

1968

Lake Creek Irrigation Co., a Corporation v. Don Clyde and Kate Clyde, His Wife; Larry F. Clyde and Barbara Clyde, His Wife; Louis A. Kirk and Jane Kirk, His Wife; James F. Clyde and Earlene Clyde, His Wife; Robert Clyde and Lynette Clyde, His Wife : Respondents' Brief

Utah Supreme Court

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In the Supreme Court of the State of Utah

LAKE CREEK IRRIGATION CO.,
a corporation,

Appellant,

vs.

DON CLYDE and KATE CLYDE, his
wife; LARRY F. CLYDE and BARBARA
CLYDE, his wife; LOUIS A. KIRK and
JANE KIRK, his wife; JAMES F.
CLYDE and EARLENE CLYDE, his wife;
ROBERT CLYDE and LYNETTE
CLYDE, his wife,

Respondents.

Case No.
11148

RESPONDENTS' BRIEF

Appeal from the Judgment of the District Court
for Wasatch County
Hon. Joseph E. Nelson, District Judge

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In the Supreme Court of the State of Utah

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Respondents.

Case No.
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RESPONDENTS' BRIEF

NATURE OF THE CASE

For purposes of consistency, we will use herein the lower court designations of the parties as plaintiff and defendant. Plaintiff is the appellant and defendants are the respondents in this court.

From the beginning, the nature of plaintiff's case has not been entirely clear and we do not believe it is easily discernible upon this appeal.

Originally, plaintiff's complaint sought to quiet title to:

"All rights to fishing in or around or in the vicinity of Deer Valley Reservoir . . . (and) the same right in to and around the vicinity of Witt Lake located in Section 10, Township 4 South, Range 6 East, Salt Lake Meridian . . ." (Italics supplied)

No particular land was described in the complaint, and the fact that the defendants owned all of the land around the Deer Valley Reservoir and Witt Lake was not then and has never been in dispute.

At the conclusion of its evidence the trial court permitted plaintiff to amend its complaint by interlineation to "conform to the evidence," and to delete from the complaint all reference to "Deer Valley Reservoir." (Tr. 130, 150-156) The evidence to which the complaint was amended to conform was not specified. The apparent effect of the amendment was the addition of a description of the land under Witt Lake, the removal from the lawsuit of any claims concerning Deer Valley Reservoir, and a deletion from the complaint of all reference to "rights to fishing." Nevertheless, plaintiff now says on page 22 of its brief that the "entire case from the filing of the complaint to this appeal has been whether defendants have acquired any right to water or any rights to fish."

Denying defendants' motion to dismiss made upon the ground that the evidence was insufficient to justify any relief to the plaintiff, the trial court then granted time to defendants to further study the effect of the amendment and to file an amended answer and counter-claim if defendants decided to do. An amended answer and counter-

claim was then filed by defendants in which they sought: (1) to quiet title to fishing rights in Witt Lake, and (2) under the Declaratory Judgment Act, to have the court declare to be valid an agreement dated March 31, 1959, between the parties and a quit claim deed from plaintiff to defendants of the same date (Plaintiff's Exhibits 7 and 8) which had settled many matters of controversy between the parties, including fishing rights in Witt Lake, some six years prior to the commencement of this lawsuit.

DISPOSITION IN LOWER COURT

The trial court held generally for the defendants on their counter-claim (R. 28-29, 32-36), and as basic propositions, ruled as follows:

(1) That plaintiff has those rights in the land under Witt Lake and in the irrigation water stored thereon which the deed and decree under which it claims provides.

(2) That as between plaintiff and defendants, title to fishing rights in Witt Lake is in defendants.

(3) That as a matter of declaratory judgment, the agreement and quit claim deed dated March 31, 1959, (Plaintiff's Exhibits Nos. 7 and 8) "were and are validly executed."

(4) That defendants are entitled to judgment against plaintiff in the amount of \$250.00 for attorneys fees under Rule 41(a)(2), *Utah Rules of Civil Procedure*, in connection with the amendment of plaintiff's complaint during the course of trial.

In its Findings of Fact and Conclusions of Law, the trial court recognized that the agreement and deed above

referred to had been executed by the president and secretary of plaintiff corporation without a formal resolution of the board of directors authorizing the execution thereof, but concluded, among other things, that the agreement and deed were, nevertheless, binding upon the corporation by reason of a ratification by the board of directors, and it being now estopped to claim invalidity thereof. Among other findings, the trial court determined that at least three of the five members of the board of directors personally participated in performance under the agreement and had knowledge that an agreement of settlement of many matters of controversy between the plaintiff and the defendants had been reached. The court determined as both fact and law that the directors had failed to inform themselves as to the particulars of the settlement agreement, although doing work thereunder, and in that respect did not use due diligence required of them as directors necessary to shield the corporation from liability. The court also concluded that the plaintiff corporation had accepted the benefits under the agreement for more than six years, and did not repudiate the same until shortly before its lawsuit was commenced. In addition, the court found, and it was freely admitted by plaintiff's witnesses, that the corporation had paid attorney Glen Hatch \$160.00 for legal services performed in drafting the agreement, about which it claimed that it had no knowledge.

RELIEF SOUGHT

Defendants believe the trial court was correct in its judgment and request the Supreme Court to so affirm.

STATEMENT OF FACTS

The recitation of facts by the plaintiff are generally correct insofar as they reflect *part* of the testimony of particular witnesses. However, in our view, they are incomplete to properly present the law matters to the court, and for the convenience of the court, the findings made below which are generally not disputed, are set forth verbatim:

"1. That plaintiff's rights in and to the land under Witt Lake described in plaintiff's Amended Complaint came from John E. Moulton and Isabell Moulton by mesne conveyances; that in the warranty deed from the Moultons dated November 14, 1911, received in evidence as defendants' Exhibit 15, the following reservations were made:

'The said grantors hereby reserve the right to use for grazing purposes all such part of the above-described land as shall not, from time to time, be covered with water for reservoir purposes, it being understood, however, that the grantee, his heirs, or assigns, shall at all times hereafter have the right to cover all, or any portion, of the lands with water for reservoir purposes.

'And it is further reserved by the grantors that the said land shall not be fenced so as to exclude the use thereof by the said grantors for grazing purposes, and for watering stock at the reservoir now constructed or that may hereafter be constructed thereon.'

"2. That defendants are the owners of all of the land surrounding Witt Lake and their title to such lands also came originally from John E. Moulton and Isabell Moulton by mesne conveyances.

"3. That the water covering said land to form Witt Lake comes from Lake Creek, a public stream, and by a decree of this court entered in 1904, a copy of which was introduced in evidence as plaintiff's Exhibit 5, plaintiff was awarded certain irrigation rights in said Lake Creek water.

"4. That from time to time said lake has been stocked with game fish by the Department of Fish and Game of the State of Utah, and occasionally over several years, the unorganized public has angled for fish therein.

"5. That on or about March 31, 1959, Clyde Ritchie and Louris V. Mahoney, who were the president and secretary, respectively, of plaintiff corporation, and had been so for many years, executed and delivered to defendants a written agreement identified as plaintiff's Exhibit No. 7, and a quit claim deed identified as plaintiff's Exhibit No. 8.

"6. That no formal resolution of the board of directors of plaintiff corporation authorizing the president and secretary to execute and deliver such instruments was entered upon the minutes of the corporation's board of directors.

"7. That in the spring of 1959, after the execution and delivery of such instrument, Clyde Ritchie, George Holmes and Kenneth Anderson, three of the five members of the board of directors, personally participated in performance under the agreement and had knowledge that an agreement of settlement of many matters of controversy between the plaintiff and the defendants had been reached; that said directors apparently failed to inform themselves as to the particulars of the settlement agreement, and did not use due diligence in that regard.

"8. That plaintiff corporation paid defendants' attorney for preparing the settlement agreement and quit claim deed pursuant to the agreement which he prepared.

"9. That prior to March 31, 1959, all of the directors knew defendants asserted a claim against plaintiff corporation for the loss of certain lambs, and knew that a settlement of said claim had been made, but apparently failed to inform themselves as to the particulars thereof; that said directors did not use reasonable diligence in that regard.

"10. That plaintiff corporation accepted the benefits of the agreement identified as plaintiff's Exhibit No. 7, for more than six years, and did not repudiate the same until shortly before his lawsuit was commenced.

"11. That defendants' attorneys addressed letters to the plaintiff corporation pertaining to the agreement and quit claim deed and responses to said letters were made by the president and secretary thereof; that said corporation maintained no office for the transaction of its business and there is no evidence that the business of said corporation was ever transacted by other than the president and secretary thereof.

"12. That it is reasonable and proper that defendants be awarded the sum of \$250.00 attorney's fees as a condition to permitting plaintiff to amend its complaint during the course of trial."

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DELINEATED THE RIGHTS OF PLAINTIFF IN WITT LAKE.

It is not disputed that plaintiff's right to the land under Witt Lake came from John E. Moulton and Isabell Moulton through Alva M. Murdock, and defendants rights to all the lands surrounding Witt Lake came directly from the Moultons. (Exhibits 3, 13, 15) It is further not disputed that the conveyances by which plaintiff claims the land under Witt Lake contain the reservations set forth on page 5 of this brief.

Plaintiff's Exhibit 5 is a copy of the decree of the Fourth Judicial District Court in and for Wasatch County entered in 1904 awarding certain irrigation rights to the plaintiff in Lake Creek water. No mention is made therein

of any fishing rights, and the decree appears to be the typical water right allocation from a public stream.

By the terms of the very instruments under which plaintiff claims, it is apparent that plaintiff's interest in the lands described in its complaint is solely the right to store Lake Creek water thereon for irrigation purposes. In view of the deed reservations and inasmuch as the titles of both parties originally came from a common grantor, the trial court was entirely correct in holding plaintiff's title to the land under Witt Lake to be subject to the defendants' right of grazing, rights to water stock, and right to have the land remained unfenced; and this does not seem to be seriously disputed by the plaintiff.

With respect to "fishing rights," it is defendants' position that the record is devoid of any evidence whatever that plaintiff ever had any "fishing rights," and under the elementary rule that a plaintiff seeking to quiet title to a property right must do so on the strength of his own and not on the weakness of his adversary's title, plaintiff would not be entitled to any affirmative decree in this regard under any circumstances. *Babcock v. Dangerfield*, 98 U. 10, 94 P. 862; *Mercur Coalition Min. Co. v. Cannon*, 112 U. 13, 184 P.2d 341; *Home Owners' Loan Corp. v. Dudley*, 105 U. 208, 218, 141 P.2d 160, 166.

Plaintiff introduced some evidence to the effect that certain persons who were stockholders in plaintiff corporation had fished in Witt Lake for a number of years, which evidence was apparently offered for the purpose of showing a fishing right in the plaintiff corporation by adverse user of some of the stockholders. There is nothing in the evi-

dence, however, which indicates in any respect that fishing which has taken place in Witt Lake has been adverse to the defendants. On the contrary, the evidence is to the effect that defendants have in past years cooperated with the Fish and Game Commission in setting the opening date for fishing therein for the general public, and that this cooperation has been maintained over the years. (Tr. 178-180) It is clear from the evidence that whoever fished in Witt Lake in the past has presumptively done so as a member of the general public and by right of the general laws and regulations relating to fish and game as promulgated by the Fish and Game Commission, and not as any agent of or by right of the plaintiff corporation.

Additionally, even if it could be shown that the persons who fished in the lake over the years were doing so adversely to the defendants, still no right to angle or fish was or could be acquired by anyone for the reason that the law is well settled that the unorganized public cannot acquire the right of fishing in a pond either by grant or prescription. *Turner v. Hebron*, (1891) 61 Conn. 175, 14 LRA 386, 22 A. 951. And, in *Gibbs v. Sweet* (1902) 20 Penn. Sup. Ct. 275, it was held that fishing in another's pond without objection will lead to no presumption right. 22 *Am. Jur.* 684.

Furthermore, the evidence is that Witt Lake is fed by Lake Creek, which is a public stream, and that neither at the point where the water is diverted from Lake Creek into Witt Lake, nor the point where waters leave Witt Lake are there any traps, screens, or other means to prevent fish from either entering or escaping from Witt Lake. (Tr. 173, 177) In such a case, the law is that fish therein are wild

animals owned by the public, and the taking thereof is subject to control and regulation of the State and not the owner of either the water or the land. 22 *Am. Jur.* 699.

From the foregoing, it is apparent that plaintiff's evidence is woefully deficient to justify any affirmative holding in its favor as to fishing rights.

POINT II

AS AGAINST THE PLAINTIFF, THE TRIAL COURT PROPERLY QUIETED TITLE TO FISHING RIGHTS IN THE DEFENDANTS.

There may be some question as to whether the defendants could quiet title to fishing rights transcending the powers of the Fish and Game Commission and the general statutory laws regulating angling and the taking of game fish; and it is not defendants' purpose in this lawsuit so to do. However, there is no question but that, as against plaintiff, defendants' title can be quieted; and it is immaterial that there may be transcending powers in others. *Fisher v. Davis*, 77 U.81, 84, 291 P. 493.

For several years prior to March 31, 1959, defendants owned all of the land around the lake and conducted lambing operations in the vicinity of the lake, which lambing operations were being seriously interfered with by the public fishing in Witt Lake. (Tr. 170-172) While they never sought to prohibit it, defendants did desire to maintain some control over the fishing public, including stockholders of the plaintiff corporation, which control was exercised by defendants for a number of years prior to the commencement of this action through cooperation with the Fish and Game Commission. (Tr. 178-180)

The provision in the agreement of March 31, 1959, with respect to fishing rights and the quit claim deed executed pursuant thereto, were in pursuance of an objective by defendant owners of the land surrounding Witt Lake to eliminate any question as to their right to control public fishing in the reservoir, including stockholders of plaintiff corporation. (Def. Exh. No. 11) It is our position that as against the plaintiff corporation, the agreement and quit claim deed (Pl. Exhibits Nos. 7 and 8) gave the defendants full right and title to control fishing in the Lake, although that right might not be absolute as against the Fish and Game Commission of the State of Utah. *Fisher v. Davis*, supra.

POINT III

THE TRIAL COURT WAS CORRECT IN DECLARING THAT EXHIBITS 7 AND 8 WERE AND ARE VALIDLY EXECUTED.

The evidence shows that while no formal resolution was adopted by the corporation authorizing the agreement and quit claim deed introduced in evidence by plaintiff and identified as plaintiff's Exhibits Nos. 7 and 8, at least four of the five directors nevertheless personally participated in performance of obligations under the agreement with knowledge that settlement of many matters of controversy with the defendants had been made. They, likewise, knew of the existence of an agreement of some sort and that they were performing under an agreement. (See testimony of directors in transcript as follows: Clyde Ritchie, p. 48-49, 61-66; Harvey Crook, p. 72-74; George Holmes, p. 103-105; Kenneth L. Anderson, p. 116-118. The remaining director, William J. Bond, was an old man and ill, (p. 210). He could also

have participated in the work according to the President, Clyde Ritchie, p. 64-65.)

In our view, it was, therefore, incumbent upon them as directors, using reasonable diligence in carrying out their responsibilities, to know the terms of the agreement under which the corporation was performing. Their professed ignorance of the acts of its president and secretary in signing an agreement does not relieve the corporation from liability under these circumstances. The terms of the agreement under which they were personally performing on behalf of the corporation were readily ascertainable by any director at any time, and their asserted collective failure to inquire into or to inform themselves as to the particulars thereof, although doing work thereunder with knowledge that some kind of an agreement had been reached with the defendants, does not shield the corporation from liability. 19 *Am. Jur.* 2d 591. *Hanover Natl. Bank v. American Dry Dock*, 148 N.Y. 612, 43 N.E. 72.

That the corporation had knowledge of the agreement and approved it is further shown by the fact that it paid Attorney Glen Hatch \$160.00 for legal services performed by him in negotiating the agreement and drafting the instruments to effect it. It seems to the defendants to be beyond question that a corporation which has knowledge sufficient to justify its payment of legal expenses for the negotiation of an agreement of settlement of controversies which the corporation has, and for drafting the necessary legal instruments to effect it, and then performing under the agreement, is certainly chargeable with knowledge of what that agreement contains.

The corporation received the benefits of the agreement, including the settlement of the claim for lost lambs, which claim would now be barred by the statute of limitations, and which claim all of the directors knew about and knew that some settlement thereof had been made. It is the well established general rule that a corporation which, with knowledge of its officers' or agents' unauthorized act or contract and of the material facts concerning it, receives and retains the benefits resulting therefrom, thereby ratifies the whole transaction. See 19 *Am. Jur.* 2d 611 and the numerous cases cited therein.

The reason for the rule is succinctly set forth in 19 *Am. Jur.* 2d at page 660 as follows:

"The acquiescence of a corporation which will amount to ratification of an unauthorized act may be evidenced by mere silence under circumstances giving rise to a duty to repudiate the transaction; a corporation cannot stand by, after it has learned of an unauthorized act or contract made or entered into by its officer or agent and have its benefit if it would prove to be favorable and reject it if it should prove unfavorable. As in the case of an individual the principal, a corporation must, within a reasonable time after receiving information of an unauthorized transaction, repudiate the transaction and restore the proceeds of the transaction, or the silence in such respect will constitute strong evidence of ratification or may be sufficient to engender a presumption or constitute a *prima facie* case thereof."

In the case of *Peterson v. Holmgren Land and Livestock Co.*, 12 U.2d 125, 363 P.2d 786, his court held a contract therein involved to be binding on the corporation even though it was not authorized by the board of directors,

and in its opinion quotes with approval the following language taken from 13 *Am. Jur.* at pages 871-872:

“If a corporate officer assuming to contract on behalf of the corporation is one to whom authority to make such a contract may be given, a person dealing with him in good faith is not affected by the fact that the proper steps to clothe him with such authority were not taken.”

Plaintiff devotes the major portion of its brief to the proposition that it could not validly transfer fishing rights to the defendants without the consent of two-thirds of its stockholders. An examination of the pleadings and the record in this matter will show that this issue is raised for the first time in plaintiff's brief on appeal. All of plaintiff's evidence throughout the lawsuit was directed to its contention that Exhibits 7 and 8 were signed by the president and secretary of the corporation without authority of a resolution of the board of directors. No evidence was offered as to who the stockholders were or whether or not they ever held a meeting concerning the transfer. The contention now advanced that two-thirds of the stockholders must have authorized the transaction is, therefore, wholly outside the proper scope of this appeal.

More importantly, however, plaintiff's belated contention in this regard is simply not supported by the law and is wholly without merit for the reason that Section 16-6-9, Utah Code Annotated 1953, is not and never has been applicable to the plaintiff corporation. As will hereinafter appear, that section applies to religious, social, benevolent, scientific, and other corporations *not* for pecuniary profit. It has never

been applicable to corporations for pecuniary profit such as the plaintiff corporation.

The Articles of Incorporation of Lake Creek Irrigation Company (plaintiff's Exhibit 1) indicate that they were entered into under an Act of the Legislative Assembly of the Territory of Utah entitled "An Act Compiling and Amending the Laws Relating to Private Corporations" approved March 13, 1884. The Articles are in the format of Articles of a private corporation for pecuniary profit as spelled out in the Act, including the provisions for capital stock to be owned by stockholders. They do not in any manner follow the statutory format of corporations *not for* pecuniary profit.

Section 2288 s22 of the Act Compiling and Amending the Laws Relating to Private Corporations, approved on March 13, 1884, read as follows:

"Religious, social, benevolent, scientific, and other corporations included in Section 1 of this Act when pecuniary profit is not their object, may, in accordance with the rules and regulations or discipline of such association or institution, elect directors, the number thereof to be not less than three nor more than thirteen, and may incorporate themselves as provided in this Act."

Section 2291 s25 of the same Act provides:

"Corporations organized by members of associations mentioned in Section 22 of this Act, may, when necessary for their good, mortgage or sell their real or personal property; provided, that such mortgage or sale must be authorized by a two-thirds majority vote of its members present at a duly called meeting for that purpose. Such sale may be made by the directors of such corporation and the proceeds thereof used as

may be provided by the by-laws thereof.' (Italics supplied)

It will be noted from the above that the two-thirds majority vote of "members" requirement was applicable only to religious, social, benevolent, scientific, and other corporations not for pecuniary profit. There was no similar requirement applying to profit corporations with respect to "stockholders."

The Revised Statutes of 1898 mechanically divided the corporation law into separate sections pertaining to corporations for pecuniary profit, and corporations not for pecuniary profit. Sections 342 through 350 dealt with corporations not for pecuniary profit, and Sections 342 and 343 set forth, with exactness, the manner in which a corporation *not* for pecuniary profit is formed. These latter sections provide verbatim as follows:

"342. Incorporation. Societies and associations where pecuniary profit is not their object may be incorporated as hereinafter provided.

"343. Id. Articles. The associates shall meet for organization, and the chairman or secretary of the meeting shall make an affidavit substantially in the following form:

'State of Utah

County of.....

I do solemnly swear (or affirm) that at a meeting of the members of (insert the name of the church or society as known before incorporation) residing in (insert the jurisdictional limits of the proposed corporation) held at, in the county of....., State of Utah, upon notice to the incorporators by (insert a precise statement of the notice given, which in all cases shall be for

not less than 15 days, and in case of societies not previously existing, shall be personal to each incorporator, and in case of societies already existing shall be by notice stating the time, place, and object of said meeting, published in some newspaper having a general circulation within the proposed jurisdiction of the corporation, and by notices posted upon the door of each of the usual places of meeting, if any, of the society) it was decided by a majority vote of the members present at said meeting to incorporate said society within said limits into a corporation, with such rights and obligations as may be prescribed by law, to be known as; to exist for years from the date of incorporation; for the purpose of (insert object); with principal office at; with a board of trustees, (vestrymen, wardens, directors, or such other officers as may be decided upon, not less than three nor more than twenty-five in number), consisting of members, of whom shall form a quorum, to be elected (annually or otherwise as may be determined, with time and place of election) in the following manner: and to qualify by each giving bond to the corporation, to be filed with the secretary thereof, in the sum of \$.....; and (insert the name of the officers for the first term, the method of adopting and amending by-laws, and of receiving and removing members, with such additional clauses conformable to law as the incorporators may deem necessary or desirable).

Signature of Affiant

Subscribed and sworn to before me this
day of, 18.....' "

Section 344 of the Act then provided that the affidavit above set forth should constitute the Articles of Incorporation of such society or association and should be filed and recorded in the manner provided for filing and recording articles of information for pecuniary profit.

Then follows Section 347 which prohibits corporations *not* for pecuniary profit from transferring their property without the consent of two-thirds of their "members." This section reads as follows:

"The trustees shall have the care, custody, and control of the corporate property, subject to the provisions of the articles of incorporation and by-laws, and may, unless otherwise provided in the articles or by-laws, upon consent of *two-thirds of the members of the corporation present at a meeting duly called and held*, mortgage, encumber, lease, sell, or convey any real or personal property of the corporation, unless such property has been received as a gift or devise for some special purpose, and if so received it shall be used and applied only for such purpose. Unless otherwise provided in the articles or by-laws, a meeting for such purpose shall be called upon not less than 14 days notice, to be given by publication in some newspaper having general circulation in the place where such corporation has its principal office, or if there be no such newspaper, then by posting on the door of the usual meeting place or places; such notice shall state the time, place, and object of the proposed meeting." (Italics supplied)

It is obvious from the above that plaintiff corporation was not originally organized as an non-profit corporation and is not, therefore, subject to the requirement that transfers of property be approved by its "members."

Plaintiff's Exhibit 2 shows that plaintiff corporation was reorganized in 1943, and that the format of the article filed at that time was again exactly the format of articles for corporations for pecuniary profit, including provisions for capital stock and "stockholders," and not "members." If it had been intended to make the corporation one *not* for pecuniary profit, the affidavit form set forth above and which at that time was still part of the code, would certainly have been used; and section 16-6-9 might then have been applicable.

POINT IV

PLAINTIFF IS BARRED BY SECTION 78-12-25, UTAH CODE ANNOTATED, FROM ASSERTING THE INVALIDITY OF THE AGREEMENT AND QUIT CLAIM DEED DATED MARCH 31, 1959.

If the incidental purpose of plaintiff's action is to accomplish the voiding of the deed and contract executed by the president and secretary of the corporation without the knowledge of the board of directors as now claimed by the plaintiff, then such action is for affirmative relief. Under these circumstances, the case falls within Section 78-12-25, Utah Code Annotated, 1953, which requires such action to be commenced within four years. *Brandy v. Salt Lake City*, 47 Utah 296, 153 993.

As the cause of action to set aside the contract and deed arose at the time of making thereof, which was on or about March 31, 1959, (recorded August 13, 1959, in Book 35 at page 379 in the office of the County Recorder in and for Wasatch County, Utah), and as the action herein was not commenced until June 28, 1965, it is obvious that a period of

more than four years, to-wit: more than six years had elapsed, and any affirmative relief is barred by the above section of the Utah Code.

POINT V

THE TRIAL COURT WAS CORRECT IN AWARDING JUDGMENT IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF FOR ATTORNEY'S FEES UNDER RULE 41(a) (2) OF THE UTAH RULES OF CIVIL PROCEDURE.

At the conclusions of its evidence, defendants moved to dismiss plaintiff's complaint upon the ground that plaintiff's evidence was insufficient to justify any relief. (Tr. 154) While this motion was pending, plaintiff moved the court for an order deleting all reference in its complaint to Deer Valley Reservoir, and the motion was granted. (Tr. 155) The court denied defendants' request to make the order of dismissal with prejudice. (Tr. 155) Subsequently, the trial court denied defendants' motion to dismiss. (Tr. 158)

Rule 41(a) (2) of the *Utah Rules of Civil Procedure* provides that after a responsive pleading is filed, an action shall not be dismissed at plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. Under this rule, the court can and did award attorney's fees to the defendants in the amount of \$250.00. Plaintiff cites nothing in its brief by way of authority showing that such an award was illegal or improper in any manner.

CONCLUSION

Based upon the evidence and the law applicable thereto, we believe the trial court was correct in its judgment and decision, and that the same should be affirmed.

Respectfully submitted,

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