFF.

Defendant does not allege lack of consideration to support the agreement between plaintiff and defendant. He asserts a failure of consideration because of the alleged non-existence of a lease which he apparently hoped was part of the assets of the corporation and which he alleges makes the corporate shares transferred to the defendant by plaintiff without value.

As of January 24, 1955, plaintiff conveyed to defendant all of his "right, title and interest to the shares of capital stock in Valley Amusement Enterprises Inc. . . ." The conveyance was complete as of that date. Defendant testified that the corporation had assets other than the so-called leasehold as of that date. (R-75).

Defendant acquired each and every right of plaintiff as a stockholder in the corporation. It is basic that the frustration of an expectation or anticipation of the purchaser does not

amount to a failure of consideration. He cannot escape liability for the purchase price merely because the venture turned out badly or as not as profitable as he expected it to be. (See Fletcher Cyclopedia Corporations Volume 12a, Page 26, Paragraph 5574).

The facts in this instance do not justify rescission or restitution in favor of defendant. Defendant made no timely effort to rescind after his so-called discovery of the non-existence of a lease. He attempted to negotiate a lease and in fact carried on his activities to make the corporation an operating company. Only at the time when his rightful obligation to pay was being pressed did he then, through his counsel, make demand for the return of his money and even then he failed to tender back all that had been conveyed.

### CONCLUSION

It is submitted that the trial court's judgment was correct in substance, that plaintiff's judgment for \$1250, interest and costs should be affirmed and that defendant is entitled to neither reversal nor judgment on his counterclaim.

Respectfully submitted:

JED W. SHIELDS

*Attorney for Plaintiff and Respondent*  
Spencer Van Noy

Received\_\_\_\_\_ copies of the foregoing brief  
this\_\_\_\_\_ day of\_\_\_\_\_, 1957.