NEWTON V. THORNTON, 1885-NMSC-002, 3 N.M. 287, 5 P. 257 (S. Ct. 1885)

William H. Newton
vs.
William T. Thornton and another, Receivers, etc.

No. 139

SUPREME COURT OF NEW MEXICO

1885-NMSC-002, 3 N.M. 287, 5 P. 257

January 05, 1885, Filed

Error to the First Judicial District Court, San Miguel County.

COUNSEL

W. D. Lee and **S. M. Barnes,** for plaintiff in error.

Frank Springer and **T. B. Catron,** for defendants in error.

JUDGES

Axtell, C. J. Wilson and Bell, JJ., concur.

AUTHOR: AXTELL

OPINION

*{*291}* **{1}** This is a suit in ejectment which was begun at the August term, 1880, of the district court of Colfax county, by the defendants in error, to recover possession of certain real estate which was held by plaintiff in error. To the declaration the defendant below pleaded the general issue, and a special plea setting up the fact that he had made large and valuable improvements on the real estate in question, and praying judgment against the plaintiffs below for the value of said improvements, in case said plaintiffs were entitled to a judgment for the possession of the property. The venue of the case was subsequently changed to the district court of the county of San Miguel, and came on for trial in the latter court at the August term, 1881. Upon the trial, the defendant appears to have offered no evidence whatever as to the right to the possession of the property, confining his evidence solely to proof as to the value of his improvements. The jury returned a verdict finding the defendant guilty, assessing the rents and profits of the property in question *{*292}* during the time it had been held by defendant at $ 300, and the value of the improvements made by the defendant thereon at $ 1,050. Upon this verdict plaintiffs moved the court to enter judgment for the

possession of the property, and $ 300, while the defendant moved for a judgment against the plaintiffs for $ 750, being for the value of the improvements in excess of the rents and profits. The court refused both of these motions, and gave judgment in favor of the plaintiffs for the possession of the property, and costs. Both parties excepted to the ruling of the court, and have had their exceptions embodied in the record which is now before us.

{2} We have two statutes in this territory relative to improvements made upon real estate by defendants in this class of cases. The first is the act of 1858, (Prince's St. 153,) which touches only those cases where "the defendant, or tenant in possession, in such suit shall have title of the premises in dispute, either by grants from the governments of Spain, Mexico, or the United States, or deed of conveyance founded upon a grant or entry for the same." This statute has no bearing upon this case, as it nowhere alleged in the pleadings, nor set up in evidence, that the defendant below had title to the premises in dispute, either by grant, or deed of conveyance founded on a grant, or entry for the same. The defendant below evidently relied upon section 3 of the other statute on this subject, an act of 1878, (Prince's St. 486,) which section is as follows:

> "When any person or his assignors may have heretofore made, or may hereafter make, any valuable improvements on any lands, and he or his assignors have been, or may hereafter be, deprived of the possession of said improvements in any manner whatever, he shall have the right, either in an action of ejectment which may have been brought against him for the possession, or by an appropriate action at any time thereafter *{*293}* within ten years, to have the value of the said improvements assessed in his favor as of the date he was so deprived of the possession thereof; and the said value so assessed shall be a lien upon the said land and improvements, and all other lands of the person who so deprived him of the possession thereof, situate in the same county, until paid; but no improvements shall be assessed which may or shall have been made after the service of summons in an action of ejectment on him in favor of the person against whom he seeks to have the said value assessed for said improvements."

{3} At common law, any person making improvements on the lands of another of such a nature that they became part of the realty, lost his time and labor, and the improvements inured to the benefit of the owner of the land. On behalf of the defendants in error it is contended that, so far as this case is concerned, the common law was unchanged up to 1878; that all the improvements claimed by the plaintiff in error having been made prior to 1878, they acquired a vested right in those improvements, and that, so far as this statute attempts to divest that right, it is void. The plaintiff in error insists, on page 6 of his printed brief, that this act has no retrospective effect, and this, it seems to us, concedes the point made by defendants in error. But plaintiff in error further insists that even if it is retrospective, it is not therefore void, because the constitution of the United States does not prohibit the legislature from passing retrospective acts. This is undoubtedly true, as a general proposition; but it is

also undoubtedly true that no statute, whether retroactive in its terms or not, should be so construed as to injuriously affect any vested rights. In this case, as the record comes up to us, it cannot be contended for a moment that the plaintiff in error would be entitled to any compensation for his improvements, were it not for the statute of 1878. It appears, from his own evidence *{*294}* that all of the improvements for which he asks judgment were made in 1876 and 1877. It seems clear to us that at the time the act of 1878 was passed, these improvements were absolutely the property of the owner of the land, and no legislature can take or destroy private property for private use by statutory enactments; and, so far as this statute attempts anything of that kind, it is clearly void. **Bay** v. **Gage,** 36 Barb. 447; **Ely** v. **Holton,** 15 N.Y. 595; **Austin** v. **Stevens,** 24 Me. 520; **Society, etc.,** v. **Wheeler,** 2 Gall. 105, 22 F. Cas. 756 **et seq.; Albertson** v. **Landon,** 42 Conn. 209; **Carver** v. **Jackson,** 29 U.S. 1, 4 Peters 1, 100, 7 L. Ed. 761; **Dash** v. **Van Kleeck,** 7 Johns. 477; **Lane** v. **Nelson,** 79 Pa. 407; **Brown** v. **Hummel,** 6 Pa. 86.

{4} In the case of **Lane** v. **Nelson,** above cited, the court said: "It is settled by a current of authority that the legislature cannot, by an arbitrary edict, take the property of one man and give it to another." And again: "To exercise judicial powers is not within the legitimate scope of legislative functions; and when vested rights are divested by acts of that character, they will, and ought to be, adjudged inoperative, null, and void."

{5} In the case of **Society, etc.,** v. **Wheeler,** 2 Gall. 105, 22 F. Cas. 756, the court says:

> "It is difficult to perceive the foundation of the equitable or moral obligation which should compel a party to pay for improvements that he had never authorized, and which originated in a tort. If every man ought to have the fruits of his own labor, that principle can apply only to a case where the labor has been lawfully applied, and the other party has voluntarily accepted those fruits without reference to any exercise of his own rights; for if, in order to avail himself of his own vested rights, and use his own property, it be necessary to use the improvements wrongfully made by another, it would be strange to hold that a wrong should prevail against *{*295}* a lawful exercise of the right of property. In the case of a tortious confusion of goods, the common law gives the sole property to the other party without any compensation; yet the equity in such a case, where the shares might be distinguished, would seem much stronger than in the present case.
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> There would also have been plausibility in the argument if the statute had confined itself to visible erections made by the tenant, who had been six years in possession under a supposed legal title. But the improvements may be altogether in the soil, and even made by the original wrong-doer, and yet the compensation must be allowed, and they may be just such improvements as, in the case of a rightful tenancy, would, at common law, be deemed waste.
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> It is sufficient, however, that no such equitable right as is now contended for is recognized in law; and, indeed, it has been deemed so far destitute of moral

obligation that even an express promise to pay for improvements made by a person coming in under a defective title has been held a **nude pact.**

As to the argument that the demandants had no vested title in the improvements until a recovery, it is clearly unfounded in law. In respect to the amelioration of the soil by labor, (which is embraced both by the statute and the verdict,) it would be absurd to contend that the amelioration was a thing separate from the soil, and capable of a distinct ownership. In respect to erections, the common law is clear that everything permanently annexed to the freehold passes with the title of the land, and vests with it. And here lies the distinction as to fixtures during a lease. They are not deemed to be permanently annexed to the soil, and may, therefore, well be removed; and so, indeed, would the law be as to like fixtures by a mere trespasser. The right, then, to permit erections follows as a necessary and inseparable incident to the right of the *{*296}* soil, and is not acquired, but is merely reduced into possession by a subsequent suit.

On the whole, if the statute must have a construction which will embrace the case at bar, with whatever reluctance it may be declared, in my judgment it is unconstitutional, inasmuch as it divests a vested right of the demandants, and vests a new right in the tenants, upon considerations altogether past and gone."

{6} Citations and quotations might be multiplied indefinitely to the same effect.

{7} The authorities on this point are unanimous, conclusive, and most emphatic. This practically disposes of the case. There are some other points made and exceptions taken by defendants in error which are unimportant, and on many of them it would be impossible for the court to pass, as those parts of the record to which they refer are not sufficiently before us. The judgment of the court is that the judgment of the court below be affirmed.