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Gust Papadopoulos v. Marion Defabrizio : Brief of Respondent

Utah Supreme Court

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No. 6377

In
The Supreme Court
of the
State of Utah

GUST PAPADOPULOS,
Plaintiff and Respondent,
vs.

MARIO DEFABRIZIO,
Defendant and Appellant.

Appeal From the Third District Court of Utah,
for Salt Lake County
Honorable P. C. Evans, Judge

RESPONDENT'S BRIEF

MOYLE, RICHARDS & McKAY,
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and Respondent.

FILED

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RESPONDENT'S BRIEF

INTRODUCTORY STATEMENT

Because appellant's brief commits errors of misstated facts, the analysis of this case adopted by that brief will not be followed. Instead, we shall make our own, properly authenticated statement of facts proved and adopted by the trial court; then point out errors in the statements of fact by appellant and indicate the results of such errors; then argue the case under our analysis of the problems

involved; and then answer briefly the points remaining which have been referred to by appellant in his brief.

STATEMENT OF FACTS

This action is for damages for trespassing and for injunctive relief against a continuing trespass. It involves a section of ground, namely, Section 31, Township 2 South, Range 2 West, lying on the east slope of the Oquirrh Mountains a mile or two north of Copperton. The land is marginal land. It is on the fringe of the wheat land which extends from the valley up into the mountains, and on the fringe of the grazing land which extends down from the mountain to the cultivated land in the valley. The plaintiff and respondent is called Pappas. In 1935 he leased Section 31 and other contiguous land from L. H. Gray, who was a witness. (Exhibit A attached to the complaint). Pappas went into possession in 1935. He lambed his sheep in the spring of the year upon the level portion of the section close to the central water hole. His sheep grazed the section until about June 15th, when they were moved to the summer range. This he continued to do through 1936 and 1937 (Tr. 70, 71, 73).

The defendant and appellant is called Defa. He was a farmer. He had an idea that he could extend the wheat belt farther west into the hills, and with this in mind made a lease with Gray on April 6, 1938, for portions of Section 31 (Exhibit 3). Shortly after making the lease with Gray, Defa found that Gray did not have title to Section 31. He found that the County had become the owner by tax deed. On May 4, 1938, he leased from the

County a portion of the same land he had formerly leased from Gray, all within Section 31 (Exhibit 1; Tr. 109, 110, 121-123).

Pappas, as he was wont to do, drove his flocks onto the land leased to him by Gray and found Defa in possession of substantially all of Section 31. Pappas learned from Defa that Gray no longer owned Section 31, whereupon Pappas immediately went to Salt Lake County to secure a lease. Salt Lake County gave to Pappas a lease of some two thousand acres, excluding Section 31 (Exhibit H; Tr. 90, 91, 156, 109-113). Pappas acknowledged his landlord Gray had no title to Section 31, and recognized Defa's lease with Salt Lake County for the section, and did in no way interfere with Defa's harvesting of his crop under his lease with Salt Lake County for 1938. The harvest was not completed until in 1939 (Tr. 73, 75-77, 112-113).

Pappas obtained a lease from Salt Lake County of Section 31 and contiguous sections for the next year, 1939. (Exhibit E). The Defa lease expired May 4, 1939, and the Pappas lease commenced May 4, 1939.

Defa and Pappas now knew that Gray had lost his title. Pappas was out of possession for 1938, and Defa was in possession. Pappas thereupon notified Gray that he would pay no more rent and had leased the land from the County (Tr. 137; Exhibit K, Exhibits H and E; Tr. 140, 142-143, 157, 138).

In 1939 Pappas went into possession of Section 31 under the terms of his lease with Salt Lake County (Exhibit E). He has remained in possession from that time until the commencement of this action (Tr. 73, 75, 94, 80, 86, 158, 159, and Exhibit I). Defa was unable to renew his lease with Salt Lake

County, which expired May 4, 1939. He then fell back upon his earlier lease with L. H. Gray. This he sets forth in his answer and amended answer (Tr. 21, 20, 27). In reliance upon Gray's title which Defa had repudiated, he began to plow and plant Section 31 in 1940 (Tr. 78, 79, 82, 113, 119, 159). It is the trespass of plowing up the feed for Pappas's flock with the loss of grazing and damage to his sheep of which the respondent complains. No question is raised by appellant as to respondent's right to an injunction if it be assumed that the trespass by appellant is established.

ERRONEOUS STATEMENTS IN APPELLANT'S BRIEF.

Respondent duly moved this Court to diminish the record in these proceedings by striking all reference to a certain deed called Exhibit 1, which was an auditor's deed given by Salt Lake County, and which motion was granted. Because of the repeated reference to this instrument (Br. 6, 7, 16, 17, 28, 29) and its legal effect upon these proceedings as well as frequent and numerous statements not supported by the record, appellant's brief in large part must be disregarded in considering the orderly presentation of the points of law involved.

According to the statement of appellant's counsel the striking of Exhibit 1, the deed from Salt Lake County, cost appellant his case, because his brief at page 6 stated: "That is the controlling undisputed fact in this case. And upon that fact, and upon that undisputed record, the whole case turns."

Statements in appellant's brief not supported by the record are:

Page 4, lines 9, 10, 11:

Respondent did not claim as a tenant of L. H. Gray except for the years 1935, 1936, 1937 (see Para. 2 of Complaint). From 1938 to 1941 he claimed as a tenant of Salt Lake County only (Complaint, Para. 5, 6, 7; Tr. 2, 3, also Tr. 137, 138, 140, 142-143, 157).

Page 4, lines 22-29:

Plaintiff and defendant met on Section 31 in April, not on May 4, 1938 (Tr. 111, 159). Mr. Rushton talked to appellant, not to both parties (Tr. 121, 122).

Page 4, lines 30-36, Page 5, lines 1-5:

There is no evidence that the parties went to the courthouse together or were there at the same time, and no evidence that anything was done "by mutual consent and agreement." (See Tr. 91-92, 110-112, 121, 156-157).

Page 6, lines 19-34, all of Page 7 except bottom four lines:

All this relates to the exhibit which was stricken and must be disregarded.

Page 7, last four lines:

There is no evidence that defendant (appellant) was in possession after harvesting the crop in 1939 until plowing was done in 1940.

Page 16, lines 5-9:

There is no support for this sentence. The parties learned that the County had taken the

land for taxes, but neither volunteered anything for L. H. Gray.

Page 16, line 20 to Page 17, line 5:

This relates to the stricken exhibit and must be disregarded.

Page 21, line 7:

The landlords L. H. Gray and Western Land Association did *not* have the record title; (see Exhibits A, B, C, D).

Page 25, bottom paragraph:

The brief cites no reference to evidence of appellant's possession or to any admissions. The statement must be disregarded.

Page 27, bottom four lines:

There is no evidence that respondent was on Section 31 on May 4, 1938.

Page 28, lines 5-12:

No evidence supports their statement about appellant and respondent going to the county commissioners together or taking any mutual joint or agreed action in procuring leases. Each acted alone, for his best interests, and without regard to the other (Tr. 91, 110, 121-123, 125, 156-158).

Page 28, lines 13-21:

This relates to the stricken exhibit and must be disregarded.

With these erroneous statements and references out of the brief the arguments under assignments numbered I, IV and V fall because their support is taken away. These arguments must be disregarded by the Court. Assigned error No. III is frivolous and will be disregarded. Assigned errors II, VI and VII will be dealt with subsequently.

POINTS INVOLVED

Because appellant's brief is confusing with its erroneous statements it will not be answered in the order of its points.

This appeal raises four questions, or four legal propositions which are stated from the point of view adopted by the trial court:

1. During all times here material plaintiff and respondent had the right to possession of Section 31.
2. Defendant and appellant trespassed upon Section 31 in 1940.
3. Respondent is not estopped to assert the County's title.
4. The award of \$425.00 damages was proper.

ARGUMENT

I.

DURING ALL TIMES HERE MATERIAL PLAINTIFF AND RESPONDENT HAD THE RIGHT TO POSSESSION OF SECTION 31.

Paragraph 9 of the complaint and finding No. X (Tr. 4, 32) allege and find a trespass by appellant on Section 31 of the land leased by respondent from Salt Lake County, which lease included all of Section 31, except the South half of the Southeast Quarter (Exhibit E). The judgment of the court enjoined appellant from interfering with the respondent's possession of Section 31, and the whole

thereof, except the South half of the Southeast Quarter (Tr. 35). Exhibits A, B, and C show that this land was formerly owned by George H. Dorton and the Western Land Association, and was conveyed by auditor's deed to Salt Lake County on March 31st and April 10th, 1936. Exhibit 1 shows the lease of this land to appellant for one year from May 4, 1938. Exhibit E shows the lease of this land by Salt Lake County to the respondent for one year from June 14, 1939, which lease was extended to June 15, 1941, by act of the Board of County Commissioners of Salt Lake County (Exhibit F). It is true that appellant's lessor, Western Land Association acquired the property from Salt Lake County on December 6, 1940 (Exhibit D). But this deed was made subject to existing leases or agreements made by Salt Lake County, which would include the lease referred to as Exhibit E.

Respondent thus establishes ownership of the land by his lessor through tax sale and a lease to him, which is sufficient title, unless attacked, under

R. S. U. 1933, 80-10-35, as Amended in 1939.

Appellant offered no evidence attacking this tax title and the lease to respondent. On the contrary appellant recognized this title in Salt Lake County by leasing this very land from the County in 1938, (Exhibit 1), and appellant's lessor recognized this paramount title by purchasing the property along with other property in 1940. (Exhibit D). Thus all parties have recognized the County's title to the land, and the County leased to respondent and none other for the period from June 14, 1939, to June 15, 1941, which includes all of the periods pertinent to this controversy.

II.

DEFENDANT AND APPELLANT TRESPASS-
ED UPON SECTION 31 IN 1940.

Respondent took possession of Section 31 in the spring of 1939 and protected appellant's crop by hiring two extra sheep herders (Tr. 73, 75). He continued in possession by grazing Section 31 in the fall of 1939 (Tr. 94) and the spring of 1940 (Tr. 73, 80, 86, 103, 105, 154, 158-159; Exhibit I). Respondent was on the land in May, 1940, when appellant or his boys commenced plowing and gradually drove respondent's sheep off of Section 31 and away from the water hole (Tr. 78, 79, 83).

It is plain that respondent had the right of possession and possession in May, 1940, when appellant came to Section 31 and plowed. Either possession or right of possession is enough to support an action of trespass to real property.

26 Ruling Case Law 955-960.

Cases Cited at 4th Decennial Digest, Vol.
29, Trespass, Secs. 20 (2), 20 (3), 20
(4).

 III.
RESPONDENT IS NOT ESTOPPED TO
ASSERT THE COUNTY'S TITLE.

At page 15, appellant's brief states that the complaint was demurrable under R. S. U. 1933, 104-2-14, and Woodbury v. Bunker, Steele et al, 98 Utah 216. The case is considered *infra*. The statute simply establishes a statutory presumption which can be

overcome by evidence. For a somewhat similar statutory interpretation see

Jackson v. James, 97 Utah 41, 46; 89 Pac.
(2d) 235.

And the complaint overcame the presumption by alleging loss of the property and dispossession under plaintiff's landlord with a subsequent lease from Salt Lake County, under which he went into possession (Complaint, para. 4, 7; Tr. 2, 3). The complaint was therefore not demurrable but the question of estoppel under the evidence is one which requires attention.

It is true that appellant and respondent leased from the same landlord, L. H. Gray (indeed they leased from another common landlord, Salt Lake County). Respondent had possession, claiming under L. H. Gray, during the years 1935, 1936 and 1937 (Tr. 70, 137), but lost the land on April 24, 1938, because of a paramount title in Salt Lake County (Exhibit 1; Tr. 73, 75, 110, 112). Appellant planted and harvested a crop in 1938 and 1939. Appellant knew that respondent was out of possession then, but so did L. H. Gray, the alter ego (Tr. 136) of the Western Land Association (Tr. 137, 138, 140, 142, 143, 157; Exhibit K). To defeat the estoppel respondent relies upon the fact that he lost possession because of a title paramount to his landlord (see Exhibit A), advised his landlord of this, advised his landlord that he was leasing from the paramount title holder, and repudiated the lease from L. H. Gray; and as to part of the land, that he is not denying his landlord's title but is simply asserting that title which was transferred to Salt Lake County.

As appears from Exhibit A, attached to the complaint, plaintiff was under obligation to L. H. Gray to pay a yearly rental for a portion of Section 31,

which is the property defendant has trespassed upon. Under the terms of said lease "failing to make said payments, the lease stands terminated without further notice." When defendant Defa told plaintiff Pappas in April, 1938, while standing upon the land in question, that L. H. Gray no longer had any right to lease Section 31 but that he, Defa, had a lease from Salt Lake County, plaintiff went to Salt Lake County to verify this statement (Tr. 91, 110, 121, 156-157). Upon learning that the records of the County Recorder's office of Salt Lake County showed that Auditor's Tax Deeds to most of Section 31, including all of the land here in question, had been issued to Salt Lake County in 1936, which deeds were introduced in evidence as Exhibits A, B, and C, plaintiff Pappas went to see L. H. Gray. Pappas then offered to lease from L. H. Gray a certain Section 3 which had not been sold for taxes and to pay a proportion of rent for said section. This, Gray refused to do and Pappas refused to pay further rent upon said lease to L. H. Gray (Tr. 139-142, 157). Pappas had leased other sections than Section 31 for 1938 from Salt Lake County which appears in evidence from Exhibit H. In the same year defendant Defa leased from Salt Lake County for one year commencing on the 4th day of May, 1938, portions of Section 31 (Exhibit 1). Plaintiff did not retake possession until May, 1939.

The legal effect of these circumstances and contract was to terminate the relationship of landlord and tenant between Pappas and Gray. In the case of *Woodbury v. Bunker*, 98 Utah 216, the Court considers a question not similar but analogous to the problem at hand. In that case the question arose whether or not a tenant may, consistent with the forcible entry and detainer statutes, claim possession under a subsequent purchaser of the tax

title without prior notice to and without first terminating occupancy and possession under his original lessor. By the converse rule the plaintiff herein, having given his former landlord notice and having refused to pay further rent and having been ousted from possession by a lessee of the owner of the land in 1938, may thereafter lease said land from the legal owner of the property, and assert his lease against the former lessor or parties in privity with said lessor.

The application of the Woodbury case to the situation of the appellant herein would prevent him from claiming to be a lessee of Salt Lake County, because he leased from the County while in possession under Gray and without termination of tenancy, loss of possession, or notice to Gray. The appellant recognized the County's title by leasing from it in 1938, and Gray recognized that title by purchasing from the County in 1940 (Exhibit D), which purchase was made subject to respondent's lease. Respondent claims under the County's title which has not been questioned in this case, and which indeed has been recognized by both the appellant and Gray; and although the appellant recognizes the County's title, he is estopped to assert it as in conflict with Gray's title under *Woodbury v. Bunker*.

In further support of this position numerous cases have been decided by many jurisdictions supporting the general proposition which is well stated in the case of

Jenkinson v. Winans (Mich), 67 N. W.
549 at Page 550 :

“Though the tenant cannot show that the lessor had no title to the premises when the

tenancy commenced, he may show that the lands have been sold at tax sales, and the landlord's title thereby extinguished. The estoppel extends only to the title which the landlord had at the time of leasing. If that title has been extinguished, it may be shown; for then the landlord has no right to the possession. As was said in *McGuffie v. Carter*, 42 Mich. 497, 4 N.W. 211, 'The rule is familiar that both tenant and those in privity, either in blood or estate, are estopped from disputing the title of the landlord, or the title of anyone who succeeds to his rights, so long as they hold the possession originally derived from him. But this principle does not forbid the tenant from showing that the landlord's title has expired, or has been extinguished by his own act or operation of law,'—citing *Iamson v. Clarkson*, 113 Mass. 348; *Fuller v. Sweet*, 30 Mich. 237; *Hilbourn v. Fogg*, 99 Mass. 11; *Despard v. Walbridge*, 15 N.Y. 374; *Mountnoy v. Collier*, 1 El. & Bl. 630, 16 Eng. Law & Eq. 232."

This case arose in Michigan under a set of facts very similar to the case at bar. The plaintiff who had lost the land on tax sale, was attempting to oust the defendant who had leased the land from a new owner under tax sale. The defendant had been ousted by the purchaser under tax sale and had then agreed with the new owner for a lease of the property. As above indicated, the Court held that the defendant could deny his former landlord's title under such circumstances.

To the same effect see the case of

Bowman v. Goodrich, (Neb.) 144 N.W.
240:

Hartzog v. Seeger Coal Co (Tex.) 163 S.W
1055 at 1059.

DeForest v. Walters (N.Y.) 47 N.E. 294
at 297.

Annotation: "It is accordingly a well established rule forming an exception to or limitation upon the general operation of the rule that a tenant is estopped to deny his landlord's title, that the tenant may show that, since the beginning of his tenancy, the title or interest of the landlord has passed to a third person."

38 L.R.A. (NS) 863.

It is, therefore, evident that Defa having leased the section in 1938 from Salt Lake County could not thereafter deny Salt Lake County's title, and that Pappas properly terminated his lease with L.H.Gray whose title expired, and properly entered into a lease with Salt Lake County for Section 31 in 1939 and 1940, which lease continued to June 15, 1941.

IV.

THE AWARD OF \$425.00 DAMAGES WAS PROPER.

Appellant assails the judgment for damages at page 29 of his brief simply by stating his opinion that damages for loss of lambs and grazing were not proper under the complaint. The evidence cited at pages 29-33 has nothing to do with this question.

Under plaintiff's lease from Salt Lake County the plaintiff was entitled to the possession of Section 31, excepting only two forty-acre tracts along the south line of the east half of the section. In violation of plaintiff's possession, defendant came upon

the land in 1940 and plowed up approximately three hundred acres of the best feed within the section. All of the rented portion of the section was destroyed for feed, with the exception of the gullies covered with heavy brush. The central watering hole for all of plaintiff's grazing land is located in the middle of this section (Tr. 71). The best lambing ground available in all of plaintiff's leased ground is located upon this section, and all of the flat portions which have been cleared and are without brush and especially used by the plaintiff for lambing, have been plowed by the defendant. (Tr. 82, 84-85).

The complaint (Tr. 1-9) plainly alleges in paragraph 9, loss of use of the land in Section 31 for grazing, and the prayer fixes the damage for this item at \$175.00. This damage is for loss of feed, and could be shown in either of two obvious ways: (a) by showing what feed was lost and fixing its market value, or (b) by showing the market value of land required to replace the lost feed. (See Tr. 81). The plaintiff testified at Transcript 87 that the rented land was not as good as Section 31 which it was to supplant, and that the feed from Section 31 was worth more than the feed which he got from the extra rented land. This case, therefore, seems to come well within the measure of damages used in

Anderson v. Jensen, 71 Utah 295,
referred to hereinafter. See also

Williston, Revised Edition, Sections 1354
and 1384.

The rule is stated at

15 Am. Jur. 539, as follows:

"It has been held, moreover, that if the property is such that it cannot be replaced,

the measure of damages is the amount such property is ordinarily worth for use. If it can be replaced, however, the damages are the cost of hiring the property which the owner is forced to substitute for it.”

The sheep of the plaintiff at lambing time were compelled to seek higher ground where feed was available. This made it necessary for ewes to leave their lambs some considerable distance in order to obtain water. It was physically impossible for the plaintiff to prevent ewes from losing their lambs, and, as a result, plaintiff has been damaged to the extent of \$250.00 for loss of and damage to his herd.

It is admitted that the general rule is that, findings of fact outside the issues raised by the pleadings cannot be given effect by the Appellate Court; but the question here is whether this general rule has any application to this case. In the first place, the finding is supported by the allegations of special damage in the complaint; secondly, evidence of loss of lambs was admissible as an element of general damages; and, in the third place, since no objection was made to the introduction of evidence on this issue, the case falls within a well recognized exception to the general rule stated.

The finding in question is 10 (a):

“(a) That on or about May 20, 1940, to and including June 1, 1940, defendant plowed a portion of the above described property, being more particularly a portion in that part of Section 31 which was leased by the plaintiff from Salt Lake County under date of June 14, 1939, and which land was heretofore used primarily for lambing and constituted the best lambing

ground of the plaintiff. That said ground was in the immediate proximity of water for ewes that were lambing and enabled ewes to reach the water with their lambs. That by reason of said plowing of said portions of said section, the use of said property for grazing and lambing of plaintiff's sheep and for the watering of plaintiff's sheep during lambing was destroyed so that plaintiff was compelled to lamb his flocks upon undesirable land remote from said watering hole thereby causing the loss of approximately fifty lambs, to plaintiff's damage and preventing the use of said property heretofore required for grazing purposes by the plaintiff."

It is true that the finding is more explicit than the complaint as to the manner in which defendant's trespass damaged plaintiff in reference to use of the land for purposes of lambing. The complaint alleged in paragraph 3 that the land described "is useful to plaintiff for the grazing, shearing and lambing of sheep," and in paragraph 8 that "on or about April 25, 1940, plaintiff drove his 2,000 head of sheep on said property for the purpose of grazing, shearing and lambing said sheep." An in paragraph 9 (a) that defendant's plowing of the land destroyed "the use of the property for grazing or for shearing of plaintiff's sheep thereby causing damage to plaintiff;" and in paragraph 9 (b) that defendant's plowing rendered

"said property by virtue of the destruction of feed and the ouster of possession of little value for the purposes of grazing, shearing and lambing plaintiff's sheep and rendering all of the property described in paragraph 6 of little value, the 300 acres which

was plowed being the most valuable grazing land of all of the said tracts, without the use of which the property under lease could not and cannot support plaintiff's sheep during lambing and shearing time;''

and in the prayer the plaintiff indicates the specific relief desired and the kind of case the plaintiff supposes he has made by the use of the following words:

“ . . . plaintiff prays judgment . . . for damages suffered . . . through plowing of land . . . for loss of grazing . . . and for damage to sheep and loss of lambs.”

See Bancroft's Code Pleading, Section 12.

It plainly appears that plaintiff has alleged damage for the loss of the use of the alleged property for grazing, and special damage to sheep and loss of lambs, which is an incident of the loss of grazing.

But if it be assumed that the damage was not specially pleaded, the judgment is still supportable. A valuable precedent on this question is

Anderson, et al. v. Jensen, et al., 71 Utah
295; 265 Pac. 745.

This was also a case involving trespass to land which was valuable for grazing and lambing sheep, but the trespass in that case was by sheep rather than by plowing the land. It appears that plaintiff owned land along the bottom near a creek which was sheltered and therefore valuable for lambing ground, whereas the defendant's property was higher up and not so valuable for lambing. Defendant permitted his sheep to graze a portion of the lambing ground, using it also for the purpose of lambing, thereby keeping plaintiff's sheep off because of the danger of getting the lambs of the two parties mixed up. The complaint sought damages for loss of use of the land both for grazing

and for lambing and also sought an injunction against continued trespass. The evidence showed that the land was valuable for grazing and that it had a separate value as lambing ground. The Court referred to this as follows:

“The evidence tends to show that plaintiffs’ land along Sheep Creek is especially desirable for lambing sheep because it is warm, comparatively level, and protected from the spring winds and storms. It is also made to appear that it is a distinct advantage to have sheep, while lambing, near water because if the ewes are compelled to travel any considerable distance to secure water there is danger of the young lambs being lost from their mothers.”

Defendant took the position that plaintiff’s damage could be measured only by the value of the forage eaten and destroyed by defendant’s sheep and also contended “that proof affecting any enhanced rental value of the land in question because of its adaptability for lambing sheep is in the nature of special damages and must be specially pleaded to admit proof thereof.” In rejecting this contention of defendant, the Court made the following holding:

“In determining such reasonable rental value, the fact that the land may be valuable for lambing purposes is as proper a matter of inquiry as is the fact that the land may be valuable for grazing purposes. The ultimate fact to be determined is the reasonable rental value of the land, and any fact which aids in determining such ultimate fact is proper evidence under the

general issue of damages and need not be specially pleaded.”

It thus appears that the value of the land for lambing was separate and apart from the value of the land for grazing and that this separate value was not an element of special damage which required specific pleading.

A somewhat similar case is

Drinkhouse v. Van Ness, 202 Cal. 359; 260 Pac. 869,

which was an action in replevin for a race horse, the plaintiff claiming \$10,000.00 damage for the value at the time of taking and \$10,000.00 damage for loss of use during the detention. Over defendant's strenuous objection evidence was received as to the value of the horse as a racing pony and also as to its value for breeding purposes both because of the races it had won and the races its colts had won; and evidence was further received over objection as to the horse's earnings as a stud horse during the period of detention. The defendant objected that plaintiff was attempting to prove special damages under an allegation of general damage and on appeal objected to the finding of these special damages as not supported by the issues of the complaint. The Court held, however, that the value of the horse at the time of the taking included its value for all purposes and that it was therefore proper to show its value for breeding purposes as a stud horse.

There is no showing here that the appellant was surprised, misled or prejudiced by the introduction of proof as to loss of lambs. In

Moyle v. McKean, 49 Utah 93, at Page 99;
162 Pac. 63,

where a similar ground for reversal was urged upon the Court, the Court said:

“It is also insisted that a certain finding ‘is not within the allegations of the complaint.’ While it is true that there are no allegations in the complaint in the precise form of the finding, yet the finding is fairly within the purview of the allegations of the complaint and is responsive thereto. That assignment must therefore also fail.”

Here the prayer of the complaint plainly advised the defendant of the nature of the case plaintiff was attempting to make. The prayer asked for “\$175.00 for loss of grazing and \$250.00 for damage to sheep and loss of lambs.” It is held in

McPheeters v. McMahon, 131 Cal. App. 418;
21 Pac. (2d) 606,

that in determining whether reversible error was committed in the introduction of evidence outside the pleadings the prayer may be consulted to determine the nature of the case which plaintiff intended to make. And in

Neel v. Ramelli, 138 Cal. App. 366; 32 Pac.
(2d) 177,

evidence was introduced on a question of adverse possession upon which findings of fact were made although not pleaded in the complaint. In upholding the lower court’s judgment the Court of Appeals suggested that the general allegations of the complaint were sufficient to raise the issue and went on to say:

“but, if not, the appellant was not prejudiced because he was fully apprised of

the issues to be tried and was given ample opportunity to present his defense.”

And it likewise appears here that defendant was fully advised of the issues of the case and of a claimed element of damage for loss of land. An argument that a technical defect existed in a complaint should not be favored by this Court since it is not in the interest of justice and is an encouragement to obstructive tactics in litigation.

R. S. U. 1933, 104-13-1; 104-14-1.

But assuming for the sake of argument only that the finding referred to was not within the issues of the complaint, the finding is still supportable in this Court. The plaintiff testified as to the loss of lambs because of defendant's trespass (Tr. 83-85). Defendant made no objection to this testimony except to the testimony as to the price for which lambs were sold, and as to this his only objection was, “I object to that unless you fix the time.” And to Steve Martinez' testimony as to loss of lambs at Page 105 of the transcript no objection whatever was interposed.

It is well established that where no objection is made to the introduction of evidence which is outside the specific issues of the pleadings, the court may make findings on such issues, which findings will be upheld by the Appellate Court.

Stephens v. Doxey, 62 Utah 241; 218 Pac. 965.

Salt Lake Investment Co. v. Fox, 37 Utah 334, 338; 108 Pac. 1132.

Houtz v. Union Pacific, 33 Utah 175, 195; 93 Pac. 439; 17 L.R.A. (N.S.) 628.

Kaiser v. Kaiser, 106 Cal. App. 663; 289 Pac. 875, 876.

Crescent Lumber Co. v. Larson, 166 Cal. 168; 135 Pac. 502.

Smith v. Golden State Syndicate, 43 Cal. App. 346; 185 Pac. 209, 210.

Starkweather v. Eddy, 87 Cal. App. 92; 261 Pac. 763.

McDougal v. Hulet, 132 Cal. 154; 64 Pac. 278.

Conlon v. Northern Life Ins. Co., 108 Mont. 473; 92 Pac. (2d) 284.

Hansen v. Standard Oil Co. of California, 55 Idaho 483; 44 Pac. (2d) 709, 714.

North Electric Mfg. Co. v. Shelley, 32 Ohio App. 379; 168 N. E. 216.

Shelley v. Board of Trade, 87 Cal. App. 344; 262 Pac. 403.

In *Stephens v. Doxey*, *supra*, the appellant complained that a finding covered a different strip of ground than that alleged. The Court said at Page 249 of 62 Utah:

“This is assigned as error on the ground that the change was not pleaded, and, therefore, not made an issue. It is not claimed the finding is without evidence to support it, or that such evidence was objected to by defendant. The assignment is without merit.”

In *Kaiser v. Kaiser*, *supra*, which was an action for accounting on a farm leased by defendant to the plaintiff the defendant appealed partly on the ground that some findings were made on matters not pleaded. As to this, the California Court said:

“Appellant contends that there is a fatal variance between the allegations of the complaint and the evidence, and that some of the findings based on that evidence are

outside the issues. Such evidence, however, was admitted without objection, and the defendant introduced evidence bearing upon all the ultimate facts found by the court. It may fairly be stated, therefore, that the case was tried on the theory that such facts were in issue, and neither party was misled to his prejudice.”

In *Crescent Lumber Co v. Larson*, *supra*, the Court quoted the general rule that a finding entirely outside of the issues must be disregarded and then noted the following exception to this rule:

“The rule just stated is subject to the qualification that a finding may be considered where the issue though not formally raised by the pleadings, was tried in the court below without objection. *Ill. T. & S. Bank v. Pac. Ry. Co.*, 115 Cal. 285, 47 Pac. 60; *Sprigg v. Barber*, 122 Cal. 573, 55 Pac. 419.”

And in *Starkweather v. Eddy*, *supra*, at Page 765 of 261 Pacific, the Court said:

“It has been frequently held that, where a cause is tried upon the theory that certain facts are in issue, after judgment the cause will be considered as though such issues were correctly tendered by the pleading.”

The test of prejudicial error should be whether the party complaining was misled or prejudiced. As said in

Mankin v. Southwestern Automobile Insurance Company, 113 Cal. App. 243; 298 Pac. 42 at 43:

“Strictly speaking, the complaint should have alleged such waiver before the evidence

was received, or should have been amended to conform with the proof. It seems very clear, however, that the irregularity of procedure in failing to make such amendment to the complaint has not resulted in any miscarriage of justice.”

And in

Dudley v. Peterson, 42 Arizona 282; 25 Pac. (2d) 276 at 278,

the Court held that although pleadings should have been amended to conform to the evidence at the time evidence was introduced, it was not reversible error and the case would not be remanded where it was plain that the pleading would be amended and the same evidence would be offered on a new trial. Appellant may remonstrate that he made some objection to introduction of this evidence, even though not the right objection or at the right time. (See Tr. 85). This argument is definitely rejected by

Geanakoules v. Union Portland Cement Company, 41 Utah 486, at Page 489; 126 Pac. 329.

APPELLANT'S POINTS

ALLEGATIONS OF ANSWER ADMITTED BY FAILURE TO REPLY.

Appellant raises one or two questions which have not been answered. At pages 8 and 21 of his brief appellant suggests that the allegations of the answer were admitted by our failure to reply, citing R. S. U. 104-11-2 and 104-13-11. These statutes, applied to the pleadings, are sufficient answer to appellant. The answer was not a counterclaim because it asked for nothing. It alleged leases to the

appellant from L. H. Gray and from Salt Lake County (Tr. 20, 27), which were but a denial, in effect, of the complaint. No reply to this was required because the answer merely controverts the complaint and the only reply that would have been made on the facts is a reiteration of the complaint (See Bancroft, Code Pleading, Sec. 2192 and the case there cited,

Tate v. Rose, 35 Utah 229; 99 Pac. 1003).

Furthermore, the failure to reply, if necessary, was waived by appellant's going to trial on the merits.

Allen v. Schultz, (Wash.), 181 Pac. 916, 918; 6 A.L.R. 676.

Hardin's Committee v. Shelman, 245 Ky. 508; 53 S. W. (2d) 923.

Von Eime v. Fuchs, 320 Mo. 746; 8 S. W. (2d) 824.

Cochran v. Cochran, 133 Wash. 415; 233 Pac. 918.

Jenkins v. Spedden, 136 Md. 637; 111 At. 136.

FAILURE TO MAKE FINDINGS ON MATERIAL FACTS RAISED BY APPELLANT.

Appellant's brief complains of the court's failure to make findings on the lease from L. H. Gray to appellant (p. 21); and on possession of Section 31 (p. 25); also of finding No. IV said to be "not supported by any evidence whatever. It is contrary to the undisputed and record evidence." (Br. 27).

It was unnecessary to make a finding as to Exhibit 3. Finding No. IV (Tr. 30) finds that Salt Lake County on and after April 24, 1938, was the owner of Section 31. That obviates a finding as to Ex-

hibit 3 which is of necessity made abortive by the finding.

As to the finding on possession, finding No. V definitely states that defendant went into lawful possession of Section 31 on or about May 4, 1938, for one year, during which time respondent was out of possession. Finding No. VIII is supported by evidence, despite appellant's statement (Br. 25). The evidence establishes that respondent was in possession in 1939, placed extra men to protect the wheat, and permitted appellant to harvest his crop without molestation (Tr. 73, 75, 112, 113, 115, 158). Appellant complains generally, but points out nothing which supports his complaining.

Appellant attacks finding No. IV as above quoted. The finding itself states the facts upon which it is based (See Exhibits A, B, C).

RIGHT TO HARVEST CROP

At pages 33 and 35 of his brief appellant states a rule that an agricultural tenant holds land for an additional year unless given notice to quit within sixty days after his term expires. R. S. U. 104-60-4. Appellant's term expired May 4, 1939 (Exhibit 1, Finding V, Tr. 30). Respondent, successor to the landlord's estate, advised appellant of termination of appellant's lease by his presence on the land and by word of mouth in May of 1939 (Tr. 73, 75, 158; Finding VIII).

Even if it be assumed that appellant's term was extended for a year to May 4, 1940, he cannot claim for the additional year to May 4, 1941, because he was out of possession (one of the statutory re-

quirements) and he was again notified to quit (Tr. 78, 83, 113; Exhibit I). Appellant was therefore a trespasser when the wheat was planted in July or August, 1940 (Tr. 79, 114), and had no claim on the crop.

Mehl v. Norton (Minn.), 275 N. W. 843; 113 A.L.R. 1055.

Annotations at 39 A.L.R. 958; 57 A.L.R. 584; 113 A.L.R. 1059; 95 A.L.R. 1127; 18 Am. Jur. 220-224.

CONCLUSION

The judgment of the district court is fully supported by all the evidence in this case and by the applicable law. That the land in question was owned by Salt Lake County at all times here material, except subsequent to December, 1940, when it was sold subject to respondent's lease, is not controverted by the evidence. This gave respondent the right to the possession which he had when appellant trespassed by plowing and planting. Respondent's damage was amply pleaded, but even if it had not been this objection was waived by appellant's failure to object to the introduction of evidence. The only real question in the case is the possibility of an estoppel against plaintiff's asserting the right he acquired from the County, which right was supported by a title recognized by both the appellant and the original lessor to both parties. Respondent lost his possession and advised his former landlord of that fact, although it was already known to the landlord. He then, with the former landlord's knowledge, leased from the

holder of the tax title and advised the appellant of that fact, although appellant must have known it already through his inability or lack of desire to obtain a renewal of his lease from the County given in May, 1938. Here is no denial of a landlord, because the landlord has himself recognized the respondent's lessor by purchasing the land from Salt Lake County subject to respondent's lease. Any presumption of holding under the former landlord is fully dissipated, which respondent is entitled to show.

The judgment of the district court is sound and should be affirmed.

Respectfully submitted,

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