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Provo City and State of Utah v. William M. Jacobsen, et al : Brief of Appellant

Utah Supreme Court

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Clinton D. Vernon; Herbert F. Smart; Geo W. Worthen; Attorneys for Appellants;

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IN THE
SUPREME COURT
OF THE
State of Utah

PROVO CITY, a Municipal Corporation,

Plaintiff and Appellant,

vs.

WILLIAM M. JACOBSEN, et al.,

Defendants,

Case No. 7402

STATE OF UTAH

Plaintiff in Intervention and
Appellant,

vs.

WILLIAM M. JACOBSEN, et al.,

Defendants.

APPELLANT'S BRIEF

FILED CLINTON D. VERNON,
Attorney General
HERBERT F. SMART,
Special Assistant Attorney General
GEO. W. WORTHEN,
CLERK, SUPREME COURT, UTAH Attorney for Provo City
ATTORNEYS FOR APPELLANTS

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APPELLANT'S BRIEF
STATEMENT OF FACTS

This action was filed on December 11, 1941 for the purpose of having the court determine the ownership of lands described in the action in which lands were included in property leased to Provo City by the Honorable Herbert B. Maw, Governor of Utah, under authority

of Chapter 25, Laws of Utah, 1941, Second Special Session.

The action further requested that the court enter a decree in eminent domain as to lands determined to be owned by the defendants. An order of occupancy was granted and the case was tried, and findings of fact, conclusions of law and decree were entered on the 26th day of November, 1943 adjudging and decreeing the defendants to be the owners of all the lands involved in said action, and denying the state's claim of ownership of any of said lands by reason of the same being lands lying below the waters of Utah lake at high water.

Thereafter, a petition for re-hearing was filed and the Supreme Court, on May 28, 1947, remanded the case to the district court "to take further evidence if the parties so desire on the issues determined, and from such evidence and the evidence already received the court shall *fix and determine* the exact location of the high water mark as it was on these lands at the time Utah became a state, and therefrom fix a boundary line between the state and these defendants on that high water mark *and quiet the title of the lands of the respective parties.*"

Thereafter the matter came on for hearing on May 24th, 1948 and evidence was offered by Provo City and the State of Utah as to the elevation of the high water mark of Utah Lake.

Dr. George A. Hansen, a geologist, and an expert witness, testified that he had made an examination of the shores of Utah Lake (Tr. P. 4) and particularly in the vicinity of Lincoln Beach at the south end of Utah Lake

where the formation was hard and resistant. Dr. Hansen identified a point which in his opinion was the most recent high water mark of the lake. (Tr. P. 141) (Pl. Ex. BB)

Mr. Wright, a civil engineer, testified that he ran two lines of levels from established bench marks to the point indicated by Dr. Hansen and established the elevation of Point A-1 as 4488.95 feet above sea level. (Tr. 156)

Fred W. Cottrell, an engineer in the office of the Utah State Engineer, testified that designated bench marks were established under his direction near Lincoln Beach and in the vicinity of the land involved in this action (Tr. P. 105, 106) which bench marks were identified as the bench marks from where Mr. Wright ran the line of levels to Point A-1 designated by Dr. Hansen as the high water mark on Utah Lake (Tr. 92 & 156).

On May 28, 1948 plaintiff and plaintiff in intervention rested their case. Defendants moved the court to strike all the evidence introduced by plaintiff and plaintiff in intervention. The court denied the motion. Defendants then moved the court to dismiss the complaint in intervention on the part of the State of Utah on the grounds that no competent evidence had been offered and received upon which the court could make a finding to sustain the position of the plaintiff in intervention. (Tr. P. 176)

The court took the motion under advisement. Thereafter, and on June 21, 1948, the court rendered its oral decision wherein the court said :

“Thus the state has established a prima facie case for the location of a line and its establishment both on the basis of its elevation above sea level and its position upon the ground” (Tr. P. 179)

“From this analysis the court is of the opinion that even if there were no further evidence before the court, that the court would have sufficient basis to accept the line 4488.95 elevation as the line on the ground and as the elevation of the shoreline at statehood, and could then project the line across the grounds in question in the suit, if the line touches the grounds, and proceed to comply with the mandate of the Supreme Court that the court quiet title below in the State and above in the defendants. That being the case, it is evident that the motion to dismiss the complaint in intervention on the part of the defendants is not well taken and the same is overruled and denied.” (Tr. 181 & 182)

Thereafter, and without the introduction of any further testimony, the parties rested on the quiet title issue of the case and after argument the court took the matter under advisement.

On December 7, 1948 the court filed its memorandum decision finding the issue in favor of defendant and against plaintiff and plaintiff in intervention, and directed defendants to prepare and present findings of fact, conclusions of law and decree.

Findings of fact, Conclusions of Law and Decree were filed May 12, 1949 and motion for a new trial was denied May 27, 1949, and on the 24th day of August, 1949 appeal was taken.

ASSIGNMENT OF ERRORS

1. The court erred in its findings of fact No. 4, in finding that the respective defendants and their predecessors in interest had, for more than fifty years prior to the 17th day of December, 1941, been in possession of the real estate described in said finding of fact, in that said finding is not supported by the evidence, and the evidence affirmatively shows that part of said land was at all times during said fifty year period under the navigable waters of Utah Lake.

The court further erred in said finding of fact No. 4, in finding that defendants and their predecessors in interest had been the record owners of said real estate, in that said finding of fact is not supported by the evidence; and the evidence affirmatively shows that no title to said real estate, or any part thereof, ever passed to the defendant or their predecessors in interest from either the United States or the State of Utah.

2. (a) The court erred in its finding of fact No. 5, in finding that neither plaintiff nor plaintiff in intervention had ever been in possession of said real estate, or any part thereof, prior to the said 17th day of December, 1941, in that the evidence affirmatively shows that the plaintiff in intervention was at all times subsequent to January 4, 1896, in possession of said real estate, and that all times prior thereto, and particularly subsequent to the meander survey of 1856 of Township 7 South, Range 2 East, said real estate was in the possession of the United States and was held in trust by the United States for the plaintiff in intervention until its admission into the Union of States.

(b) The court erred in its finding of fact No. 5 in that neither plaintiff nor plaintiff in intervention had ever been the record owner of said real estate, or any part thereof, prior to the 17th day of December, 1941, in that the evidence does not support said finding and the evidence affirmatively establishes that plaintiff in intervention was at all times subsequent to January 4, 1896, the actual owner and the record owner of said real estate.

3. The court erred in its findings of fact numbered 6 to 41 inclusive, in finding that the respective defendants were the record owners of the land described as belonging to said respective defendants and that the respective defendants and their predecessors in interest were and had been in continuous possession of said premises described as belonging to the respective defendants for a period in excess of fifty years in that the evidence does not support said findings of fact or any of said findings of fact, and the evidence affirmatively shows that a part of the land set out and described as belonging to the respective defendants was at all times during said fifty year period under the navigable waters of Utah Lake.

The evidence further affirmatively shows that no title to said real estate, or any part thereof, ever passed to any of said defendants, or the predecessors in interest of said defendants, from either the United States or from the State of Utah.

4. The court erred in its findings of fact numbered 6 (a), 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 (a), 20 (a), 21 (a), 22, 23 (a), 24 (a), 25 (a), 26, 27, 28, 29, 30,

31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41, in that said findings and each of the same are not supported by the evidence and for the further reason that said findings and each of the same are immaterial in that each finds a fact which cannot affect the rights of plaintiff and plaintiff in intervention; and for the further reason that the evidence offered to support said findings and each of the same is and was inadmissible for the reason that no title could be acquired against plaintiff in intervention by adverse possession.

5. The court erred in its finding of fact No. 42 in that the evidence does not support said finding and for the further reason that said finding is wholly immaterial.

6. The court further erred in said finding of fact No. 43 in finding that the court is unable from the evidence received and considered to determine the exact location and elevation of this shore line as it existed on January 4, 1896, for the reason that said finding is not supported by the evidence; and evidence affirmatively shows that said high water mark and said shore line on January 4, 1896, was at the elevation of 4488.95 feet above sea level.

7. The court erred in its finding of fact No. 44 in that the evidence does not support said finding; and for the further reason that it affirmatively appears from the evidence that the said high water mark can be accurately determined and its position can definitely be established and projected over the land involved in this action.

8. The court erred in its finding of fact No. 45 in that the evidence does not support said finding, and for

the further reason that said finding is against the evidence. The court specifically erred in finding in its finding of fact No. 45 that before and after statehood all of the lands in question lying East of the West shore line were dry and not covered by any water from Utah Lake or Provo Bay. The evidence affirmatively shows that at no time prior to statehood were all of the lands lying East of the West shore line dry and uncovered from any water from Utah Lake or Provo Bay.

9. The court erred in its finding of fact No. 46 in that said finding, and each part thereof, is not supported by the evidence, is against the evidence, ignores all legal presumptions, and assumes a state of facts not established in evidence.

10. The court erred in its finding of fact No. 47 in finding that no competent evidence has been offered and received either at the first trial or the new trial from which the court can find the natural water level or elevation of Utah Lake as of January 4, 1896, for the reason that the natural water level of elevation of Utah Lake on January 4, 1896, is not determinative of the high water mark of Utah Lake on said date.

The court further erred in its finding of fact No. 47 in failing to find that the high water mark of Utah Lake on January 4, 1896, was at elevation 4488.95 feet above sea level.

11. The court erred in its finding of fact No. 48 in finding that on the date of said order of occupancy certain of the real estate described in paragraph 3 was above the water's edge of Provo Bay in Utah Lake, for the reason that the water's edge does not and did not

constitute the boundary between the property of the State of Utah and the defendants, and for the further reason that the same is uncertain and ambiguous in that it cannot be ascertained from said finding what real estate described therein is above the water's edge.

The court further erred in its finding of fact No. 48 in that the position of the water's edge of Provo Bay and Utah Lake at the date of said order of occupancy is incompetent and immaterial in determining what property belongs to the state of Utah by right of sovereignty.

The court further erred in its finding of fact No. 48 in finding that the real estate described in said finding is recorded in the names of said defendants on the County Recorder's rolls in Utah County and that Utah County has assessed and collected taxes from defendants on said lands, for the reason that said finding is against the law and title to said land cannot be acquired against the State of Utah by the payment of taxes or estoppel.

12. The court erred in its findings of fact in failing to find the elevation of the old shore line in accordance with the mandate of the Supreme Court.

The court further erred in its findings of fact in failing to find that the elevation of the old shore line was the elevation of the high water mark on January 4, 1896 as testified to by Dr. George Hansen, to-wit: 4488.95 feet above sea level.

The court further erred in its Findings of Fact in failing to find that the only evidence of the elevation of the old shore line was the testimony of Dr. George Hansen and Mr. Niel Murdock that the high water mark of Utah Lake on January 4, 1896 was 4488.95 feet above sea

level, and in failing to find that that elevation was the elevation of the old shore line.

The court erred in its Finding of Fact by finding against the mandate of the Supreme Court that all of the lands in question lying east of the west shore line were before and after statehood dry and not covered with any water from Utah Lake and Provo Bay, in that the Supreme Court in its decision on rehearing determined that part of the said lands were below the elevation of the old shore line, which determination was ignored by the court in its Findings of Fact herein.

13. The court erred in its Conclusion of Law Number 1 in concluding that the State of Utah, by virtue of sovereignty, was the owner in fee of all lands underlying the natural high water mark of Utah Lake on January 4, 1896; and in failing to find "That the State of Utah, by virtue of sovereignty, became the owner in fee of all lands underlying Utah Lake to high water, or high water mark on January 4, 1896."

14. The court erred in its Conclusion of Law Number 2 in concluding that the State of Utah has no right, title or interest in any part of the land described in paragraph 48 of the foregoing Findings of Fact, for the reason that the same is not supported by the evidence and is against both the evidence and the law.

15. The court erred in its Conclusion of Law Number 3, in concluding that Provo City acquired no right, title or interest in and to the lands described in paragraph 48 of the aforesaid Findings of Fact by virtue of the lease from the State of Utah, for the reason that the same is not supported by the evidence and is against

the law, and the court further erred in said conclusions by failing to conclude that the city of Provo acquired full right to possession and enjoyment by reason of said lease and that defendants had no right, title or interest in or to said lands.

16. The court erred in its Conclusions of Law Numbered 4 to 39 inclusive in that said conclusions, and each of them, are against the law and against the evidence.

17. The court erred in failing to conclude that the defendants did not acquire any right, title or interest in and to any of the lands described in paragraph 48 of the court's findings of fact, by adverse possession, or by equitable or judicial estoppel against the State of Utah, and did not acquire title to any of the lands in question by reason of the Statute of Limitations running against the State of Utah.

18. The court erred in its decree entered herein in decreeing that the defendants named in paragraphs 1 to 36 inclusive were respectively the owners of all the right, title and interest in and to the real property described in the respective paragraphs numbered 1 to 36 inclusive, for the reason that the Decree, as to each parcel of property described, is not supported by the evidence and is against the law.

19. The court erred in failing to make and enter its Decree herein decreeing that the state of Utah is the owner in fee and that plaintiff, Provo City, is entitled to the possession, against any and every claim of the defendants and each of them, of all the land described in paragraph 48 of the court's Findings of Fact and that said defendants, and each of them, have no right, title

or interest in any of the property described in paragraph 48 of said findings.

20. The court erred in failing to make and enter its Decree herein, decreeing to the State of Utah (and quieting the title of the State of Utah) to all the real property described in paragraph 48 of the court's Findings of Fact, underlying Utah Lake below High Water at the time Utah was admitted into the Union of States, for the reason that the State of Utah, upon its admission into the Union, became the owner by virtue of sovereignty of all land underlying Utah Lake to high water.

21. The court erred in failing to make and enter its Decree herein, decreeing that the State of Utah is the owner in fee of all land lying below the elevation, 4488.95 feet above sea level, such a decree being supported by the evidence and the law.

ARGUMENT

THE EVIDENCE ADDUCED AT THE ORIGINAL TRIAL AS WELL AS THE EVIDENCE ADDUCED AT THE FURTHER TRIAL DOES NOT SUPPORT THE COURT'S DECREE ENTERED HEREIN.

In its decision the Supreme Court found the affirmative defenses (equitable estoppel, judicial estoppel, adverse possession, and the doctrine of riparian rights) against the defendants, and remanded the case to the district court for the purpose of having it establish the elevation of the old shore line and to extending said elevation across the lands in question and quieting the title to all lands above in the defendants and to all lands

below in the State of Utah.

We, therefore, assume that it is unnecessary for us to analyze the evidence adduced at the original hearing or to allude to the same except as said evidence tends to the establishment of the elevation of the old shore line.

This court has determined that the evidence establishes the existence of an old shore line on the west side of this property running from the vicinity of the old Provo Resort to Will Peay's cabin.

In its decision on re-hearing this court held, and we believe the same is res judicata, that the old shore line was higher than part of the land lying east of said shore line and all land lying below the elevation of the old shore line belonged to the State of Utah.

The trial court's decision upon further hearing ignores entirely the determination of the Supreme Court in its decision on re-hearing.

The trial court found in its finding of fact No. 45, "... That at said times (before and after statehood) all of the lands in question lying East of the West shore line were dry and not covered by any water from Utah Lake or Provo Bay."

We submit that this finding ignores completely the mandate of this court and rejects completely the only evidence adduced upon the further hearing of the elevation of said shore line or high water mark.

In the previous trial no evidence was offered of the elevation of the old shoreline. No testimony was offered showing the relative elevation of the Provo Resort and

the Will Peay cabin. Nor was any evidence offered showing the relative elevation of the Provo Resort and the area where compromise monument was located. Exhibits in this case, and particularly Exhibit 12 M. C., disclose that the old resort was located on ground not described in this action and a considerable distance north of compromise monument.

We do know that the contour of the high ground to the West referred to in the testimony as Snail Island has been greatly altered since statehood, and that the old shore line or bank, the elevation of which we seek under the court's mandate, is not now in existence.

Ruth Farrer testified that the old shore line or bank was about a block west of the pavilion (Tr. P. 801). She further testified that the shore line or bank west of the pavilion was a good bank but that the bank west of the old monument was more gradual. (Tr. P. 805) (Res. Brief, P. 21)

Ruth Farrer further testified that the water of the lake was about 1/2 block west of the old wells on the resort property. (Tr. 764-65) She likewise testified that the water of Utah Lake was approximately 1/2 block west of the monument. (Tr. P. 769-81)

Ruth Farrer testified that when she referred to the shore line she was talking about the water's edge. (Tr. 807)

Ruth Farrer testified that the big trees on the resort property were uprooted by the high waters of 1922. (Res. Brief P. 21) Citing (Tr. 763-764, Tr. 794-795)

Heber Knudsen testified that before 1922 there was a definite shore line on the east shores of Utah Lake.

es. Brief P. 28) (Tr. 1071)

Respondents, in their brief at page 14, state: "In 1921 Utah Lake flowed over its banks and washed new channels in the area."

William Jacobsen testified that he had a lease on all property. That it was covered by water in the spring of 1921 except on the shore lines of Utah Lake there was high ground out down there. (Tr. 1308-1309)

William Jacobsen was asked, and answered as follows:

"Q. You say that was all covered by water in the spring of 1921?

A. Yes.

Q. Now—

A. Except on the shore lines there was high ground out down there.

Q. What short line do you mean?

A. Utah Lake." (Tr. 1308-1309)

Mr. Jacobsen testified that trees grew along the shore line on high ground west of the old resort and the monument.

He further testified that the trees were uprooted. "After the water went down the old stumps of the trees were along the shore line where the water had uprooted or tipped them over."

"Q. What years did the water tip them over to your knowledge?

A. Well, it would be during the high waters of '21

and '22.'" (Tr. 1292-93)

Dr. George Hansen testified in the further hearing of this matter on May 28, 1948 that the geological structure of the territory west of the airport is lake aluvium, lake deposits. (Tr. of further hearing P. 149.)

He further testified that the effect of high water and wave action upon the shore line west of the airport would tend to obliterate the shore line markings and spread out or level out or destroy the former shore line levels. (Tr. 149-150)

On cross examination the following questions were asked of, and the following answers given by Dr. George Hansen:

"Q. Now assuming, Doctor, that in 1921 that land was completely inundated by the waters of Utah Lake and the water from Provo River, what effect would that have upon any old bank which might have been in existence there as a shoreline?

A. You mean on this bank being underneath the level of the lake itself?

Q. What effect would the water action have upon—this high water coming over this old bank, what effect would it have upon that bank?

A. High water going over—if you had a bank bordering on the right and high water came over it would tend to level off, the wave action would tend to level off.

Q. In other words, the old shore line that existed on the west shore of Utah Lake would be obliterated by high waters that came over it?

A. That's right.

Q. I mean the east shore.

A. Any shore, whether east or west, if it was a shore in which your sediments involved are very fine silts. That would be exactly right.

Q. And certainly, Doctor, you know as a geologist one of the most destructive of all forces is the action of water going over soft material?

A. That's right.

Q. And water going over this soft shore line or bank would completely obliterate and level it off?

A. That would be right.

Q. And the tendency would be to leave the whole area flat; is that right?

A. That is exactly the thought expressed in these dotted lines (indicating.) (Tr. of further hearing P. 150 and 151)

Dr. Hansen was asked the following question and gave the following answer:

“Q. . . . If you have a high bank which separates water from lower land, and the water goes over that higher bank, it would tend to raise the elevation of the land, will it not?

A. In other words, the wave action would tend to tear the material off the top of the bank and distribute it inland?

Q. That is my point.” (Tr. of further hearing P. 152)

Under these circumstances the law is that the parties should resort to the best evidence available to establish ancient boundaries.

In Vol. 11, C. J. S., Sec. 105, beginning at page 698, under the title "Boundaries," the author in discussing admissability of evidence says:

"Boundaries may be proved by pertinent, relevant, and material testimony, or in other words, by every kind of evidence admissible to establish any other controverted fact. The evidence takes a wide range guided by the wise discretion of the presiding justice, who may resort to any evidence which is the best evidence available. . . ."

This the plaintiff and plaintiff in intervention did. The evidence establishes that the character of the land where the old shore line existed was soft, sandy lake aluvium. (Tr. of further hearing P. 149)

Dr. Hansen testified that the effect of water going over this soft shore line would be to completely obliterate and level it off. (Tr. of further hearing P. 149)

The evidence is uncontradicted that just that happened to the old shore line since statehood.

The only evidence offered in the original trial that would directly aid in finding the elevation of the old shore line or bank was the evidence of the running of a cross section or line of levels across Snail Island by Mr. Doremus and Mr. DeMoisy. The only evidence of a shore line or bank was found between the elevation 4489.25 feet and 4488.05 feet above sea level. (See P. 37-38 of plaintiff's petition for re-hearing Case No. 6674 and plaintiff's Ex. R1 and R2.)

At the trial, pursuant to the Supreme Court mandate, Dr. Hansen, a qualified geologist, found the elevation and most recent high water mark of Utah Lake to be at the elevation 4488.95 feet above sea level. This elevation was found at Lincoln Beach where the shoreline material is resistant, coarse, boulder and heavy gravel. (Tr. of further hearing page 10.)

Dr. Hansen identified Point B as representing the lowest permanent high water mark on the shores of Utah Lake. (Tr. 27 Pl. Ex. BB) He further testified: "This terrace at "B" represents the base of the terrace that has been in process of formation over an indefinite period of time, and I have every reason to believe that it is the terrace that was in existence in 1896." (Tr. P. 27)

Dr. Hansen further testified that he also found evidence of a more recent high water mark at Point A-1.

Dr. Hansen was asked certain questions and answered as follows:

"Q. You testified that B was the latest high water mark?

A. Permanent high water mark.

Q. What did you mean by that?

A. Well, I mean over a period of many, many years, long period of time; B is the last great notch made in the sands around Utah Lake.

Q. And below B. Doctor, can you state whether or not there is evidence of any temporary mark, or what is the situation between B and the water's edge there, so that the court may understand.

A. Between B. and A. of course, probably minor irregularities. Nothing comparable to what we designate as the one at B and C. But at Lincoln Beach there are indications of minor irregularities, but as I said in general they belong to the same angle of recession from B out. However, about a point—I would say a point may be a foot above the present water level, there is a small etching recorded in your heavy boulders that would suggest that the water has made some slight impression there.” (Tr. 140-142.)

The following questions were asked, on cross examination, to which Dr. Hansen answered as follows:

“Q. In other words, Doctor, between B and these points you have indicated there are several notches which might have been formed at any period after the water receded from Point B; is that right?

A. Several minor irregularities, but the one I have designated seems to be the most important of the lot.

Q. And, therefore, you don't know whether the one designated was formed before these other minor notches or after them do you?

A. All I know is that the one I am designating is the one that coincided with the water level at its high water level at the present time.” (Tr. 143)

From this point (A-1), which Dr. Hansen testified as being the high water of the lake formed during the last few decades, (Tr. 142) Mr. Wright ran a line of levels to A-1 from bench marks identified as having been established by the State Engineer's Office. (Tr. 105-106). And found the elevation of Point A-1 to be 4488.95 feet above sea level. (Tr. 156)

Mr. Wright ran a line of levels across the land in question from other B M's established by the state engineer's office, and found most of the points where elevations were taken below 4488.95 feet above sea level. A few were above that elevation. These points with the elevations found are shown upon Plaintiff's Exhibit A.A. (Tr. 98-99-101-111-112)

Coincidentally, the elevation 4488.95 feet above sea level is the same elevation as compromise elevation, as stipulated by the parties. (Tr. 566)

An examination of plaintiff's Exhibits C & D, the graphs showing the fluctuations of Utah Lake, reveals that every year in which records were kept, except the year 1889, the waters of Utah Lake rose to or above the elevation 4488.95 feet above sea level.

The testimony and map (Pl. Ex. S & U) relating to the land in question given and prepared by Charles DeMoisy, while not showing the elevation of the water of Utah Lake, reveals that during the years of 1891, 1892 and 1893 he, DeMoisy, saw the water overflowing the patented land of Geo. T. Peay, defendants' predecessor in interest, and which, of course, means the elevation of the lake at that time was considerably higher than 4488.95 feet.

We submit that the court will take judicial notice that Utah Lake is highest during the spring and early summer. This lake is, and has from early times, served as a storage reservoir for water users in Salt Lake County. It reaches its maximum level with the inflow of melting snow and from the springs from the Wasatch mountains. As the inflow to the lake decreases and the de-

mands for irrigation upon the water of the lake increase, the water level lowers.

The court will take judicial notice that such lakes in this western region are naturally higher during May, June and July, the peak being reached generally about the first of June. Even if there were no outlet from which the water of the lake were drawn off, evaporation from the lake spread over such area would greatly decrease the volume of the water in such a lake.

The testimony of Charles DeMoisy, testifying as a witness for George T. Peay in Case No. 3623, shown in Plaintiff's Ex. U, corroborates this conclusion. He testified that when he first became familiar with the land, in the fall of 1890, belonging to George T. Peay, predecessor in interest of the defendants, that the lake was lower than he had ever seen it since; that there was no great amount of water in the lake. He testified as having made a survey of the land in January, 1893 and stated: "When I made the survey in 1893 I think the water was about the same as it was in 1890; the land was not overflowed."

The observation of Mr. DeMoisy would bear out and support what we think the court will judicially notice, that such an inland lake is lowest in the months of November, December, January and February.

Corroborative further of this conclusion is plaintiff's Exhibit "C" and plaintiff's Exhibit "D", the graphs showing the fluctuation of Utah Lake.

An examination of these graphs will disclose that the average level of the lake from 1884 to 1895 was .085 foot above compromise level. The graphs likewise still indicate that during every year from 1891 to 1895 inclu-

sive the water of the lake stood at the above compromise elevation for a period of not less than six months.

On Demember 2, 1895, at the time Mr. Doremus and Mr. DeMoisy ran the line of levels across Snail Island at the location of compromise monument, the elevation of the water in Utah Lake west of Snail Island was 4486.967 (4486.97) feet, or a little less than 2 feet below compromise.

An examination of plaintiff's Exhibit "D" will disclose that the level of Utah Lake on said date, as shown upon said graph, agrees almost exactly with the elevation found by Mr. Doremus and Mr. DeMoisy.

The elevation of the shore line which the Supreme Court directed the District Court to find was found by a qualified geologist, Dr. Hansen, to be at the elevation of 4488.95 feet above sea level. This testimony is the best evidence available at this time.

This elevation was also found by DeMoisy and Doremus in their survey across the old shore line in the vicinity of compromise monument, on Dec. 2, 1895, when they found its elevation between 4488.05 feet and 4489.25 feet.

All of the evidence of the plaintiffs relating to the bed and shores of Utah Lake supports these surveys.

Defendants did not offer any evidence of the elevation of this old bank, and we submit that had they been able to obtain any information more favorable to their cause, it would have been offered.

We submit that there is competent evidence that the elevation of the old shore line is 4488.95 feet above sea

level and that the District Court erred in not establishing the elevation of the old shore line at 4488.95 feet above sea level, and then directing that a survey be made at the elevation across the lands in question and quieting title in the State of Utah to all lands below this survey, pursuant to the Supreme Court's mandate.

Respectfully submitted,

CLINTON D. VERNON,
Attorney General

HERBERT F. SMART
Special Assistant Attorney General
Attorneys for Appellant

GEO. W. WORTHEN,
Attorney for Provo City