

1956

# N. J. Meagher, Jr. et al v. Equity Oil Company et al : Brief of Appellant and Respondent Weber Oil Company

Utah Supreme Court

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Gustin, Richards, Mattsson & Evans; Attorneys for Appellant and Respondent;

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## Recommended Citation

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Case No. 8483

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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N. J. MEAGHER, Jr., MARY ALICE  
ARENTZ, KATHERINE C. IVERS,  
MARGARET FRANCES PRICE, N. J.  
MEAGHER and KATHERINE T.  
MEAGHER, his wife,

*Plaintiffs,*  
*(Appellants and Respondents)*

— vs. —

WEBER OIL COMPANY, JOE  
JUHAN and PAUL STOCK,

*Defendants,*  
*(Appellants and Respondents)*

and

EQUITY OIL COMPANY and ALL  
UNKNOWN PERSONS who claim any  
interest in the subject matter of this  
action,

*Defendants.*

**FILED**  
MAR 26 1956  
Clerk, Supreme Court, Utah

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**BRIEF OF APPELLANT AND RESPONDENT**  
**WEBER OIL COMPANY**

---

Appeal from the Fourth Judicial District in and for the  
County of Uintah

HONORABLE R. L. TUCKETT, *Judge*

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GUSTIN, RICHARDS,  
MATTSSON & EVANS  
*Attorneys for Appellant and*  
*Respondent Weber Oil Company*

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# IN THE SUPREME COURT of the STATE OF UTAH

N. J. MEAGHER, Jr., MARY ALICE  
ARENTZ, KATHERINE C. IVERS,  
MARGARET FRANCES PRICE, N. J.  
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MEAGHER, his wife,

*Plaintiffs,*  
(*Appellants and Respondents*)

— vs. —

WEBER OIL COMPANY, JOE T.  
JUHAN and PAUL STOCK,

*Defendants,*  
(*Appellants and Respondents*)

and

EQUITY OIL COMPANY and ALL  
UNKNOWN PERSONS who claim any  
interest in the subject matter of this  
action,

*Defendants.*

Case No.  
8483

## BRIEF OF APPELLANT AND RESPONDENT WEBER OIL COMPANY

Plaintiffs' opening brief deviates so substantially from the prescribed rule and contains so many half truths that we are required, as an aid to the Court, to make a comprehensive statement of the record rather than to pinpoint the contradictions.

Plaintiffs, in their brief, seem to ignore the proposi-

tion that this is an appeal from a summary judgment with a record devoid of any finding of bad faith, conspiracy, fraud, breach of fiduciary relationship, damages or interest. The primary question is whether the combined 25% of the oil heretofore awarded to defendants Stock and Juhan is to be taken from the Stock half or the Phebus half of the Sheridan Lease. Weber Oil Company admittedly owns the Phebus half. The Stock half has heretofore, after mandate, been litigated (*Meagher v. Uintah Gas Co. et al.*, 255 P. 2d 989). It was by the affirmed decree in that case that Stock and Juhan were awarded a combined 25% of the lessee's rights with respect to oil under the lease.

While this is the first time that the corporate defendants have been named as parties in this litigation, factual statements are made in the two previous decisions of this Court (185 P. 2d 747 and 255 P. 2d 989), which facts, we assume, need not be reiterated except as may be deemed advisable by way of emphasis.

## STATEMENT OF THE CASE

Appellants' complaint (R. 1-12), consisting of four counts, was filed on May 11, 1954. The Fourth Count (R. 9-10) claims damage by reason of possible accumulations of income tax not yet paid by plaintiffs but which they say they will have to pay in higher income tax brackets in the year they receive the proceeds from oil runs providing they are entitled to such proceeds. This count was disposed of by the trial court in a formal order of dismissal dated December 21, 1954 (R. 113-114). No ap-

peal is taken from the order of dismissal except that plaintiffs in paragraph 3 of their statement of points “in re appeal” of Weber Oil Company (R. 346-347) and their statement of points “in re the appeals of” defendants Stock and Juhan (R. 368-369) refer to the ruling and designate the count as a “trespass to personal property.”

In the Rulings on Motions signed, dated and filed by the trial court on the 14th day of October, 1955 (R. 213-215) it is ruled that “The Defendants’ Motions for Summary Judgment are granted as to the first and third counts of the Plaintiffs’ Complaint.” The First Count (R. 1-4) is to quiet title and to cancel and remove of record certain specific documents to the extent that the same may be a cloud upon plaintiffs’ title. The Third Count (R. 8) alleges that defendants have converted to their own use the plaintiffs’ share of the oil and the proceeds thereof produced by defendants from the lands covered by the Sheridan Lease. There is no appeal or cross appeal taken from the ruling dated October 14, 1955.

The Second Count (R. 4-8) alleges that plaintiffs are, and since January 27, 1948 have been, the owners in equal shares of the leasehold estate consisting of an undivided one-half interest in the lessee’s rights with respect to oil under the so-called Sheridan Lease, and is one for an accounting joined with allegations calculated to support the order to show cause and the temporary restraining order which was issued on the date the complaint was filed (R. 14-19). The restraining order was vacated and set aside and plaintiffs’ motion for a temporary injunc-

tion was denied and the order to show cause dismissed by the formal order of the court dated September 23, 1954 (R. 123-125) after a hearing at Vernal, Utah, on May 20, 1954, which hearing was stenographically reported. The transcript is in the record in this case.

At the hearing on the order to show cause the court, as the order of September 23, 1954 states, considered the affidavit of N. J. Meagher, Jr. (R. 20-30), the counter affidavit of Weber Oil Company by J. L. Dougan, its President (R. 57-65), the counter affidavit of Equity Oil Company by J. L. Dougan, its President and General Manager (R. 66-67), and the affidavit of Paul Stock and Joe T. Juhan (R. 68-71), and concluded that the plaintiffs had failed to establish that there was any threat that the defendants would remove their property from the jurisdiction of the court and that plaintiffs had failed to establish any grounds whatsoever for injunctive relief.

In the order of September 23, 1954, by paragraph 4 thereof, defendant Equity Oil Company was required "pursuant to the stipulation of the parties made in open court" to continue "to hold in a special fund an amount equal to 40.75 per cent of the gross crude oil runs from the property described in plaintiffs' complaint after deducting operating expenses, until the further order of the Court." And in the same order the Senior Meaghers (N. J. Meagher and Katherine T. Meagher, his wife) were included as parties plaintiff, it being ordered that "they shall be deemed to have adopted the allegations of said complaint without further amendment thereof." (R. 123-125).



The 40.75% of the gross crude oil runs from the property is the amount allocated to one-half of the working interest in the Sheridan Lease after giving effect to outstanding royalties totaling 18½%. The impounding was with the knowledge, acquiescence and approval of Weber Oil Company, the defendants Stock and Juhan, the plaintiff N. J. Meagher, Sr. and a written commitment made by Equity Oil Company under date of August 31, 1950 (R. 63).

The court in its rulings on motions dated October 14, 1955 (R. 213-215 at page 214) concludes that Equity Oil Company appears *only* as a “stakeholder”; that Equity has, pursuant to an agreement with the plaintiffs, maintained a special account of an amount equal to at least 40.75% of the gross crude oil runs after expenses of operations; that plaintiffs are entitled to a summary judgment against the defendant Equity Oil Company on the Second Count of plaintiffs’ complaint; for an accounting of the operations and profits of the oil produced by said defendant on the lands in question; and to a judgment against defendant Equity Oil Company for an amount equal to one-half of the proceeds after operating expenses are deducted.

The Interlocutory Judgment and Decree, as prepared by plaintiffs’ counsel, was entered on December 13, 1955 (R. 216-224). On the same day the court entered its order in favor of Juhan and Stock (R. 245) ordering Equity Oil Company to forthwith pay over to them jointly or to their order one-half of the 40.75% of the proceeds of the

gross crude oil runs then in its hands as stakeholder after deducting the appropriate share of operating expenditures. This order conflicts with the plaintiffs' Interlocutory Judgment and Decree which requires Equity Oil Company to pay over to the plaintiffs (excluding the Senior Meaghers) the entire 40.75% "less one-half of said expenses." All parties, including the plaintiffs but excluding Equity Oil Company, purport to appeal from the Interlocutory Judgment and Decree or parts thereof (R. 306, 310, 314, 346-347, 348-349, 368-369). The plaintiffs appeal from the order of December 13, 1955, directing Equity Oil Company to pay over to defendants Stock and Juhan jointly or to their order one-half of the 40.75% of the proceeds of gross crude oil runs held by it as stakeholder after deducting the appropriate proportionate share of operating expenditures (R. 319).

By an order dated December 15, 1955 and filed December 17, 1955 (R. 246) the court purported to recall, vacate and set aside its said order dated December 13, 1955, in favor of Juhan and Stock. The order of December 15, 1955, is made the subject of appeal by defendants Stock and Juhan (R. 310).

Specific objections to the form of Interlocutory Judgment and Decree as proposed by plaintiffs were made by defendant Weber Oil Company (R. 235-241). Defendants Stock and Juhan filed their objections to the proposed Interlocutory Judgment and Decree and made their motion for an order requiring Equity Oil Company to forthwith pay over to them jointly one-half of the 40.75%

of the gross crude oil runs after deducting the proportionate share of operating expenditures, basing the motion upon the affirmed and final Dunford decree in Civil Case 2238 in the same court, and expressly stated that the motion should not be construed as an admission on the part of those defendants that plaintiffs are entitled to the other one-half of said 40.75% (R. 230-234).

Civil Case 2238, Uintah County, Utah, is the same case taken to this Court in *Meagher v. Uintah Gas Co. et al.*, 255 P. 2d 989. The Dunford decree referred to is the Judgment and Decree dated June 4, 1951, a certified copy of which, together with the Findings of Fact and Conclusions of Law are found at pages 281-305 of the record herein. The Dunford decree is the subject of the remittitur from this Court dated February 11, 1953, and introduced as evidence in the instant case as Exhibit 5, which remittitur reads in part as follows:

“This cause having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the lower court be, and the same is modified in accordance with the views expressed in the opinion filed herein, and as so modified the judgment is affirmed, each party to bear its own costs on appeal.

\* \* \*

ISSUED January 20, 1954”

In the instant case, after the filing of the answer and counterclaim of defendant Weber Oil Company (R. 80-90), the answer of defendant Equity Oil Company

(R. 91-95), the answer and counterclaim of defendant Juhan (R. 96-100), the answer and counterclaim of defendant Stock (R. 101-112), the reply of plaintiffs to the counterclaim contained in the answer of defendants Stock and Juhan (R. 149-154) and the reply of plaintiffs to the respective pleadings filed by Weber Oil Company and Equity Oil Company (R. 155-160), the plaintiffs filed their motions for summary judgment (R. 162-163), basing their motions upon the records and files "of this court" and the affidavit of N. J. Meagher in support thereof, portions of which affidavit (R. 165-186) the corporate defendants moved to strike (R. 190-202) as did the defendants Stock and Juhan (R. 203-206).

Weber Oil Company made its motion for summary judgment (R. 188-189) basing the same upon the records and files "in the within action, including the depositions and admissions of the plaintiffs herein and upon the decision" of this Court in its Case 7723 (*Meagher v. Uintah Gas Co. et al.*, 255 P. 2d 989) and the remittitur issued from this Court in said case January 20, 1954. The corporate defendants, by J. L. Dougan, filed their affidavit on motion for summary judgment (R. 207-212).

The trial court, in its rulings of October 14, 1955 (R. 213-215), erroneously stated that defendants Juhan, Stock and Equity Oil Company had filed motions for summary judgment as well as the plaintiffs. The fact is that the plaintiffs and the defendant Weber Oil Company were the only ones to file motions for summary judgment prior to the date of October 14, 1955. The court in its

rulings (R. 213) considered it unnecessary to rule on the motions to strike portions of the affidavit of N. J. Meagher made in support of plaintiffs' motion for a summary judgment.

The hearing had at Provo, Utah, on the motions for summary judgment on May 25, 26 and 27, 1955, was stenographically reported and the transcript of the hearing is a part of this record. The deposition of N. J. Meagher, taken in the instant case, was read into the record (Rep. Tr. 48-166). Among the exhibits was a quitclaim deed (P-7) dated May 10, 1954, the day before this action was filed, whereby N. J. Meagher and Katherine T. Meagher, his wife, quitclaimed to the other plaintiffs, their children, the property described in the complaint, also P-13, an agreement dated April 9, 1951, between Equity Oil Company, Weber Oil Company, Joe T. Juhan and Paul Stock, recorded March 11, 1953. The entire record in Civil Case 2238 was received by the court in the hearing on the motions as well as the remittitur from this Court in its Case 7723.

## STATEMENT OF POINTS

### POINT 1.

WEBER OIL COMPANY SHOULD BE DISMISSED OUT OF THE ACTION WITH A SUMMARY JUDGMENT IN ITS FAVOR AS TO THE TITLE THAT IT ADMITTEDLY OWNS.

### POINT 2.

THE INTERLOCUTORY JUDGMENT AND DECREE OF DECEMBER 13, 1955, IS VOID AS TO WEBER OIL COMPANY.

## POINT 3.

THIS COURT CAN ONLY ACT HEREIN AS AN APPELLATE COURT AND NOT AS A COURT HAVING ORIGINAL JURISDICTION.

## POINT 4.

THE INTERLOCUTORY JUDGMENT AND DECREE WAS AN IMPOSITION UPON THE TRIAL COURT.

## POINT 5.

THE FOURTH COUNT FAILS TO STATE A CLAIM AS AGAINST ANY OF THE DEFENDANTS.

## ARGUMENT

Appendices A, B, C, H, I, J, K, M and N at the end of plaintiffs' brief all refer to matters adjudicated in Civil Case 2238 and finally disposed of by this Court on appeal in *Meagher v. Uintah Gas Co. et al.*, 255 P. 2d 989. The question immediately arises as to how many times matters can be litigated and when have the plaintiffs exhausted their cause of action. The tenor of plaintiffs' brief would be to accept in part and to reject in part that which has been previously litigated. The various indicia of ownership, if any, and the testimony of the witnesses loses its identity and has become merged in the judgment by all of the authorities. The plaintiffs in the instant case, by clever subtlety, are attempting (1) to avoid the consequences of their failure to appeal or cross appeal in the previous case from the decree awarding Stock one-sixteenth and Juhan three-sixteenths of the oil produced under the Sheridan Lease ( $\frac{1}{2}$  of the 40.75%); and (2) to avoid their omission to join in a petition for rehearing in the last appeal (Case 7723). To obscure these funda-



mental omissions they indulge in name calling beneath the dignity of reply, and in so doing hope to divert attention from the real issues involved.

#### POINT 1.

WEBER OIL COMPANY SHOULD BE DISMISSED OUT OF THE ACTION WITH A SUMMARY JUDGMENT IN ITS FAVOR AS TO THE TITLE THAT IT ADMITTEDLY OWNS.

The affidavit of N. J. Meagher, Jr. herein (R. 27-28) referring to Civil Case 2238, the former action, states:

*“The trial court, on March 6, 1951, adjudicated that Meagher, for the use and benefit of his grantees, the plaintiffs herein, was, as against defendants Juhan and Stock, the owner of the half interest in the lease to which he asserted title. Neither defendant Equity Oil Company nor defendant Weber Oil Company were parties to that litigation for, as hereinabove recited, issues had been joined thereon long before either of said parties acquired any interest whatsoever in the Sheridan Lease, and for the further reason that the only interest or title held by said defendants is derivative from and traceable to the Phebus one-half interest, which one-half interest is not in dispute.”* (Emphasis added.)

The second sentence of the above quote is a direct admission that the Phebus half of the Sheridan Lease is not in litigation and never has been and that plaintiffs make no claim to the same. The first sentence of the quote refers to the Memorandum Decision of March 6, 1951, found at pages 140-194 of the record on appeal in Case 2238 and *not* to the Findings of Fact, Conclusions

of Law and Decree entered in that case on June 4, 1951 (R. 281-305). The decree awards to Stock and Juhan a combined 25% of the oil. It is untrue to say, as does the first sentence of the above quote, that on March 6, 1951, it was *adjudicated* that Meagher was, as against defendants Juhan and Stock, the owner of the half interest in the lease to which he asserted title.

It is interesting to note, however, that in the Memorandum Decision, at page 167 of former record on appeal, Judge Dunford rationalizes the mandate of this Court in the first appeal as follows:

“By directing further proceedings, instead of merely ordering judgment for the defendants, or judgment quieting plaintiff’s title subject to the lease, it appeared to this Court *that the only possible thing contemplated by the Supreme Court was to determine the parties’ rights under the lease*. The plaintiff was compelled to accept that interpretation, and moved to have his rights, as well as the rights of the defendants thereunder, determined. The most that could be said of his change of position is that he was mistaken in his understanding that A1 and A5 (the Sheridan Lease and Modification Agreement) were void and constituted nothing more than a cloud upon his property.” (Emphasis added.)

The theory announced by the trial judge (Dunford) was carried into the Findings of Fact, Conclusions of Law and Decree of June 4, 1951, where the court proceeded to delineate the whole title to the leasehold. This Court on appeal, 255 P. 2d 989 at page 992, contrary to



the theory that a new cause of action was before the trial court, said:

“\* \* \* that an entirely new and different cause may not be pleaded by reply. Nor could a plaintiff in a quiet title action assert title acquired after its commencement. \* \* \* We cannot view Meagher’s claim of one-half interest alleged in his amended reply as a new or different cause. After reversal by this court, he conceded only half ownership in the originally pleaded whole. Meagher’s action persists on the same theory, — one to quiet title.”

This Court states:

“Meagher claims nothing through Phebus, but claims a one-half interest through Stock’s ‘release,’  
\* \* \*.”

And that one of the three claims brought into the case since the former decision (185 P. 2d 747) was:

“Stock’s, by counterclaim, to assert a one-half interest in operating rights in 440 acres, in opposition to Meagher’s identical claim.”

In the previous decision, 185 P. 2d 747 at page 748, it is stated:

“On January 19, 1945, Phebus quitclaimed his interest to Juhan.”

This Court in 255 P. 2d 989, at page 991, finds that:

“Defendant Juhan has transferred his interest in the operating rights to Equity Oil, and it to Weber Oil, neither litigants here.”

N. J. Meagher, Jr. in the portion of his affidavit quoted above unequivocally identifies the interest now held by Weber Oil Company as the Phebus one-half interest.

Paragraph number 13 of N. J. Meagher's (Sr.) affidavit in support of plaintiffs' motion for summary judgment states:

"On January 19, 1945, Phebus executed the aforesaid quitclaim transferring his interest in the Sheridan Lease to Juhan.

Plaintiffs assert no title to said Phebus interest in the Sheridan Lease." (R. 167)

At the Provo hearing on the motion for summary judgment the difference between counsel as to interpretation of the Dunford decree, as modified by this Court on appeal, is strikingly pointed out:

"MR. GUSTIN: What right, after the Dunford decree and after it had been adjudicated by the Supreme Court that the subject matter was the Stock half, what is there out of that half that could now be litigated unless you are impeaching the Dunford decree?

MR. WHEAT: Well, the answer is simple, the Supreme Court *did not* adjudicate the Stock half was the subject matter of the litigation." (Rep. Tr. 292) (Emphasis added)

To say that the Stock half was not the subject matter of litigation in the last appeal is spurious. This Court leaves no room for equivocation that Meagher claims nothing through Phebus but claims a one-half interest through Stock's "release," the "principal subject of this

suit." It necessarily follows that out of the subject matter in litigation Stock was decreed one-sixteenth and Juhan was decreed three-sixteenths of the oil ( $\frac{1}{2}$  of 40.75%). This facet of the decree was affirmed by this Court and was never the subject of appeal.

The decree in favor of Stock and Juhan was a divisible independent portion thereof and if the plaintiffs had questioned it they should have taken their cross appeal. *Rosenthynne v. Matthews-McCulloch Co.*, 51 Utah 38, 168 P. 957, *Reimann v. Baum*, 115 Utah 147, 203 P. 2d 387, and *Spendlove v. Shewchuck*, 116 Utah 248, 209 P. 2d 247, in which latter case it is stated that when the respondent does not cross appeal and does not assign the ruling of the lower court as error, then "respondent has not raised any issue before this court which the court can review."

The motion of Weber Oil Company for summary judgment (R. 188-189) was for a decree of summary judgment against the plaintiffs adjudicating Weber Oil Company to be the owner of an undivided one-half interest in the lessee's rights under the Sheridan Lease, and that the plaintiffs, and each of them, have no right, title, interest or estate in or to the undivided one-half interest in said Sheridan Lease so adjudicated as held, owned and possessed by defendant Weber Oil Company. The motion was based upon the decision of this Court in its Case 7723 (255 P. 2d 989) and the remittitur issued on January 20, 1954, to which judgment reference is made by the Meagher affidavit on motion for summary judgment (R. 179). The plaintiffs, as well as the defendant

Weber Oil Company, were claiming that their respective motions should be granted on the former Dunford judgment as affirmed on appeal.

All of the counts of the complaint are premised upon the proposition that the plaintiffs have an undivided one-half interest in the Sheridan Lease *as against all* of the defendants, and the complaint refers to and attempts a construction of the decision of this Court to that effect in the last appeal. The motions to dismiss made by Weber Oil Company (R. 72-77) effectively raised the issue as to whether the action could be so litigated as against Weber Oil Company, but most certainly, as the matter was submitted on the motions for summary judgment, the title question had resolved itself to the point where, as a matter of law, the court was required to say that Weber Oil Company is the owner of an undivided one-half interest in the lessee's rights under the Sheridan Lease and that the plaintiffs have no right, title, interest or estate therein.

The Interlocutory Judgment and Decree appealed from delineates, in favor of the plaintiffs, a 25% title out of the Phebus side of the Sheridan Lease and takes from Weber the adjudicated Stock and Juhan portion, and thus would amend, vary, contradict, reverse and annul the Dunford decree as affirmed by this Court on appeal in that regard. In the instant case the trial court could not nor can it be presumed to have departed from the affirmed Dunford decree as to Stock and Juhan. We point to the expression of this Court in *Utah Copper Co. v. Dis-*

*strict Court*, 91 Utah 377, 64 P. 2d 241 :

“The rule is well established and there does not seem to be anything to the contrary that when a case has been determined by a reviewing court and remanded to the trial court, the duty of the latter is to comply with the mandate of the former. The mandate is binding on the lower court and must be strictly followed and carried into effect according to its true intent and meaning as determined by the directions given by the reviewing court. When the trial court fails or refuses to obey or give effect to the mandate or remittitur, or misconstrues it or acts beyond its province in carrying it out, it becomes the province and duty of the appellate court to enforce compliance therewith, and it is generally recognized that such may be done on writ or order of mandamus. The lower court upon remand of a case from a higher court, must obey the mandate or remittitur and render judgment in conformity thereto and has no authority to enter any judgment not in conformity with the order. Whatever comes before and is decided and disposed of by the reviewing court is considered as finally settled and the inferior court to which a mandate issues is bound by the decree as the law of the case and must carry it into execution according to the mandate, and after the reviewing court has determined the case before it and remanded it to the lower court, the latter is without power to modify, alter, amend, set aside, or in any manner disturb or depart from the judgment of the reviewing court; that the judgment of the higher court is not reviewable in any way by the court below and the lower court cannot vary or examine the decree of the higher court for any other purpose than execution, *or give any other or further relief or review it even*

*for apparent error upon any matter decided on appeal, or meddle with it further than to settle so much as has been remanded.”* (Emphasis added.)

The plaintiffs, if they have any title in the Sheridan Lease, have 25% of the lessee's rights with respect to oil, less the proportionate share of operating expenditures. Stock and Juhan have 25% and Weber Oil Company has 50%. The plaintiffs have no interest in the April 9, 1951 agreement (Appendix L, Plaintiffs' Brief).

## POINT 2.

THE INTERLOCUTORY JUDGMENT AND DECREE OF DECEMBER 13, 1955, IS VOID AS TO WEBER OIL COMPANY.

By its rulings on motions on October 14, 1955 (R. 213-215) *the court* exercised all of the authority afforded it under Rule 56, Utah Rules of Civil Procedure. Thereafter the only issues left to be tried were those specifically reserved as against Equity Oil Company. The rulings on motions dated, signed *by the court* and filed in the action effectively dispose of all the remaining counts against the defendant Weber Oil Company, and specifically grants Weber Oil Company's motion for summary judgment thereon. There were no reserved issues against any defendant except Equity Oil Company and then only in its status as a stakeholder.

Proceedings under Rule 56 are summary in their very nature and require the judgment to be entered "forthwith". No findings are required and the judgment



so entered is final, except as provided in subdivision (d) of the rule. In the instant matter the only party remaining in the action is Equity Oil Company. The Fourth Count of Plaintiffs' complaint had been dismissed by the formal order of the court dated December 21, 1954 (R. 113-114).

There was no appeal from the rulings of October 14, 1955, and it was not until after the time for appeal had expired that the court entered the so-called Interlocutory Judgment and Decree as drafted by plaintiffs. The ruling of October 14, 1955, is not an order for a judgment or a memorandum from which the judgment was to be drawn. It is not a minute entry. It is a final judgment. The rulings embody the self executing order granted on defendants' motions for summary judgment. The time for an appeal could not be extended by the Interlocutory Judgment and Decree of December 13th nor could the court make such further order without first having set aside its order of October 14th.

In *Mower v. McCarthy*, ..... Utah ....., 245 P. 2d 224, the dissenting opinion suggests, under Article VIII, Section 9, Constitution of Utah, that this Court is powerless to review an appeal in cases of law without findings of fact. This Court held, notwithstanding the constitutional provision, that in reviewing a case involving certain rules of civil procedure where issues of fact are involved and there are no findings of fact it is assumed that the trier of the facts found them in accord with its decision. The reason given by the lower court in the instant case

is that the prior action, Case 2238, determined the title issues and stated in effect that the Dunford decision, as affirmed, was *res judicata* as to all of the parties. The defendants could not re-litigate the Stock side of the title and the plaintiffs could not re-litigate so as to reach over into the Phebus side of the title.

Plaintiffs contend that the Interlocutory Judgment and Decree of December 13, 1955, is interlocutory as to Weber Oil Company and the individual defendants, as well as to Equity Oil Company. The alleged decree as to Weber is void but, nevertheless, Weber Oil Company can invoke this Court's judgment on the voidness of the alleged decree by appeal to this Court, which it is doing. See *Openshaw v. Young*, 107 Utah 399, 152 P. 2d 84.

Admittedly the rulings of October 14, 1955, are interlocutory as to Equity Oil Company in its status of stakeholder and as to it there is no appeal until a final judgment. It must be assumed, however, that the trial court correctly interpreted the decision of this Court in the former case and that when it directed an accounting against Equity Oil Company of one-half of the proceeds after operating expenses are deducted it was referring to one-half of the 40.75% of the gross crude oil runs in Equity's hands as stakeholder. All of which is consistent with the Dunford decree as amended on appeal to this Court.

### POINT 3.

THIS COURT CAN ONLY ACT HEREIN AS AN APPELLATE COURT AND NOT AS A COURT HAVING ORIGINAL JURISDICTION.



Point 2 of plaintiffs' brief would have this Court rewrite the Interlocutory Judgment and Decree so that Weber Oil Company, Stock and Juhan are obligated to account and pay or, in the alternative, that this Court "*make clear* that the lower court is not precluded from making such provision when rendering its further orders and decrees in this matter." We submit that such is not the function of the appellate court.

The third point argued by plaintiffs boils down to a "request" that this Court make "a clear declaration" that Equity Oil Company is not a stakeholder but is a principal, if not the principal defendant in the action. The order of September 23, 1954 (R. 123-125) states:

"4. That the defendant Equity Oil Company, *pursuant to the stipulation of the parties* made in open court, continue to hold in a special fund an amount equal to 40.75 per cent of the gross crude oil runs from the property described in plaintiffs' complaint after deducting operating expenses, until the further order of the Court." (Emphasis added.)

It was upon that theory that the motions for summary judgment were argued to the trial court. Consistent therewith the court, in its rulings on motions on October 14, 1955 (R. 213-215), stated:

"*The Equity Oil Company appears only as a stakeholder.* It has, pursuant to agreement with the Plaintiffs, maintained a special account of an amount equal to at least 40.75 per cent of the gross crude oil runs after expenses of operations." (Emphasis added.)

Plaintiffs do not point to anything in the record that would relieve them from the solemn pronouncement of the stakeholder status of Equity Oil Company. There is nothing that will support their change of theory and there is nothing before this Court that will permit its intervention, sitting as an appellate court, in the absence of some appealable record, and as to that there is none. Furthermore, it was determined by this Court in the last appeal (255 P. 2d 989) that Equity Oil Company transferred the operating rights to Weber Oil Company, and this after a review of the same documents that counsel now point to to justify their change of theory. This Court, in the exercise of appellate jurisdiction, will follow the record before it and is limited in its jurisdiction by constitutional edict.

#### POINT 4.

THE INTERLOCUTORY JUDGMENT AND DECREE WAS AN IMPOSITION UPON THE TRIAL COURT.

(a) The Interlocutory Judgment and Decree is not only superfluous and a redundancy in the record after the entered and final, as to Weber, order of October 14, 1955, but it presumes on its face to be a determination of disputed matters of fact. Counsel found it expedient to make a recital of instruments that were passed upon in the previous case and merged in the Dunford decree to create the impression of findings of fact as if the case had been litigated for the first time in the instant action. The only question the court had before it on the motions for summary judgment was whether, as a matter of law,

it could say that title issues had been determined. There are significant departures from the summary judgment of October 14th, and then to cap the climax counsel complain of their own handiwork. They say that Weber Oil, Juhan and Stock should be held to account in the same manner as Equity. They would expand the judgment and distort the rulings of the court even further than they have already done by the form of judgment and decree that they prevailed upon the court to sign.

(b) The instrument says nothing about the granting of Weber Oil Company's motion for summary judgment and which had the effect of dismissing it out of the case. Quite to the contrary the form of the instrument would retain jurisdiction of the whole action "for such further proceedings as shall be deemed necessary upon motion of any party or upon the Court's own motion," and subtly refers to "costs and interest." As prepared by counsel the instrument is cleverly deceptive.

(c) The recitals depart from the findings of this Court as found at 255 P. 2d 989 at page 991 where this Court stated:

"Defendant Juhan has transferred his interest in the operating rights to Equity Oil, and it to Weber Oil, neither litigants here."

Compare this finding, which is the heart of the matter, with the language in the December 13th instrument:

"During the pendency of the aforesaid litigation, Civil 2238, defendant Joe T. Juhan assign-

ed portions of whatever interest he may have had in the Sheridan Lease to defendant Paul Stock and to defendant Equity Oil Company, both of whom had actual and constructive notice of the prior transfer from defendant Paul Stock to plaintiff N. J. Meagher.” (R. 219, lines 15-22).

There was only one time to correct the finding of this Court that Juhan “has transferred his interest in the operating rights to Equity Oil” and that was on the petition for rehearing in the former appeal. If the fact was as plaintiffs now claim it to be, they should have joined in the petition for rehearing that the defendants filed in said action and which this Court had under advisement for many months. By failing to point out the error, if in fact there was an error, they lulled this Court into complacency and awaited their time to impose upon the trial court in the instant case the factual premise as if it had never before been determined.

The trial court was “powerless to vary or examine” the judgment of this Court for any other purpose than execution “or give any other or further relief or review it even for apparent error upon any matter decided on appeal.” *Utah Copper Co. v. District Court*, *supra*. In this State, at least, counsel cannot deliberately lead the court into error. *Pettingill v. Perkins*, 2 Utah 2d 266, 272 P. 2d 185.

(d) The summary judgment of October 14th requires Equity Oil Company to account to *all* of the parties—not just to the Meagher children as provided in the December 13th instrument. Why this departure?



N. J. Meagher and Katherine T. Meagher, his wife, on March 15, 1954, demanded that the defendants pay to them, as well as their children, their alleged share of the proceeds from the oil produced and sold (R. 32-34). Plaintiffs' motion for summary judgment in paragraph numbered 3 (R. 163) says: "That *plaintiffs* by virtue of their ownership of said interest in the Sheridan Lease are entitled to an accounting from defendants of their operations thereunder." N. J. Meagher, in his deposition on April 16, 1955, and read into the record (Rep. Tr. 52), testified:

"Q. And you claim the personal right, the individual right, of an accounting in this action?

A. I think so."

Exhibit 7 in the instant record is a quitclaim deed dated May 10, 1954, the day before the present action was filed, whereby N. J. Meagher and Katherine T. Meagher, his wife, quitclaimed the property specifically described in the complaint herein to their children, the other plaintiffs. The former quitclaim deed from N. J. Meagher and Katherine T. Meagher to their children dated January 27, 1948, Exhibit A-22 in the prior action, was before the discovery of oil. It is settled law in this State that a quitclaim deed does not pass an after acquired title. *Duncan v. Hemmelwright*, 112 Utah 262, 186 P. 2d 965, *Dowse v. Kammerman*, ..... Utah ....., 246 P. 2d 881. There is respectable authority for the proposition that under an oil and gas lease the right of the lessees is merely an option to explore the premises, and

no estate, title or interest is vested in them prior to the discovery of oil through drilling operations:

“When such oil was discovered on the leased premises through the drilling operations, a new property was brought into being, consisting of the oil in place beneath the surface of the premises. It was then that there was discovered the property interest.”

*Petroleum Exploration et al. v. Commissioner of Internal Revenue*, (C.C.A. 4th Cir., 1951 Ill.) 193 F. 2d 59.

To thus prevail upon the trial judge for a judgment by-passing the Senior Meaghers either from a tax angle or to leave undetermined some facet of the litigation that could possibly give rise to future harassment, is equally reprehensible.

(e) Plaintiffs say in their brief at page 11 that Weber Oil Company has never asserted that it acquired any interest “in the Stock half” of the lease as a bona fide purchaser for value. This begs the question because it has heretofore been adjudicated and it is admitted in these proceedings that Weber has the Phebus half of the Sheridan Lease. Plaintiffs attempt to delineate through the recitals of the December 13th instrument a title in Weber from the Stock half, notwithstanding the previous adjudication and the admissions in the instant record. That is one of the subtleties of the December 13th instrument as prepared by plaintiffs’ counsel. If any finding of fact was appropriate, then there should be inserted the admitted fact that it was after the remittitur

in the first appeal that Equity Oil Company, openly and notoriously, entered upon the property, drilled for and discovered oil; that from the time of the quitclaim deed and assignment from Equity Oil Company to Weber dated December 30, 1947, and until August 3, 1949, when Mr. Meagher filed his amended reply in the former action, six oil wells were completed on the property as producers (R. 207-212), all drilled pursuant to a claim of right without protest by them.

#### POINT 5.

THE FOURTH COUNT FAILS TO STATE A CLAIM AS AGAINST ANY OF THE DEFENDANTS.

This count was dismissed out of the action by the formal order of the court on December 21, 1954 (R. 113-114). It is a novel theory to say that one becomes liable through the forbearance of money for income tax consequences. Counsel do not point to any authority supporting the claim and we believe none can be found. There is no causal connection between anything that the defendants are alleged to have done or are alleged to have omitted doing and the obligation to pay income tax.

#### CONCLUSION

We not only challenge the integrity of plaintiffs' brief in light of the record, but also their good faith in their submission to the trial court of the Interlocutory Judgment and Decree dated December 13, 1955, differing so obviously from the rulings of October 14, 1955. The brief does not contain a forthright statement of the record

in the instant case, from which record it is obvious that the Interlocutory Judgment and Decree of December 13th is a nullity and a document from which the plaintiffs cannot appeal. The court below disposed of the action, so far as Weber Oil Company is concerned, by its summary judgment entered on October 14, 1955, from which there was no timely appeal. The judgment adjudicating one-half of the leasehold interest to Weber Oil Company is final.

The appeals from the so-called Interlocutory Judgment and Decree should be dismissed.

Respectfully submitted,

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