

1956

N. J. Meagher, Jr. et al v. Equity Oil Company et al :
Brief of Appellants and Respondents Paul Stock
and Joe T. Juhan

Utah Supreme Court

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Burton W. Musser; Richard Downing; Oliver W. Steadman;

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Case No. 8483

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

FILED

APR 19 1956

Supreme Court, U. of U.

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 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

**BRIEF OF APPELLANTS AND RESPONDENTS
PAUL STOCK AND JOE T. JUHAN**

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

HONORABLE R. L. TUCKETT, *Judge*

**BURTON W. MUSSER
RICHARD DOWNING
OLIVER W. STEADMAN**

*Attorneys for Appellants and
Respondents Paul Stock and Joe
T. Juhan.*

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IN THE SUPREME COURT of the STATE OF UTAH

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Case No. 8483

BRIEF OF APPELLANTS AND RESPONDENTS PAUL STOCK AND JOE T. JUHAN

PRELIMINARY STATEMENT

This analysis of plaintiffs' brief, by appellants and respondents Paul Stock and Joe T. Juhan, is made necessary by the form and character of plaintiffs' brief. We think it appropriate to point out and discuss in detail many inaccurate, loose and erroneous statements and conclusions found therein.

Such misstatements and erroneous conclusions appear on pages 1, 2, 3, 4, 5, 10, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 33, 35 and 36 of plaintiffs' brief.

Preliminarily, however, let it be noted that the names of the plaintiffs are not given in the title of their brief. This is important as will presently appear. Neither are the names of the defendants stated. This also is important because the defendants changed.

A true enumeration of all of the parties is contained in the title hereof.

Plaintiffs' brief has 37 pages. The appendices have 83 pages. This seems to be an abuse of the rules.

Only appendices D, E, F and G to plaintiffs' brief have any relevancy to the issues here. References herein to appendices are to plaintiffs brief.

There are 6 plaintiffs; only 4 are included in the December 13, 1955 interlocutory judgment and decree. At page 2 of plaintiffs' brief the author asserts that "since October of 1944, plaintiffs have owned an undivided half of the working interest, as to oil, in the so-called 'Sheridan Lease.'" Now it is important to know who the plaintiffs are. Does the author mean all 6 of the plaintiffs, or 4 of the plaintiffs, or 2 of the plaintiffs? Why does he require us to speculate on what he means? Under our theory none of the plaintiffs has ever owned any rights to the working interest of the Sheridan Lease.

October of 1944 is the date of the Stock paper. To claim ownership through that paper is a colossal fraud. On this point this Court spoke only after mandate and in the light of an inadequate record.

On January 27, 1948 (Ex. A-22) before the discovery of oil, Meagher Sr. quitclaimed the property to the other plaintiffs. This deed did not convey the after acquired oil rights (see Weber's brief p. 25 et seq.).

On May 10, 1954, after the discovery of oil, the Senior Meaghers again quitclaimed the property to their children. This was to confirm the first deed (Plaintiffs brief page 7). This is the deed that passed the title to Meaghers' children, if any titled passed.

On April 16, 1955, the Senior Meaghers still claimed a personal right to an accounting as if they still owned the property (Rep. Tr. 56). So the statement above quoted from plaintiffs' brief is untrue. The plaintiffs since October 1944 have not owned a one-half interest in the "Sheridan Lease." And the second trial based on the first quitclaim deed was a fraud on that court.

Again at page 2 (Plaintiffs' brief) it is asserted "Thus this suit for an accounting was forced upon plaintiffs." That statement is untrue. This suit is more than a suit for an accounting.

In bringing this suit to recover the whole 40.75% plaintiffs characteristically seek to circumvent the first mandate and the affirmed Dunford Decree. This the lower court in this action refused to let plaintiffs do. See "Rulings on Motions" dated October 14, 1955 (R.

213-215). Those rulings were made in conformity with our rules and that judgment possesses all of the formality and dignity that a summary judgment can possess. There the lower court granted judgment to defendants on the first and third counts of the complaint; and to the plaintiffs for an accounting on the second count of the complaint. The fourth count of the complaint had long since been dismissed out of the action (R. 113-114). Plaintiffs made no attempt to amend or appeal. This disposes of pages 27 to 32 of plaintiffs' brief. All authorities cited by plaintiffs, except 3, go to the lower court's dismissal of their 4th count. That occurred on December 21, 1954.

Again at page 2 (Plaintiffs' brief) plaintiffs say that their rights were so obvious that they were declared by summary proceedings in this case. On the contrary, to the lower court it was obvious that if the Dunford Decree was to be given weight, Stock and Juhan jointly were entitled to one-half of the 40.75% held by Equity as stakeholder. That is why the lower court signed and filed the December 13, 1955 order requiring Equity to pay over to these appellants that amount. The order was in strict harmony with the Dunford Decree and with the lower court's Rulings on Motions (R. 213-215).

ANALYSIS OF PLAINTIFFS' STATEMENT OF FACTS

At page 3 of their brief, plaintiffs discuss "*the* litigation" rather than *this* litigation. They represent that these appeals bring this controversy to this Court

for the fourth time. The assertion is untrue—and, moreover, if it be true, these proceedings should be summarily dismissed.

At page 4 (Plaintiffs' brief), plaintiffs again put in issue this Court's mandate in No. 6972 (185 P.2d 747). Plaintiffs state "This Court . . . remanded the case for further proceedings which, of course, required determination of the ownership of interests in the lease." That is a completely untrue statement. Now is the time to set the record straight and end the repeated intentional falsification of the record.

THE MANDATE (FIRST APPEAL)

The mandate in the first appeal (No. 6972) did not remand the case for "*further proceedings, which, of course, required determination of the ownership of interests in the lease.*" That statement stems from dishonesty and deceit. It is calculated misstatement.

The mandate is:

"The decision of the lower court is reversed, *and the case remanded to that Court for proceedings to conform to this opinion.*" (Emphasis added).

In scores of instances the author of plaintiffs' pleadings and brief has thus intentionally falsified the mandate. The author of plaintiffs' brief persistently inserts the word "*further*" in the mandate and deletes the words "*to conform to this opinion*" from the mandate. He thus emasculates the mandate. This is not inad-

vertent. It is consciously done. Why does he resort to this trick? We do not charge the plaintiffs nor Mr. Van Dam with such conduct. The author's conduct in this regard, so often resorted to, here and in the lower court, is a fraud meant to mislead this Court on an important issue.

The author of their brief at page 4 says:

“Next, *the* case reached this Court in a mandamus proceeding.”

This case reached the Supreme Court only in this proceeding. Counsel adroitly says “*the* case”. Now he can argue he meant *that* case, or *this* case whichever suits his purpose best. Throughout their brief this chameleon characteristic persists.

Again on page 5 of plaintiffs' brief he raises the mandate issue. The author says:

“The third occasion for this Court to act involved an appeal from the decision of the lower court after the *second trial below*. In that *second trial*, the lower court examined all claims of the parties to interests in the Sheridan Lease . . .” (Emphasis added).

The only jurisdiction, the only power, the lower court possessed after the mandate in that case was revested in it by the remittitur. That is the function of a remittitur. Its jurisdiction was limited to carrying out the mandate.

Where did the lower court obtain jurisdiction to grant a new trial? Or to permit amendments to plead-

ings? Or to bring in new parties? And if a new trial was properly had, why this trial?

And further, in the appeal from the *second* trial the power of this Court was limited to determine if the lower court had complied with the mandate. If it had, the appeal should have been dismissed. If it had not, this Court should have sent the case back with appropriate instructions. The fact that this Court entertained the appeal from the *second* trial is proof enough that the mandate had not been complied with. See *Krantz v. Rio Grande Western Ry. Co.*, 13 Utah 1, 43 P. 623, and *Helper State Bank v. Crus*, 95 Utah 320, 81 P.2d 359 at page 363, and other Utah cases.

If the mandate was not complied with these appellants are entitled to a trial on the merits of the issues formed by the pleadings.

If the mandate was complied with these appellants are entitled to the fruits of the Dunford Decree, i.e. $\frac{1}{2}$ of the 40.75%.

At the top of page 6 of their brief plaintiffs say this suit was commenced “. . . to declare plaintiffs’ rights as against Equity Oil Company and Weber Oil Company, and to obtain an accounting and payment from all defendants.” Plaintiffs’ proposed interlocutory judgment and decree does not do that. Plaintiffs led the lower court into error and now seek to have that decree changed, corrected or reversed. One cannot induce a court to commit error and then take advantage of that error.

THE FACTUAL BACKGROUND

(Plaintiffs' brief p. 6)

At pages 6, 7, 8, 9, 10 and 11 of their brief the author re-states past events commencing with October 21, 1944. This is past history. This is not a "statement of the case" as provided by the rules. It is no aid to this court. To support his theory, he cites Civil No. 2238 in the *second trial* (after mandate) eight times. Plaintiffs claim two final decrees. They now seek another. It is difficult for one to understand why plaintiffs did not, in the first place, try all the issues against all of the parties defendant in favor of all of the parties plaintiff. Sometime plaintiffs' right to further litigate will be exhausted. Maybe that time has already arrived.

At page 11 of their brief the author says that the District Court granted the *interlocutory summary judgment*. It could grant only one such judgment. That is the judgment of October 14, 1955 (R. 213-215). Under rule 56(d) this judgment is not appealable. The appeal from the interlocutory judgment and decree of December 13, 1955, is abortive because that decree is mere surplusage. Plaintiffs' appeal should be dismissed.

The lower court in this case did not find or decree in its October 14, 1955 Rulings that the title claimed by the plaintiffs is valid against Equity and Weber. It decided just the opposite (R. 213-215).

The author at page 12 of plaintiffs' brief puts the word "mistakenly" in the Judge's mouth. In his order of December 15, 1955, the Judge gave two reasons for his order. Neither is based on "mistake" (R. 246). The

orders of December 13, 1955 and December 15, 1955 will be hereinafter discussed.

Again on page 14 (Plaintiffs' brief) the author refers to the December 15, 1955 order, as "expressly" stating that the December 13, 1955 order was "entered by mistake" and is vacated as being in conflict with the "Interlocutory Judgment and Decree". The word "mistake" is not in the December 15, 1955 order. And the December 13, 1955 order could not be in conflict with the interlocutory judgment and decree of the same date for the simple reason that that decree is a nullity—being mere surplusage.

PLAINTIFFS' ARGUMENT

(Plaintiffs' brief p. 15)

The author of plaintiffs' brief persistently refuses to correctly state the record. He adds to, subtracts from, and otherwise consciously perverts what Mr. Van Dam says (R. 249-251) and what the trial judge said. We pass the improprieties involved.

Commencing with page 14 of plaintiffs' brief, the author thereof records what the judge told Mr. Van Dam and what Mr. Van Dam told the judge. Compare that with Mr. Van Dam's affidavit, Appendix G 1 - G 4.

Mr. Wheat's Statements.

Mr. Wheat:

"The judge stated that Mr. Musser had presented an order on behalf of Stock and Juhan" (Plaintiffs' brief 17).

Mr. Van Dam's Statements.

Mr. Van Dam:

"Then Judge Tuckett said that Mr. Musser had presented an order to him in behalf of defendants Stock and Juhan, *and asked me if we objected to it*" (Mr. Van Dam did not). (App. G-1).

Mr. Wheat deleted "and asked me if we objected to it" and the fact that Mr. Van Dam did not object to it.

Mr. Wheat:

"Mr. Van Dam asked the Judge if the order affected the interests of plaintiffs under the interlocutory judgment and decree, and the Judge said that it did not" (Plaintiffs' brief 17).

Mr. Van Dam:

"I asked him (Judge Tuckett) whether the order would have any effect upon the rights of plaintiffs under the Interlocutory Judgment and Decree. He said it was *his understanding that it would not.*" (App. G-1, G-2).

Mr. Wheat deleted the italicized words.

Mr. Wheat:

"Mr Van Dam then pointed out to the Judge that such an order would concern the plaintiffs *because the impounded funds do not include all of the oil proceeds but impound only the plaintiffs' half*" (Plaintiffs' brief 17).

Mr. Van Dam:

"I then told him it seemed to me that the order was in conflict with the Interlocutory Judgment and Decree, and had the effect of distributing part of the impounded funds both to plaintiffs and to defendants Stock and Juhan at the same time." (App. G-2).

Mr. Wheat puts the italicized words in the mouth of Mr. Van Dam. This is inexcusable.

Mr. Wheat:

"The Judge said he had no intention of *awarding the defendants anything to which the plaintiffs are entitled under the Interlocutory Judgment and Decree.*" (Plaintiffs' brief 17).

Mr. Van Dam:

"Judge Tuckett said he did not intend to do any such thing, *and stated that he would withhold the order* (which had already been filed and entered R. 263) *and take it back with him to Provo.*" (App. G-2).

Mr. Wheat adds and deletes the italicized words from and to what Mr. Van Dam said. (The December 13, 1955 order does not award anything to these appellants that plaintiffs are entitled to.)

Mr. Wheat:

"He also said he would withhold the order * * *. The judge instructed Mr. Van Dam to advise counsel with respect to the situation, *and Mr. Van Dam did so*" (Plaintiffs' brief 17).

Mr. Van Dam:

"He requested me . . . to notify Mr. Musser of his intentions with respect to the order." (Mr. Van Dam tried to contact Mr. Musser but was unable to.) (App. G-2).

Mr. Wheat adds the italicized words "and he did so."

On page 18 (Plaintiffs' brief) the author states: "The vacating order of December 15th confirms the foregoing . . ." It does no such thing. It does assign as the ground for trying to revoke the order of December 13th the assertion that said order conflicts with the decree of the same date. That ground is wholly insufficient because the decree of December 13th is a nullity.

RULINGS ON MOTIONS

On page 18 of plaintiffs' brief, the last line, the author characterizes the "Rulings on Motions" as a *memorandum decision* and states: "By *memorandum decision* entitled "Rulings on Motions," dated October 14, 1955, . . ."

This statement of the author of plaintiffs' brief is deliberately, palpably and, again, inexcusably false. The "Rulings on Motions" of October 14, 1955, are so important in these proceedings that these appellants set portions of it out herein.

The trial judge's "Rulings on Motion" is not a *memorandum decision* of the District Judge. It is a formal summary judgment made and entered "By the

Court" under Rule 56, Utah Rules of Civil Procedure, and possesses all of the formality and dignity that any such judgment can possess. It is the judgment pursuant to the motions for summary judgment. With the greatest fidelity the trial judge adhered to our rules relating to summary judgment. On the other hand the interlocutory judgment and decree of December 13, 1955, is surplusage. The trial judge unfortunately was led into error by the telephone conversations (R. 255-257 and 264).

These appellants specifically call this Court's attention to the affidavit of Mr. Van Dam (R. 255-257), Appendix G to plaintiffs' brief, and to Mr. Musser's affidavit (R. 266). These affidavits show an amazing course of conduct involving grave improprieties.

"RULINGS ON MOTIONS

(R. 213-215)

No. 3228 Civil

In this matter the Plaintiffs, as well as the Defendants Joe T. Juhan, Paul Stock, and the Equity Oil Company, a Corporation, have filed Motions for Summary Judgment.

* * *

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.

The Plaintiffs are entitled to a Summary Judgment against the 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 said Defendants Equity Oil Company *for an amount equal to one-half the proceeds after operating expenses are deducted.* (Emphasis added.)

In the first count of Plaintiffs' Complaint, the Plaintiffs seek to quiet title to their interest under the Sheridan lease. These issues were tried and determined in the prior case and the plaintiffs cannot retry the same issues. The Defendants' Motions for Summary Judgment are granted as to the first and third counts of the Plaintiffs' Complaint.

Dated at Provo, Utah, this 14th day of October, 1955.

BY THE COURT:

R. L. Tuckett"

OBJECTIONS TO PLAINTIFFS' PROPOSED INTERLOCUTORY JUDGMENT AND DECREE

On Page 19 (Plaintiffs' brief) the author says:

"Defendants Stock and Juhan *proposed no form of decree*, but did file objections to the *form* submitted by plaintiffs . . ." (First italics theirs, second ours).

There is not an iota of truth in the above statement. The objections to plaintiffs' proposed interlocutory judgment and decree contain 4 pages (R. 230-234) and adopts Weber's objections (R. 235).

The first paragraph of the objections is:

“Defendants Paul Stock and Joe T. Juhan object to plaintiffs’ proposed ‘Interlocutory Judgment and Decree’ filed herein *and the whole thereof for the reasons and because of the objections herein contained, and the objections filed herein by Weber Oil Company.*” (R. 230). (Emphasis added.)

Included in appellants’ objections is the following:

“Under the Dunford decree, as affirmed, these individual defendants have jointly a full one-fourth interest as to oil in the Sheridan Lease, which interest was carved out of the Stock one-half interest and which was ‘the principal subject of litigation’ in Case No. 2238, after mandate.

If the decree in No. 2238 is a final judgment upon which plaintiffs can and do rely, they cannot be heard to urge the entry of their proposed judgment decreeing to them the property the former judgment decreed to these defendants. That conclusion is unassailable. In moving this Court to grant their motion for summary judgment against these defendants, plaintiffs attack the former judgment of this Court and seek to have it declared to be a nullity. That conclusion is unassailable.

• • •

If the judgment in 2238, after mandate, is a final adjudication as claimed by plaintiffs, their motion for summary judgment herein *must be denied.*

If the judgment in 2238 is not a final adjudication as it is now treated by plaintiffs herein,

their motion for summary judgment *cannot be granted*. A trial of all the issues joined is the alternative.

* * *

The Court herein has ruled that all parties—plaintiffs and defendants, except Weber, are bound by the former decree. To proffer plaintiffs' proposed Interlocutory Judgment and Decree contradicts plaintiffs' complaint, holds for naught the Dunford decree, disregards the Supreme Court's affirmation of the Dunford decree, is contrary to plaintiffs' motion for summary judgment, ignores the rulings of this Court herein and is a brazen attempt to lead this Court into greivous error.

* * *

DATED this 10th day of November, 1955."
(R. 232, 233, 234).

These objections go to the merits of plaintiffs' proposed interlocutory judgment and decree. They cannot be tortured into a mere objection to *form*. The author's misstatement of the record is not inadvertent. It is much graver than that. It goes to professional honesty. We sincerely believe these deceptions will not profit him.

THE SUBMISSIONS WITHOUT ORAL ARGUMENT

Plaintiffs' brief, page 20, contains Mr. Wheat's letter submitting the matters to Judge Tuckett without oral argument. In their letter they misstate the letters of Weber and of Stock and Juhan and pervert these letters into a submission of the "form" of interlocutory judgment and decree without oral argument. These letters are as follows: (Mr. Gustin's letter and Mr. Mus-

ser's letter are not in the record. They are referred to by Mr. Wheat. If desirable we will ask for a diminution of the record to include them.)

"November 19, 1955

Honorable R. L. Tuckett
Judge, District Court
City and County Building
Provo, Utah

Sir:

Re: Meagher et al v. Equity Oil Company et
al. Uintah County, Civil No. 3228

We intended our letter to you of November 10, 1955, re above subject, with which we transmitted to you our 'Objections and Motion', to be a submission on our part of said objections and motion without further argument. That letter and the referred to objections and motion now do not seem quite clear with respect to said submission. We do respectfully submit for your decision said objections and motion without further argument.

We desire to be heard only in the event other parties are heard and you desire to hear orally from us.

Respectfully,

Burton W. Musser

cc: Mr. Harley W. Gustin
Mr. Gilbert C. Wheat
Mr. Herbert Van Dam
Mr. Richard Downing
Mr. Oliver W. Steadman"

"GUSTIN, RICHARDS & MATTSSON

Attorneys-at-Law

Walker Bank Building
Salt Lake City 11, Utah

November 21, 1955

Honorable R. L. Tuckett
Judge, District Court
City and County Building
Provo, Utah

Dear Judge Tuckett:

Re: Meagher et al. v. Equity Oil Company
et al. (Uintah County Civil Case
3228)

We have a copy of Mr. Musser's letter directed to you under date of November 19th. On behalf of Weber Oil Company and Equity Oil Company we subscribe to the same course of procedure suggested by Mr. Musser, provided, of course, the plaintiffs are not heard orally.

If the matters are to be submitted without further oral argument, we call attention to an error in our proposed form of judgment which was handed to you on October 22nd last. On the second page in the third line of paragraph numbered 1 the date 'January 4, 1924' should be '*June* 4, 1924.'

Respectfully yours,

GUSTIN, RICHARDS & MATTSSON

By Harley W. Gustin

cc: Mr. Gilbert C. Wheat
Mr. Herbert Van Dam
Mr. Richard Downing
Mr. Oliver W. Steadman
Mr. Burton W. Musser"

LILLICK, GEARY, OLSON, ADAMS
& CHARLES

Attorneys at Law

San Francisco 4, California

November 21, 1955

Honorable R. L. Tuckett
Judge of the District Court
Provo

Meagher, et al v.
Equity Oil Company, et al
No. 3228—Civil

Dear Judge Tuckett:

Mr. Van Dam has advised me that Mr. Gustin, in behalf of defendants Equity Oil Company and Weber Oil Company, and Mr. Musser, in behalf of defendants Paul Stock and Joe T. Juhan, have suggested that the settlement of the form of Interlocutory Judgment and Decree be submitted without oral argument.

If you consider that the matter has been adequately presented *in the various proposals for decree and objections which are before you*

now, we are agreeable to having the matter stand as submitted. (Emphasis added).

Yours very truly,
Gilbert C. Wheat

5:9:12337

cc. Messrs. Gustin
Musser
Steadman
Downing

This letter is not an objection to our motion for one-half of the 40.75% nor an objection to its submission to the court.

The author's misinterpretation of these letters is one more attempt to mislead this Court. Plaintiffs submitted everything that was before the court. The author is haggling over the plain meaning of words. His claim that there was no submission *does not excuse him for failing to object to the motion.* Finally he must admit that there was no objection and could be no objection to the motion which culminated in the December 13, 1955 order in favor of Stock and Juhan. If Mr. Wheat did not submit Mr. Musser's motion by the same token Mr. Musser did not submit Mr. Wheat's decree. It is nonsense.

At page 21 of their brief plaintiffs suggest that the December 15, 1955 order may be voidable and then ask

“... this Court to clarify the record either by reversing the inadvertent order of December 13th, or by affirming the (voidable) order of December 15th, . . .”

“Any port in a storm.”

On pages 21 and 22 of plaintiffs’ brief, plaintiffs seek an amendment of the interlocutory judgment and decree proposed by them, and which was not changed by the judge (App. G-1). Mr. Van Dam says: “I asked him if he had made any change in it, and he said he had made none.” (App. G-1, G-4). The judge signed the interlocutory judgment and decree in the exact form and language of plaintiffs. It does not now lie in their mouths to ask this Court to cure an error deliberately invited and insisted on by plaintiffs.

On pages 22 and 23 of plaintiffs’ brief under the heading “3” plaintiffs say: “Possibly this Court will deem this issue to be beyond the scope of this appeal.” (This is an understatement.) “If so, plaintiffs request a *clear declaration* to that effect to avoid further controversy.” That is to say, this Court without pleadings, without hearing and without facts should make a “*clear declaration*” to carry out an obvious falsehood.

Pages 22 to 27 (Plaintiffs’ brief) consist of irrelevant incoherencies. We believe this Court will ignore them. Pages 27 to 32 (Plaintiffs’ brief) are effectively dealt with in Weber Oil Company’s brief page 27. We adopt that.

All parties seek a dismissal or reversal of these appeals so far as they relate to the December 13, 1955

interlocutory judgment and decree.

These appellants seek the revocation of the December 15, 1955 order.

Plaintiffs *request, on reversal*, (Plaintiffs' brief, p. 36, para. 3) that this Court, on this appeal, adjudicate that Equity, Weber and these appellants, Stock and Juhan, are jointly and severally bound by the interlocutory judgment and decree, or, in the alternative, *declare* that the interlocutory judgment and decree *does not* diminish the obligations of Weber, Stock and Juhan as the same may be determined in further proceedings below.

Plaintiffs also request, on *reversal*, (Plaintiffs' brief, p. 36, para. 4) that Equity is responsible to plaintiffs jointly and severally with defendants Weber, Stock and Juhan, and to the same extent defendants Weber, Stock and Juhan, are so obliged (sic).

Plaintiffs also *request, on reversal*, (Plaintiffs' brief, p. 36, para. 6) that this Court, on this appeal, *direct* the lower court to conduct further proceedings not *expressly* or *specifically determined* by the interlocutory judgment and decree. As this decree is void, what is this Court going to direct the lower court to do?

Each of these *requests* is inconsistent with reason and common sense and therefore each is absurd. So far as plaintiffs' appeal is concerned this is another abortive and time consuming procedure.

Weber Oil Company has in accordance with the rules and in a highly factual and lawyer-like manner made a "Statement of The Case." We respectfully ask leave to, and we do, adopt its statement of the case.

The author of plaintiffs' brief refuses to abide by the laws and rules of this State relating to summary judgments¹; he refuses to be bound by the mandates of this Court²; he refuses to conform to our laws relating to appeals³; he refuses to prepare his brief in conformance to our rules⁴; he misstates and falsifies the record⁵; he will not abide by rulings of the Court⁶; he piteously cries for "American Justice"⁷; Plaintiffs' brief is a fraud. It is filled with deceit, trickery and sharp practices by which the author seeks to gain an unfair and dishonest advantage.

¹ See Rule 56, Utah Rules of Civil Procedure.

² The mandates in the first and second appeals have not been complied with.

³ Only final judgments can be appealed from.

⁴ As to size and contents of briefs.

⁵ There was a submission by all parties of all pending matters to the lower court; these appellants objected to the plaintiffs' proffered interlocutory judgment and decree as a whole and not merely as to form; the lower court's "Rulings on Motions" is not a mere memorandum descision; the author puts words in the mouths of his associate and of the trial judge etc., etc. Plaintiffs' "The factual background" is saturated with over statements, misstatements, additions and deletions.

⁶ Judge Tuckett's "Rulings on Motions" of October 14, 1955, is the law of this case up to this point and until the issues below are tried. Plaintiffs' interlocutory judgment and decrec is a phoney and a nullity.

⁷ Plaintiffs' brief pages 36 to 37.

STATEMENT OF POINTS

1. The December 15, 1955 order, seeking to revoke the December 13, 1955 order, should be vacated because:
 - (a) The lower court was without power to revoke its formal order on the grounds stated, and
 - (b) These appellants were entitled to notice and a hearing on the December 15, 1955 order.
2. The so-called interlocutory judgment and decree of December 13, 1955, as proposed by plaintiffs, is surplusage. It isn't a final appealable judgment.

ARGUMENT

1. THE DECEMBER 15, 1955 ORDER SHOULD BE REVOKED.

This order is dated at Provo, Utah, December 15, 1955, and was filed at Vernal, Utah, December 17, 1955 (R. 246). It was signed without notice to these appellants and without a hearing.

There are two grounds of revocation expressed in the order: (1) There is no issue of law or of fact presented by the pleadings on file upon which said order could be based; and (2) That said order is in conflict with the interlocutory judgment and decree entered in said cause on the 13th day of December, 1955.

(1) It isn't clear what the trial judge means by his first ground. These appellants had a judgement. That

judgment had been affirmed by this Court (255 P. 2d 989). As affirmed the judgment had been invoked against these appellants. Unless everything after the mandate is a nullity, these appellants' judgment was enforceable. Equity Oil Company was holding the money until the *further order of the court* (R. 123-125). The motion of Stock and Juhan sought a *further order of the court* (R. 234). The motion upon which the order was based was not objected to by any party. It had been confessed by all parties. It had been duly submitted for decision by all parties (This brief p. 16). By their lack of action or objection to the motion plaintiffs disclaim all interest in the $\frac{1}{2}$ of 40.75%, the subject matter of the motion. The motion was served on all parties and pending for 30 days.

The trial judge's first ground is untenable.

(2) The second ground given by the trial judge is more obscure than the first. While the clerk's records show the entry of the December 13, 1955 order before the entry of the December 13th interlocutory judgment and decree, the probability is that they were signed simultaneously and deposited together with the clerk. Philosophically it cannot be determined which, if either, is in conflict with the other, except as will now be shown.

Under our rules the December 13, 1955 interlocutory judgment and decree is surplusage (Rule 56, Utah Rules of Civil Procedure). There is no statute or rule giving the lower court jurisdiction or power to enter the so-called December 13th interlocutory judgment and decree. The lower court had made its rulings on motions for

summary judgment on October 14, 1955 (R. 213-215), and that court had no jurisdiction or power to enter any other interlocutory judgment and decree.

Appellants' order of December 13, 1955, could not possibly be in conflict with the interlocutory judgment and decree of December 13, 1955, because that decree could not and did not legally exist. It is mere surplusage. It is based on no statute or rule or practice, it was and is error. It does not and cannot supplant, augment, take away from or change in the slightest particular the October 14, 1955 "Rulings on Motions" of the lower court.

So the lower court was not in error on either of the grounds mentioned when it entered the December 13, 1955 order in favor of these appellants. But if it had been it cannot use that error to recall, vacate or set aside an entered order previously made by it.

Blankenship v. Royalty Holding Co. (C.C.A. 10th Cir.), 202 F. 2d 77.

"Courts possess the inherent power to correct errors in the records evidencing the judgment pronounced by the court so as to make them speak the truth by actually reflecting that which was in fact done. They do not, however, possess the power to correct an error by the court in rendering a judgment it did not intend to render and by such an order change a judgment actually but erroneously pronounced by the court to the one the court intended to record. With these principles all courts are in accord."

2. THE INTERLOCUTORY JUDGMENT AND DECREE OF DECEMBER 13, 1955, IS BY ITS VERY NATURE INTERLOCUTORY AND NOT APPEALABLE.

Paragraph 9 of that judgment and decree (R. 216-224) reserves the question of fact to be determined by the trial court and paragraph 10 thereof decrees that the judgment and decree is interlocutory and reserves further questions for further action by the court. Pages 12, 21 and 22 of plaintiff's brief emphasizes the point. At page 22 plaintiffs state:

“Again, because of the interlocutory nature of the interlocutory Judgment and Decree, plaintiffs are at a disadvantage in analyzing its final effect upon their rights.”

Under our Constitution only final judgments are appealable. *Freeman on Judgments*, Vol. 1, Section 22, page 34, defines a final judgment and quotes the following:

“‘A decree is final for the purposes of an appeal to this court when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.’”

An interlocutory decree is defined by the same author in Section 38, page 63:

“An interlocutory decree is one made ‘pending the cause, and before a final hearing on the

merits. A final decree is one which disposes of the cause, either by sending it out of the court before a hearing is had on the merits, or after a hearing on the merits, decreeing either in favor of or against the prayer of the bill.' But no order or decree which does not preclude further proceedings in the case in the court below should be considered final."

Rule 72(a), *Utah Rules of Civil Procedure*, provides for an appeal from final judgments. The appeal herein is taken from the granting of a motion for summary judgment and is pursuant to Rule 56(d), *Utah Rules of Civil Procedure*. This rule provides that a summary judgment may be granted where all of the issues are not determined and a trial is necessary. The fourth paragraph of plaintiffs' motion for summary judgment states:

"(4) That further proceeding shall be taken in this proceeding to state said account and determine all issues which remain undisposed of by said interlocutory summary decrees;" (R. 163).

Where an order of summary judgment is granted without disposing of all of the issues, such an order of summary judgment is not a judgment from which an appeal lies under Rule 54(a), *Utah Rules of Civil Procedure*, citing *Biggin v. Otlmer Iron Works* (C.C.A. 7th Cir.), 154 F. 2d 214.

There is no appeal from the interlocutory judgment and decree of December 13, 1955, either by way of intermediate appeal pursuant to Rule 72(b) or an appeal

under Rule 72(a), *Utah Rules of Civil Procedure*. The lower court's "Rulings on Motions" of October 14, 1955, *supra*, was made pursuant to motions for summary judgment. Those rulings are in strict conformity with our rules. No appeal lies therefrom.

The importance of the situation is emphasized by the jurisdictional question involved and the possibility of further unnecessary litigation if this Court acts in a matter where jurisdiction is lacking.

McEwen v. McEwen, Or., 280 P. 2d 402:

"It is from the foregoing decree that defendants have appealed to this court. It is manifest that this is not a final decree. *Winters v. Grimes*, 124 Or. 214, 264 P. 359.

* * *

Under the decree in the instant case, the parties are directed to account. A further hearing and determination by the court upon such accounting is necessary. Until the accounting is had and finally settled by the court the decree cannot become final. *Robertson v. Henderson*, 181 Or. 200, 202, 179 P. 2d 742; *Muellhaupt v. Joseph A. Strowbridge Estate Co.*, 136 Or. 99, 298 P. 186.

Whether a right of appeal exists is a jurisdictional question. Unless an appeal is authorized by the statute, this court has no jurisdiction to consider it. Jurisdiction of the supreme court cannot be conferred by consent, agreement or waiver of the parties litigant. *Liimatainen v. State Industrial Accident Commission*, 118 Or. 260, 277, 246 P. 741; *Catlin v. Jones*, 56 Or. 492, 494, 108 P. 633.

When want of jurisdiction appears at any stage of the proceedings it is the duty of the court, on its own motion, to refuse to proceed further. *Ehrstrom v. Baum*, 159 Or. 299, 300, 79 P. 2d 991; *Spokane Merchants' Association v. Gollihur*, 122 Or. 146, 257 P. 812; *Dippold v. Cathlamet Timber Co.*, 98 Or. 183, 193 P. 909; *Rynearson v. Union County*, 54 Or. 181, 184, 102 P. 785.

* * *

In 2 Am. Jur. 860, Appeal and Error, Section 22, it is stated

‘A judgment, order, or decree, to be final for purposes of an appeal or error, must dispose of the cause, or a distinct branch thereof, *as to all the parties*, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined. * * *’ (Italics ours.)

See also *In re Norton's Estate*, 175 Or. 115, 151 P. 2d 719, 156 A.L.R. 617; *Abrahamson v. Northwestern Pulp & Paper Co.*, 141 Or. 339, 15 P. 2d 472, 17 P. 2d 1117; *Watkins v. Mason*, 11 Or. 72, 4 P. 524.

No motion was filed in this court to dismiss this appeal. However, it clearly appearing that the decree as a whole is interlocutory and not final, this court is without jurisdiction to review the proceeding. In such circumstances, it is the duty of the court to dismiss the appeal on its own motion.”

CONCLUSION

The litigation complained of by plaintiffs from 1944 to date—and there must be more, suggests the desirability of bringing it to a close. This much desired end can be brought about, we believe, in only one way, that is, for this Court to enforce its judgment as reflected in its mandate in Case No. 6792 (185 P. 2d 747), and to hold that everything that occurred in Case No. 2238 (before Judge Dunford) after mandate is a nullity. Now the slate is clean. The parties can proceed from that starting point as they are advised. Without such a declaration by this Court the end of litigation is not in sight for at every step, even on execution, the parties affected may invoke their property rights to and under this Court's judgment. These rights are guaranteed by Article I, Section 7 of the Constitution of this State, and by the Constitution of the United States.

Respectfully submitted,

BURTON W. MUSSER
RICHARD DOWNING
OLIVER W. STEADMAN

*Attorneys for Appellants and
Respondent Paul Stock and
Joe T. Juhan.*