

1959

State of Utah v. J. Howard Valentine et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

— FILED

STATE OF UTAH, by and through
its ROAD COMMISSION,
Plaintiff and Appellant,

— vs. —

J. HOWARD VALENTINE and
FLORENCE S. VALENTINE,
Defendants,

WESTERN STATES REFINING
COMPANY, a Corporation,
*Intervening Defendant
and Respondent.*

OCT 20 1959

Clerk, Supreme Court, Utah

Case
No. 9100

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
STATEMENT OF POINTS.....	4
ARGUMENT	5
POINT I.	
THE TRIAL COURT ERRED IN PERMITTING THE WESTERN STATES REFINING COMPANY TO INTERVENE IN THE CAUSE FOR THE REASON THAT SAID CORPORATION WAS ESTOPPED FROM CLAIMING DAMAGES FOR THE UNEXPIRED TERM OF THE PURPORTED LEASE WITH THE DEFENDANTS VALENTINE BY ACQUIESCING IN AND RECEIVING THE BENEFITS FROM THE ORDER OF OCCUPANCY	5
POINT II.	
THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION TO DISMISS THE PETITION TO INTERVENE BY THE WESTERN STATES REFINING COMPANY	10
POINT III.	
THE TRIAL COURT ERRED IN ITS FINDINGS IN DETERMINING THAT THE INTERVENOR WAS ENTITLED TO AND HAD A RIGHT TO OPERATE A SERVICE STATION UNTIL AUGUST 9, 1962, OR AT ALL, AND TO HAVE JUDGMENT ENTERED IN ITS FAVOR FOR DAMAGES	10
POINT IV.	
THE PURPORTED LEASE WAS EXECUTORY AND AS SUCH WAS NOT BINDING UPON THE PLAINTIFF WHO HAD NO KNOWLEDGE OF SUCH LEASE	11
POINT V.	
THERE ARE NO DAMAGES RECOVERABLE BY THE INTERVENOR, FOR THE REASON THAT AT THE TIME OF ENTERING INTO THE ALLEGED LEASE UPON WHICH THEY SUE, THE INTERVENOR KNEW THAT THE PROPERTY WAS ABOUT TO BE CONDEMNED AND THAT ANY INTEREST IT TOOK WAS A DEFEASIBLE INTEREST SUBJECT TO DEFEASANCE	13
POINT VI.	
AT THE DATE OF THE SERVICE OF SUMMONS, THE INTERVENOR HAD NO OPERATIONAL EXPERI-	

TABLE OF CONTENTS — (Continued)

	Page
ENCE AND COULD NOT EVALUATE THE LEASE- HOLD	14
 POINT VII.	
THERE WAS NO SUBSTANTIAL EVIDENCE BE- FORE THE TRIAL COURT TO ASSESS DAMAGES TO THE INTERVENOR	15
CONCLUSION	16

Authorities Cited

12 American Jurisprudence, Contracts, para. 10	13
13 American Jurisprudence, Corporations, para. 984	6
19 American Jurisprudence, Estoppel, para. 50	9
para. 61	8
para. 62	9
para. 64, p. 686-687.....	9
7 American Law Reports 467 and 487.....	6
Orgel, Valuation, Vol. 1, para. 162	14
Vol. 1, p. 658-662	16
Restatement, Property, para. 157-O: 16b	13
Thompson, Real Property, para. 1029.....	14

Cases Cited

City of Los Angeles v. Deacon (1932), 7 P. 2d 378.....	16
Hamilton v. Pittsburgh B. & L. E. R. Co., 190 Pa. 51, 42 At. 369.....	15
Hammonds v. Flewellen (1932), Tex. Civ. App., 48 S. W. 2d 813.....	9
Hardwick v. American Can Co., 113 Tenn. 657, 88 S. W. 797.....	12
Hatch v. Standard Oil Co., 100 U. S. 124, 25 L. Ed. 554.....	12
Heller v. Jentzch, 309 Mo. 440, 260 S. W. 979.....	13
H. L. Rust Co. v. Drury (DC), 62 App. D.C. 329, 68 F. 2d 167.....	13
Idaho Implement Co. v. Lambach, 16 Ida. 497, 101 P. 951.....	12
James Poultry Co. v. Nebraska City (1939), 284 N. W. 273.....	16
Korf v. Fleming (1948), 32 N. W. 2d 85.....	16
Loyal v. Wolf, 179 Ala. 505, 60 So. 298.....	12
Oklahoma Moline Plow Co. v. Smith, 41 Okla. 498, 139 P. 285.....	12
Tracey v. Standard Acci. Ins. Co., 119 Me. 131, 109 A. 490, 9 A.L.R. 521	9

Statutes Cited

78-34-7, Utah Code Annotated 1953.....	11
78-34-11, Utah Code Annotated 1953.....	11

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Case
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BRIEF OF APPELLANT

INTRODUCTION

There are four transcripts of testimony in this case, dating from August 12, 1952, through March 11, 1959. For the purposes of this brief, we shall refer to the testimony adduced on the motion for the order of occupancy as Tr. O. O., and to other testimony as Tr. Trans., dated Reference is made to the record as R.

STATEMENT OF THE CASE

Pursuant to a resolution of the Road Commission, dated July 21, 1952 (Exhibit No. 1), the plaintiff, State of Utah, by and through its Road Commission, commenced this action on July 31, 1952, against the defendants, J. Howard Valentine, now deceased, and Florence S. Valentine, by the service of summons, the filing of a complaint and a notice of the hearing on the motion for the occupancy of the property described in the complaint. (R. 1-8)

On August 12, 1952, a hearing was held before the Second District Court on the motion for immediate occupancy, at which time an order was granted, subject to conditions. (R. 50) On August 29, 1952, a formal order was entered by the court, granting the plaintiff the right to immediately occupy the premises, conditioned that the defendants be permitted to retain possession of the premises until said premises were actually needed by the plaintiff. (R. 9) On December 6, 1955, the Western States Refining Company, a corporation, filed a motion to intervene as a defendant in the cause. The court granted the motion. (R. 13) On November 7, 1956, plaintiff moved for the dismissal of the claim of the intervenor. The motion was denied. (Tr. Trans. Nov. 7, 1956, 4-8) Pursuant to notice filed and served on the defendants Valentine on or about the 1st day of November, 1955, the plaintiff took possession of the premises as of about the 12th day of December, 1955. Hearings on the matter on its merits were held on November 7, 1956, February 4,

1959, and March 11, 1959. At the conclusion of which, the trial court entered a judgment on findings of fact and conclusions of law in favor of the intervening defendants in the sum of \$17,500, together with interest.

STATEMENT OF FACTS

On or about the 5th of February, 1959, judgment was entered and satisfied in favor of the defendants Valentine. (R. 30-32) Hence, the Valentines are no longer parties to this action. The question now before this Court is whether the intervenor, Western States Refining Company, can recover damages by virtue of the purported lease which we shall discuss more fully as we proceed in the argument of this case. The record indicates that a lease was executed on April 10, 1952, between the Valentines and the Western States Refining Company, involving the property sought to be condemned by the State Road Commission. (Exhibit A)

At the commencement of this action, the intervenor was not a party defendant. It was agreed and stipulated between the parties that nothing was on record to indicate any interest in the property other than that of the Valentines at the time the summons was served in this action. (Tr. Trans. March 11, 1959, page 33)

At the hearing on the motion for the order of occupancy, Mr. Valentine was the vice-president of the Western States Refining Company, and Mr. Wagstaff was the president of the corporation — both being present in

court and both agreed to the order of the court, not only by silence and acquiescence, but by constructive and active participation therein. (Tr. O. O. 20-21) During the hearing on the order for occupancy, Mr. Wagstaff was named as associate counsel. (Tr. O. O. 18)

At the date of the service of summons and the service of notice of the motion for occupancy, the service station was not in operation. (Tr. O. O. 13-15) (Tr. Trans., Nov. 7, 1956, p. 9-10)

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN PERMITTING THE WESTERN STATES REFINING COMPANY TO INTERVENE IN THE CAUSE FOR THE REASON THAT SAID CORPORATION WAS ESTOPPED FROM CLAIMING DAMAGES FOR THE UNEXPIRED TERM OF THE PURPORTED LEASE WITH THE DEFENDANTS VAL-
ENTINE BY ACQUIESCING IN AND RECEIVING THE BENEFITS FROM THE ORDER OF OCCUPANCY.

POINT II.

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION TO DISMISS THE PETITION TO INTERVENE BY THE WESTERN STATES REFINING COMPANY.

POINT III.

THE TRIAL COURT ERRED IN ITS FINDINGS IN DETERMINING THAT THE INTERVENOR WAS ENTITLED TO AND HAD A RIGHT TO OPERATE A SERVICE STATION UNTIL AUGUST 9, 1962, OR AT ALL, AND TO HAVE JUDGMENT ENTERED IN ITS FAVOR FOR DAMAGES.

POINT IV.

THE PURPORTED LEASE WAS EXECUTORY AND AS SUCH WAS NOT BINDING UPON THE PLAINTIFF WHO HAD NO KNOWLEDGE OF SUCH LEASE.

POINT V.

THERE ARE NO DAMAGES RECOVERABLE BY THE INTERVENOR, FOR THE REASON THAT AT THE TIME OF ENTERING INTO THE ALLEGED LEASE UPON WHICH THEY SUE, THE INTERVENOR KNEW THAT THE PROPERTY WAS ABOUT TO BE CONDEMNED AND THAT ANY INTEREST IT TOOK WAS A DEFEASIBLE INTEREST SUBJECT TO DEFEASANCE.

POINT VI.

AT THE DATE OF THE SERVICE OF SUMMONS, THE INTERVENOR HAD NO OPERATIONAL EXPERIENCE AND COULD NOT EVALUATE THE LEASEHOLD.

POINT VII.

THERE WAS NO SUBSTANTIAL EVIDENCE BEFORE THE TRIAL COURT TO ASSESS DAMAGES TO THE INTERVENOR.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN PERMITTING THE WESTERN STATES REFINING COMPANY TO INTERVENE IN THE CAUSE FOR THE REASON THAT SAID CORPORATION WAS ESTOPPED FROM CLAIMING DAMAGES FOR THE UNEXPIRED TERM OF THE PURPORTED LEASE WITH THE DEFENDANTS VAL-ENTINE BY ACQUIESCING IN AND RECEIVING THE BENEFITS FROM THE ORDER OF OCCUPANCY.

The Western States Refining Company was not a party to the action until on or about December 6, 1955. Nonetheless, the corporation through its principal officers, was in court and *actively* engaged in the arrangement contained in the order of occupancy. *Query*: Is the corporation bound by the agreements and stipulation of its officers entered into at the date of the order of occupancy, August 12, 1952?

As we understand the intervenor's contention before the trial court was that inasmuch as it (the corporation) was not a party to the action, it could not be bound by any action agreed upon by its vice-president and acquiesced in by its president. To this, we disagree. We think that even though such acts were apparently not authorized by the corporation, the same were ratified by the acceptance of the benefits accruing therefrom and that under the agreement, they had no cause of action after the need for the property by the plaintiff was indicated.

“It is a well established general rule that a corporation which, with knowledge of its officers' or agents' unauthorized contract or act and of the material facts concerning it, *receives and retains the benefits* resulting therefrom ratifies the transaction if it is one capable of ratification by parole.” (Emphasis added)

13 Am. Jur., Corporations, 984.

7 A. L. R. 467 and 487.

Mr. Valentine, as well as Mr. Wagstaff, was acting in a dual capacity at the time of the hearing on the motion

for the order of occupancy. Mr. Valentine was the vice-president of the intervenor and as an individual had been the owner of the property sought to be condemned since 1947. (Tr. O. O. 10)

From the testimony of Mr. Valentine (Tr. O. O. 12), we find the following statements:

“*We* have grown from a small plant, of course, as refineries go *we* are still a very small plant.”

“Our only recourse is to build *our* own stations. *We* have been planning to build this station on this place for the last three or four years. *We* have been saving our money to get proper financing and have waited until *we* could get *our* volume up too and now *we* have found that *we* absolutely have to have it in order to take care of this increased production of *our* plant.” (Emphasis added)

And at Tr. O. O. 13, Mr. Valentine further informs us:

“Q. You are not contesting the State’s right to take this property?”

“A. No. I told them they could have it if they would give *me* a strip somewhere else if I could move *my* equipment on it.”
(Emphasis added)

In answer to the court’s question the defendant Valentine stated:

“We can get back the big share of this money the next few months on the gallonage *we* sell there. The money has been spent, they are pumping gas there today.” (Emphasis added)

(Tr. O. O. 15)

This substantial information indicates that Mr. Valentine was not only acting in his own capacity as the lessor, but was acting for and on behalf of the intervenor. The Western States Refining Company took possession of the property immediately after the order of occupancy and they continued in such capacity as lessee until December, 1955. During that time, the corporation reaped the *benefits of the conditioned order of occupancy* and, therefore, are estopped from making any claim as to damages for the unexpired term of the lease. (Tr. O. O. 15-17, 20) The order was entered on this basis. (Tr. O. O. 20)

It is generally understood that estoppel to question or object to a thing done or any position taken by another may arise by express consent thereto. This rule has been applied in numerous instances to preclude the consenting party from asserting the invalidity or avoiding the consequences of acts which were beyond the legitimate and rightful powers of the parties acting when done pursuant thereto, or in reliance on, such consent — such as the reduction of a verdict by a court which has no power to disturb such verdict. 19 Am. Jur., Estoppel, para. 61.

The doctrine of estoppel is frequently applied to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with

one in which he, or those by whose acts he is bound, has acquiesced. 19 Am. Jur., Estoppel, para. 62.

“Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts or benefits from a transaction, contract, instrument, regulation or statute upon which he might have rejected or contested.”

“Such estoppel operates to prevent a party thus benefiting from questioning the validity and effectiveness of the matter or transaction insofar as it imposes a liability or restriction upon him; or in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligations.”

19 Am. Jur., Estoppel, para. 64, p. 686-687.

“Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with one previously assumed by him, at least where he had or was chargeable with full knowledge of the facts and another will be prejudiced by his actions.”

19 Am. Jur., Estoppel, para. 50.

“The law will not stand by in silence and see one party mislead another to his injury, whether by ignorance, negligence or design.”

Tracey v. Standard Acci. Ins. Co., 119 Me. 131, 109 A. 490, 9 A. L. R. 521.

In *Hammonds v. Flewellen* (1932), Tex. Civ. App., 48 S.W. 2d 813, the court stated:

“If a person either by words or *conduct* has intimated that he will offer no opposition to an act to be done or induces a reasonable belief that he consents to the act in view to be done and another person is thereby induced to do that from which he otherwise might have abstained, such person would be estopped from questioning the act done or the fair inference to be drawn from his conduct.”

POINT II.

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION TO DISMISS THE PETITION TO INTERVENE BY THE WESTERN STATES REFINING COMPANY.

(Tr. Trans., November 7, 1956, p. 4-8)

We incorporate the argument contained under Point I and hereby refer to it as our argument under Point II of this brief.

POINT III.

THE TRIAL COURT ERRED IN ITS FINDINGS IN DETERMINING THAT THE INTERVENOR WAS ENTITLED TO AND HAD A RIGHT TO OPERATE A SERVICE STATION UNTIL AUGUST 9, 1962, OR AT ALL, AND TO HAVE JUDGMENT ENTERED IN ITS FAVOR FOR DAMAGES.

The intervenor is bound by the stipulations and agreement made at the hearing on the order of occupancy and the court's order in respect thereto. The service station was not built on the land in question and was not in operation at the time of the service of summons. All

affect on market value or value of leasehold interest has arisen from the date of the summons and the use of the property since that time. Section 78-34-11, Utah Code Annotated 1953.

The intervenor is not in a position as an innocent purchaser who had lost the benefit of its bargain. All value of the lease arose after the order of occupancy and was the result of that order. The intervenor had actual notice of the proceedings in this cause; and if they so desired, they could have come in under Section 78-34-7, Utah Code Annotated 1953, immediately after the summons was served in the action against the Valentines.

POINT IV.

THE PURPORTED LEASE WAS EXECUTORY AND AS SUCH WAS NOT BINDING UPON THE PLAINTIFF WHO HAD NO KNOWLEDGE OF SUCH LEASE.

On April 10, 1953, the defendants and the intervenor entered into a lease agreement (Exhibit A), which said lease provided in part as follows :

*“Said lease to commence on the 10th day of August, 1952, for a term of ten years from thence next ensuing and to expire on the 9th day of August, 1962 * * *, the first installment to become due on the 10th of August, 1952, or as soon thereafter as a service station is erected and accepted as hereinafter provided.”*
(Emphasis added.)

The lease further provides in substance that the service station was to be constructed according to plans and

specifications provided by the intervenor and attached as a part of the lease. It further provides that the lessee may assign the lease to a corporation to be formed which shall be a wholly owned subsidiary of the lessee, and that the assignment shall be made without recourse to the lessee. It is interesting to note at this point that no plans and specifications were provided and approved insofar as Exhibit A is concerned, and we have no knowledge of any such plans and specifications.

The intervenor in July and August of 1952 had no vested right in the property. A right which is not vested but lies in action and which requires resort to a court of equity to invest plaintiff with the right claimed is "executory." *Hardwick v. American Can Co.*, 113 Tenn. 657, 88 S. W. 797; *Hatch v. Standard Oil Co.*, 100 U. S. 124, 25 L. Ed. 554; *Loyal v. Wolf*, 179 Ala. 505, 60 So. 298; *Oklahoma Moline Plow Co. v. Smith*, 41 Okla. 498, 139 P. 285; *Idaho Implement Co. v. Lambach*, 16 Ida. 497, 101 P. 951.

The Valentines bound themselves to build a service station some time in the future after April 10, 1952. The payment of rental did not commence until August 10, 1952, or "as soon thereafter as a service station is erected and accepted" by the lessee.

"An executory contract is one in which a party binds himself to do, or not to do a particular thing, whereas an executed contract is one in which the object of an agreement is performed and everything that was to be done, is done."

12 Am. Jur., Contracts, para. 10.

The order of occupancy was made prior to the completion of the station and the intervenor, not having taken possession of the property, could not force completion of the station.

POINT V.

THERE ARE NO DAMAGES RECOVERABLE BY THE INTERVENOR, FOR THE REASON THAT AT THE TIME OF ENTERING INTO THE ALLEGED LEASE UPON WHICH THEY SUE, THE INTERVENOR KNEW THAT THE PROPERTY WAS ABOUT TO BE CONDEMNED AND THAT ANY INTEREST IT TOOK WAS A DEFEASIBLE INTEREST SUBJECT TO DEFEASANCE.

Defeasance, as defined in Restatement, Property, para. 157-0: 16b, is as follows:

“The word ‘defeasance’ is used in this statement generally to describe not only the ending of an interest in accordance with its terms, as for example, by the expiration of a stipulated duration or in accordance with the terms of a special limitation, but also the cutting short of an interest, as for example, the cutting of an interest by a power of termination by an executory limitation.”

If the intervenor had any property right at all, after its possession of the property, it was at most a tenancy at will or at least a tenancy at sufferance. If it was the latter, it is not a tenancy at all; it is merely an adverse possession. *H. L. Rust Co. v. Drury* (DC) 62 App. D.C. 329, 68 Fed. 2d 167; *Heller v. Jentzsch*, 309 Mo. 440, 260

S.W. 979. If it is a tenancy at will, it is not transferrable (hence not salable) for the reason that the purchaser has no right which he holds against the landlord. Thompson, Real property, para. 1029.

POINT VI.

AT THE DATE OF THE SERVICE OF SUMMONS, THE INTERVENOR HAD NO OPERATIONAL EXPERIENCE AND COULD NOT EVALUATE THE LEASEHOLD.

The evaluation of any interest in the property owner as against the condemnor is as of the date of the service of summons in the condemnation action. (This not to the contrary under the decisions of the former law.)

It was during the period from August 12, 1952, until December of 1955, and only during that period, and under order of the court, that the intervenor produced any business whatsoever. So it becomes evident that there was no possible evaluation of the leasehold interest at the time the State actually took possession of the property. *Chicago, etc. v. Catholic Bishop*, 10 N. E. 372. Mr. Kiepe testified at the hearing (Tr., March 11, 1959, p. 10) that at the time he inspected the property, there was no value to the leasehold. As to a later date, Mr. Kiepe testified, based upon assumptions and potential values, that the leasehold had some value. He particularly qualified his remarks with respect to the assumptions submitted to him. There is no substantial basis for the assumptions or the hypothetical questions submitted to Mr. Kiepe at the time he testified on March 11, 1959. See Orgel on Valuation, Vol. 1, para. 162, et seq.

POINT VII.

THERE WAS NO SUBSTANTIAL EVIDENCE BEFORE THE TRIAL COURT TO ASSESS DAMAGES TO THE INTERVENOR.

The only competent testimony submitted to the court which we consider non-speculative nor remote is that of Mr. Kiepe, who testified in substance that there was no value to the lease for a buyer knowing that the State Road Commission was about to develop a road through the premises of defendants Valentine and that even as late as 1955, when the Western States Refining Company vacated the premises, there would still be no value to the remainder of the lease. (Tr. Trans. March 11, 1959, p. 10-29)

The testimony of Mr. Wagstaff and his assistants, as submitted to the court on the hearing of February 4, 1959, was purely speculative and remote, and we wonder how speculative one can get in arriving at a proper measure of damages. The other testimony which was adduced in 1956 was not substantiated by any records, nor was there any competent testimony to indicate the value of the leasehold. (Tr. Trans., Nov. 7, 1956, p. 35-46)

Elements of this remote, speculative and conjectural damage are tarred with that label and are not subject to compensation as being a too distant extension of damages based on consideration of the highest and best value of the land.

The court in the case of *Hamilton v. Pittsburgh B. & L. E. R. Co.*, 190 Pa. 51, 42 At. 369, aptly stated its position on business profits as evidence of value as follows:

“The very most that can be said in its favor is, that such profits might possibly be made, but that they would be made depends on so many contingencies that a verdict which purports to be the truth cannot be based upon them. * * * Assume that today his fuel would cost no more for a large additional output, how can he undertake to fix for years the cost of labor and materials for operating his plant? How can he determine that in the future rival manufacturers will not have advantages in some other location superior to his and undersell him on the market? How can he determine that his present supply of natural gas will continue and that it will not give out? * * * The testimony on this subject was wildly speculative. * * *”

In the instant case, we add one further speculation. How can the intervenor determine whether gas wars and undercutting will not give way to the more conservative methods of doing business? See Orgel, Vol. 1, p. 658-662. Ordinary profits are not to be considered. *City of Los Angeles v. Deacon* (1932), 7 P. 2d 378; *Korf v. Fleming* (1948), 32 N. W. 2d 85; *James Poultry Co. v. Nebraska City* (1939), 284 N. W. 273.

CONCLUSION

We submit that the cause should be remanded to the court below with orders to dismiss the same.

Respectfully submitted,

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