

1959

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

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 COM-
PANY, a Corporation,
Intervening Defendant and Respondent.

No. 0 1959
Court, Utah
Case No.
9100

BRIEF OF RESPONDENT

COTRO-MANES & COTRO-MANES

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Defendant and Respondent*

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The intervenor admits that the plaintiff's statement of the case is substantially correct. However, exception is taken to the second paragraph of the statement, wherein the plaintiff alleges that the court granted plaintiff immediate occupancy of the premises. This was not the fact or the case. The order shows that the plaintiff was given the right to occupy the

premises whenever the land was needed for construction (R. 9). The occupancy by the plaintiff did not take place until three years and three month after the signing of the order of occupancy.

STATEMENT OF FACTS

The intervenor admits that the plaintiff's statement of facts is substantially correct, except as to the following particulars.

Mr. Valentine, one of the defendants, was in court in the capacity of a party defendant and not in any other capacity whatsoever.

Mr. Wagstaff was in court in the capacity of a practicing attorney and one of the defendants' counsels, and not in any other capacity whatsoever.

Plaintiff's comment in its statement of facts, that Mr. Valentine and Mr. Wagstaff, "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," is argumentive, improper, an incorrect statement of the facts, and a conclusion of the plaintiff.

STATEMENT OF POINTS

POINT ONE. The intervenor is not bound by the order of occupancy under the provisions of the due process of law clause of the Constitution of Utah.

POINT TWO. The intervenor was entitled to intervene into the action as a matter of right, and the trial court did not err in permitting the intervention.

POINT THREE. The intervenor is not bound by any order or proceeding in the action made prior to the date of intervention.

POINT FOUR. The value of intervenor's leasehold interest is fixed as of the date of the order allowing intervention.

POINT FIVE. Plaintiff had actual notice of the lease between the defendants and the intervenor.

POINT SIX. Plaintiff, by its conduct, is barred from pleading equitable estoppel.

POINT SEVEN. The intervenor is entitled to just compensation for its leasehold interest in the property condemned.

POINT EIGHT. There is sufficient evidence upon which the trial court based its judgment, and as a matter of law the judgment should be affirmed.

ARGUMENT

POINT ONE

THE INTERVENOR IS NOT BOUND BY THE ORDER OF OCCUPANCY UNDER THE PROVISIONS OF THE DUE PROCESS OF LAW CLAUSE OF THE CONSTITUTION OF UTAH.

It is undisputed and admitted that the intervenor was not served with process in the condemnation proceedings and that

summons was not issued or served naming the Western States Refining Company as a party to the action. The record further shows that no service of process was made by publication or other constructive service methods.

The Constitution of Utah provides:

"No person shall be deprived of life, liberty or property without due process of law."

Constitution of Utah
Art. I, Sec. 7

The Supreme Court of Utah ruled in the case of Parry v. Bonneville Irr. Dist., 71 U. 202, 263 P. 751:

"It is of course an elementary rule of law that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgment."

The Rules of Civil Procedure set forth how an action will be commenced and when the court obtains jurisdiction. Rule 3, Utah Rules of Civil Procedure, states:

"Commencement of Action. (a) How commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons. * * * (c) Time of Jurisdiction. The court shall have jurisdiction from the time of filing the complaint or service of summons."

Rule 10(a) of the Utah Rules of Civil Procedure states:

" * * * in the complaint the title of the action shall include the names of all the parties, * * * "

The complaint in this action does not name the Western

States Refining Company, the intervenor, as a party to the action (R. 1).

The plaintiff now states that the intervenor is bound as a party to the action because of the presence of some of the officers of the intervenor in the courtroom at the time of the hearing on the order of immediate occupancy.

The Court stated in the case of *State v. Telford*, 93 U. 228, 72 P.2d 626:

"There are many cases where courts have jurisdiction of a subject matter but that jurisdiction must be invoked according to a certain procedure. In invoking the jurisdiction of the district court on matters wherein it has original jurisdiction, it requires a complaint, petition, or application. One cannot invoke the jurisdiction by simply stating orally one's complaint."

The Utah court in the case of *Naisbitt v. Herrick*, 76 U. 575, 290 P. 950, ruled:

"Due process of law requires that before one can be bound by a judgment affecting his property right, some *process* must be served upon him which in some degree at least is calculated to give him notice." (Emphasis ours.)

The record shows that not only was summons not served upon the intervenor, but that the intervenor was not named as a party to the action in the complaint. The Second Judicial District Court in and for Davis County, Utah, did not have jurisdiction over the Western States Refining Company, the intervenor, until December 13, 1955, and any orders, decrees, rulings or judgments made prior to that date were a nullity as to the Western States Refining Company.

POINT TWO

THE INTERVENOR WAS ENTITLED TO INTERVENE INTO THE ACTION AS A MATTER OF RIGHT, AND THE TRIAL COURT DID NOT ERR IN PERMITTING THE INTERVENTION.

The plaintiff asserts in the first point of its brief that the court erred in allowing the Western States Refining Company to intervene in this action. In making such an assertion, the Road Commission disregards the legislative enactments of the Utah Legislature, which passed a law setting forth who is entitled to intervene as a party to a condemnation suit.

“Who may appear and defend.—All persons in occupation of or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in the same manner as if named in the complaint.”

78-34-7, Utah Code Annotated, 1953

The position taken by the state, relating to the right of the intervenor to intervene and protect its property rights, is incomprehensible in view of the provisions of the statute just quoted.

POINT THREE

THE INTERVENOR IS NOT BOUND BY ANY ORDER OR PROCEEDING IN THE ACTION MADE PRIOR TO THE DATE OF INTERVENTION.

The plaintiff asserts in the first point of its brief that the intervenor is bound by the order of occupancy made by the court on the 29th day of August, 1952 (R. 9). The record shows that the Western States Refining Company did not become a party to the action until the 13th day of December, 1955 (R. 13).

Under no stretch of the due process clause of the Constitution or of the imagination could the intervenor be said to have been a party to the action at the time of the hearing on the order of occupancy. The mere fact that the president of the intervenor, Mr. W. S. Wagstaff, was in the courtroom does not make the corporation a party to the action. At that time Mr. Wagstaff was a practicing attorney-at-law and a member of the bar of this state. His being made counsel of record for the defendants (the Valentines), cannot be said to be an act which would give the court jurisdiction over the corporation.

The plaintiff asserts that the corporation received benefits from the order of occupancy and therefore it is estopped from claiming any damages from the taking of the land.

The defendants could not bind the intervenor by any representations or stipulations that they chose to make. Insofar as the order of occupancy is concerned, it was a mere interlocutory order, *State v. Danielson*, 122 U. 220, 247 P.2d 900, and the defendants, or the intervenor after it came into the action, had it been affected by the order, could attack the order and the grounds for its issuance. *Utah Copper Co. v. Montana Bingham Consol. Mining Co.*, 69 U. 423, 255 P. 672.

After reviewing the record, there are serious doubts that, if contested, the court's order allowing occupancy would have been sustained. The State's own witness testified in August, 1952, at the hearing on Immediate Occupancy:

Mr. Heath: " * * * We noted the activity on this land and the main reason for asking for the order of immediate occupancy is we didn't want to enhance the value the state would have to buy in the future by buying out a business."

R-39, Tr. 0. 0., page 7

The record continues:

Mr. Iverson: "Isn't this the case, Mr. Heath, the only reason this order of occupancy is asked for is because the defendants here have been improving the property and have gone ahead with the use of it?"

Mr. Heath: "That is the main reason."

R-39, Tr. 0. 0., page 9

The court granted the order of immediate occupancy, but carefully granted the defendants the right to use the land and occupy it until the state needed the land for the road (R. 39, Tr. 0. 0., page 20, 21). The court by direct implication recognized that the State did not need the land at that time nor would it need it for some time to come, but entered the order so that it would be unnecessary for the parties to come back at a later time.

While it is discretionary with the court to grant an order of immediate occupancy, there should be a showing of the necessity for a speedy occupation of the land. *Utah Copper Co. v. Montana Bingham Consol. Min. Co.*, 69 U. 423, 255 P. 672. It is clear from the record that there was no necessity for an

immediate occupation of the property. The plaintiff alleges that the intervenor acquired benefits by this order. What benefits?

POINT FOUR

THE VALUE OF INTERVENOR'S LEASEHOLD INTEREST IS FIXED AS OF THE DATE OF THE ORDER ALLOWING INTERVENTION.

The plaintiff asserts in the third and sixth points of its brief that the value of the leasehold interest is fixed as of the date of the summons.

The intervenor admits that this is correct and is the statutory law, insofar as it pertains to those upon whom the summons is served.

The law of this State is clear and definite that a party having an interest in land being condemned, but who is not a party to the suit, is not bound by that summons and that the value of the interest taken is fixed as of the date of the intervention of that party into the action.

The plaintiff, State of Utah, has the burden and the duty of bringing in each and every party it seeks to bind by the condemnation suit, and the rights of those who are ignored and who are not brought in as proper parties to the action cannot be bound by any orders or decrees rendered by the court in the matter. This has been conclusively settled in the cases of *Oregon S. L. & U. N. Ry. Co. v. Mitchell*, 7 U. 510, 27 P. 693, and *Ogden L. & I. Ry. Co. v. Jones*, 51 U. 62, 168 P. 548. In the latter case the Utah Court said:

"It is also admitted that where a summons is not served, the time at which the value of the land and the damages must be determined under our statute is the date on which the landowner enters his appearance in the action."

The Supreme Court of Utah ruled in the case of *Brigham City v. Chase*, 30 U. 410, 85 P. 436:

"Where such persons are not all named as parties or not served, the judgment of condemnation will simply be a nullity as to those omitted."

In the *Brigham City* case, the court goes on to say that the condemnors "proceeds at their peril" where they have not named all the parties to the action or served them with process.

As the Western States Refining Company did not become a party to the action until December 13, 1955 (R. 13), as a matter of law damages must be assessed as of that date.

POINT FIVE

PLAINTIFF HAD ACTUAL NOTICE OF THE LEASE BETWEEN THE DEFENDANTS AND THE INTERVENOR.

In point three of plaintiff's brief, it alleges that it was the duty of the intervenor to come into the action, as it had actual notice of the proceedings. This argument is diametrically opposed to the theory adopted in point one of its brief, wherein it asserts that the intervenor should not have been permitted to come into the case at all.

As the State of Utah commenced the action, it was its duty to bring in all the parties it sought to bind by the pro-

ceedings. The intervenor was under no legal duty to come into the case at all.

The plaintiff had actual notice of the existence of the lease at the time of the hearing on the order of occupancy, by the testimony of Mr. Valentine, who not only stated that there was a lease, but gave its terms and conditions (R. 39, Tr. 0. 0., page 12). The State received a land appraisal (Intervenor's Exhibit No. 1) filed by Mr. Werner Keipe, which set forth in detail the existence of the lease. The question that the plaintiff leaves unanswered in its brief is: Why did not the State of Utah bring in the intervenor as a proper party to the action in 1952 after it had actual notice of the existence of the lease between the Western States Refining Company and the defendants, Valentines?

The plaintiff had further notice of the lease by the fact that the intervenor was in possession of the property from the early part of August, 1952, up to the time that the State took possession in December, 1955.

Possession is actual notice of an interest in the title to land. *Meagher v. Dean*, 97 U. 173, 91 P.2d 454; *Toland v. Corey*, 6 U. 392, 24 P.190 (affirmed by the United States Supreme Court, 154 U. S. 499, 38 L.Ed. 1062, 14 S. Ct. 1144). In this latter case, the Utah Court said:

"We think the better doctrine is that an occupant's possession is actual notice of his title, and all persons with notice of such possession must at their peril take notice of his full title in the premises, no difference what the record shows."

Utah law does not require that all leases be put on record,

and it is a well recognized fact in the business world that the vast majority of leases executed are not placed on record.

Plaintiff asserts that the lease was a mere executory lease. This is not the case, and the record so shows that this was an executed and delivered lease.

The lease had been executed by the parties on April 10, 1952 (Tr. Trans. dated November 7, 1956, page 23, Def's Exhibit No. 1, Lease). The lessors, Valentines, the defendants, had bound themselves to build a gasoline station according to the plans and specifications attached to the lease, and they had in fact substantially completed the station prior to the hearing on the order of occupancy. Plaintiff admits this in its brief in its fourth point. Both parties were bound by the lease and neither party could breach the lease without the incurrance of a legal liability. The only thing that was executory about the lease was the exact date upon which the rental commenced to run. The term of the lease had already commenced to run prior to the hearing on the order of occupancy.

Plaintiff makes the observation that the plans and specifications were not attached to the lease, and, by innuendo, attempts to cast some doubt upon the lease. The record shows that no demand for the plans and specifications was ever made by the plaintiff, and had such a demand been made the plans would have been produced.

The plaintiff alleges that not only was the lease executory, but that the intervenor did not have a vested right in the property. This is not the fact nor the law. In the case of Ewert

v. Robinson, CCA 8th (1923), 289 F. 740, 35 A.L.R. 219, the Circuit Court said:

"It is no longer necessary to go upon land, as in the days of old and receive a twig or a clod of dirt as a token of changed possession. The delivery of the deed or lease accomplishes the same thing, and in a much less cumbersome manner."

Warvelle, in his work on Ejectment, Sec. 156, states:

"An estate for years is both created and perfected by the execution and delivery of a lease for the term, and such lease, while it confers no rights of ownership, does carry a right to the possession and profits of the land."

Where a lease has been executed with authority and it is prima facie the act of the parties, it is entitled to introduction to show the right to possession of the land. Tarpey v. Deseret Salt Co., 5 U. 205, 14 P. 338.

The plaintiff cites a number of cases defining executory interests, but it is to be noted in reading the cases that they all pertain to buy-sell agreements dealing with personal property, to wit: stoves, barrel staves, cotton, wagons and buggies, and baled hay.

POINT SIX

PLAINTIFF, BY ITS CONDUCT, IS BARRED FROM PLEADING EQUITABLE ESTOPPEL.

Plaintiff, throughout its brief, seeks to interject equitable reliefs against the intervenor by pleading estoppel. The writers of this brief believe that it is unnecessary to cite authority for

the "clean hands doctrine" of equity which requires one who seeks equity to do equity.

The evidence shows that the State of Utah, until the time that the defendants, pursuant to the terms of the lease, commenced to construct the service station, had no intention of condemning any land in the vicinity of the property in question.

Mr. Heath, right-of-way engineer for the state, testified that the only reason the state took the land was that the defendants had started to build improvements on their property, and the state did not want any landowners to enhance the value of their land (R. 39, Tr. 0. 0., pages 7, 8, 9). He further testified that the state had not condemned any other land and that the state would negotiate with all other landowners before filing suit (R. 39, Tr. 0. 0., page 8).

The conduct of the State of Utah throughout the entire law suit has been such that it cannot now plead the defense of equity.

POINT SEVEN

THE INTERVENOR IS ENTITLED TO JUST COMPENSATION FOR ITS LEASEHOLD INTEREST IN THE PROPERTY CONDEMNED.

The State of Utah Road Commission has attempted to seize and take the interest of the Intervenor without just compensation in violation of the Constitution of the United States and Constitution of Utah.

The United States Supreme Court, in the case of U. S. v. General Motors Corp., 323 U. S. 373, 65 S. Ct. 357, 89 L.

Ed. 311, 156 A.L.R. 390, after ruling that the taking of property without just compensation is violative of the Fifth Amendment to the Constitution, stated:

"When it (U. S. Government) takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken * * * ."

The Constitution of the State of Utah states:

"Private property shall not be taken or damaged for public use without just compensation."

Art. I, Sec. 22,
Constitution of Utah

To deny the intervenor just compensation for the value of its leasehold interest would be to violate all of the constitutional safeguards that our forefathers secured for us in the Constitutions of the United States and the State of Utah.

The California court recently, in the case of *Charlestrom v. Lyon Van and Storage Company* (1957), 313 P.2d 645, rejected an attempt to deny a leaseholder compensation for its leasehold interest. In that case, the lessor, knowing of the impending condemnation, served the lessee with notice of termination for alleged violations of the lease, so that he could claim all of the damages which were to be awarded for himself. The court rejected this scheme and went on to say:

"Ordinarily when the government condemns leased property thereby taking title to the whole property in fee the lease is obliterated, and, in the absence of an agreement to the contrary, the parties to the lease are each entitled to compensation for the taking of their respective rights."

POINT EIGHT

THERE IS SUFFICIENT EVIDENCE UPON WHICH THE TRIAL COURT BASED ITS JUDGMENT, AND AS A MATTER OF LAW THE JUDGMENT SHOULD BE AFFIRMED.

"It is recommended that the State Road Commission make sure in its settlement with the present owners, that satisfactory settlement is also made with the tenant."

Intervenor's Exhibit No. 1
Report of Werner Keipe

The above quotation is from the appraisal report of Mr. Keipe. At the time the statement was made by Mr. Keipe, he was employed by the plaintiff to make an appraisal of the land in question for the plaintiff. The State now seeks to show that Mr. Keipe placed no value upon the leasehold interest.

The entire hypothesis upon which the State relies to show that the leasehold interest had no value is based upon the theory of what would a buyer give for land knowing that it was about to be condemned.

The method of computing compensation generally in condemnation suits is the "fair market value" of the land or the leasehold taken.

The court, in the recent case of *Vrontikis Brothers vs. State*, U.2d, P.2d, observed:

" * * * The accepted formula for determining fair market value is * * * what would a purchaser willing

to buy but not required to do so, pay and what would a seller willing to sell but not required to do so ask."

By adding the condition of "knowledge of impending condemnation" a fair market value could not be arrived at. Mr. Keipe's entire testimony of the leasehold interest having no value was predicated upon the assumption that the land *would* be condemned in the immediate future (Tr. Trans. dated March 11, 1959 (pages 8, 9, 10). When Mr. Keipe, on cross examination, removed the hypothesis of impending condemnation, he arrived at a value of the leasehold, based upon the station's sale of gasoline during 1953, 1954 and 1955, under one theory of computation, of \$6,000.00 (Tr. Trans. dated March 11, 1959, page 17) and under another theory of computation, of \$23,325.00 (Tr. Trans. dated March 11, 1959, page 19).

The record contains substantial evidence of the market value of the leasehold interest which runs from \$6,000.00 (Tr. Trans. dated March 11, 1959, page 17) to \$40,000.00 (Tr. Trans. dated February 4, 1959, page 11).

"The measure of damages for leasehold interest taken under eminent domain has been declared generally to be the fair market value of the leasehold or unexpired term of the lease."

3 A.L.R. 2d 290

Annotator's comment, citing cases

In determining the value of the leasehold interest, it is not always an easy thing to ascertain with exactness what the "fair market value" is.

"Leaseholds are not ordinarily the subject of sale on the market, and vary so much in the length of term, rent, and other particulars, including the nature of the property demised, and its particular use by the lessee, that applying market value as the criterion for determining the value of the leasehold may, in some circumstances, be impossible or might produce inequitable results."

Editorial Summary
3 A.L.R. 2d 289

In line with this reasoning, the intervenor introduced additional evidence other than that of the value of the leasehold interest based on the fair market value. This evidence was to the profits that the leased property made during the period of time of the operation of the business from 1952 up to the time of the taking in December, 1955.

"Where it appears that the property condemned is of such a nature that the profits derived from its use are the entire or chief source of its value, evidence of the amount of the profits is to be considered in determining the market value."

Annotator's comment, 7 A.L.R. 171,
Citing cases

Considering the profits of the business and the resulting loss of profits from the taking as the means of determining market value, the evidence shows a value up to \$68,720.00 (Tr. Trans. dated March 11, 1959, page 42).

The Supreme Court of the United States, in the case of U. S. v. General Motors Corp., cited previously, stated:

"In the ordinary case, for want of a better standard, market value, so called, is the criterion of that value. In some cases this criterion cannot be used either because

the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value."

The intervenor furnished the court with substantial evidence of the value of the leasehold interest, based on market value and the loss of profits resulting from the taking. The court's judgment awarding "a just compensation" in compliance with the Constitution and based upon the evidence was correct, and as a matter of law, the judgment should be affirmed.

SUMMARY

Intervenor is entitled to "just compensation" for the taking of its leasehold interest on the property condemned by the plaintiff and the trial court's judgment should be affirmed.

Respectfully submitted,

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and Respondent*