

1959

Herbert B. Maw, Wendell B. Hammond and George K. Fadel v. Brack Howard Noble and Ann C. Noble : Brief of Defendants and Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

OCT 20 1959

Clerk, Supreme Court, Utah

HERBERT B. MAW, WENDELL B.
HAMMOND and GEORGE K.
FADEL,

Plaintiffs and Respondents,
vs.

BRACK HOWARD NOBLE and ANN
C. NOBLE, his wife,

Defendants and Appellants.

Case No.
9107

BRIEF OF DEFENDANTS AND APPELLANTS

COTRO-MANES & COTRO-MANES
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BRIEF OF DEFENDANTS AND APPELLANTS

STATEMENT OF FACTS

The above entitled matter was tried, without a jury, on the 25th day of May, 1959. From a judgment in the sum of \$11,250.58 in favor of the plaintiffs, the defendants appeal. This matter arose over the question of attorney fees. In 1955 the defendants, as owners of land located on the Salt Lake-Davis County lines, were named as party defendants in a

condemnation suit by the State of Utah who sought to condemn their land for the use of a highway. The defendants retained the services of Herbert B. Maw, one of the above named plaintiffs, to represent them in the litigation. Subsequently, at the defendants' request, George Fadel and Wendell B. Hammond were associated in the case. Shortly thereafter an "Agreement for Employment of Attorneys" was entered into between the above named parties. A copy of the employment agreement is attached to this brief and marked Appendix A.

After a protracted litigation, the Supreme Court of Utah affirmed a judgment in favor of the defendants in the sum of \$140,000.00. On March 11, 1959, the State of Utah paid over to the defendants all amounts due under the judgment which had not been paid prior thereto, the total amount being \$169,521.07. This sum represented the principal amount of the judgment of \$140,000.00, and accumulated interest dating from the time of taking in 1955 in the sum of \$29,521.07. The state, in making payment to the defendants, named the plaintiffs as joint payees of the final settlement check. Thereafter the plaintiffs submitted to the defendants a statement of the division of the judgment paid by the State of Utah (Exhibit No. 12). The plaintiffs asserted that the interest amounting to \$29,521.07 was a part of the recovery and therefore was to be prorated out in accordance with the agreement of employment, which in this case made one-half of the interest payable to the attorneys as fees. The defendants contended that the interest was to be divided, pro-rata, between the plaintiffs and the defendants, based upon what each was entitled to of the \$140,000.00 under the employment contract. The

defendants rejected the accounting of the plaintiffs, who thereupon refused to surrender the check to the defendants for the balance due from the State of Utah. The plaintiffs immediately commenced a suit, and upon stipulation between counsel the check was cashed and \$12,000.00 of said check was deposited with the Clerk of Court pending the outcome of the suit. The balance of the moneys received from the check were paid to plaintiffs and defendants as their interest appeared under the agreement.

The plaintiffs in their complaint alleged that \$1,975.00 collected by the defendants some two years before as settlement of a condemnation suit in Davis County, Utah, was subject to the contract and therefore they were entitled to \$987.50 of that amount. This assertion was not contained in the accounting submitted by the attorneys before filing suit. The defendants filed an answer to the plaintiffs' complaint and counterclaimed, alleging that the defendants were entitled to interest on certain sums advanced the plaintiffs as advance attorney fees.

The plaintiffs maintained at the trial that the interest accumulated since the taking of the property above referred to, including the interest on the \$80,000.00 which was exempt under the terms of the contract, was a part of the judgment, and therefore divisible under the agreement by and between the parties herein.

On the other hand, the defendants contended that the interest accumulated on the \$80,000.00 exempt under the terms of the agreement was not a part of the judgment, and therefore plaintiffs could not and should not participate and divide

that interest.

Further, the defendants asserted and contended that the interest over and above that on the \$80,000.00 should be divided by and between the parties herein upon the basis of the proportion of the principal, to-wit, \$140,000.00, to which each was entitled.

STATEMENT OF POINTS

POINT ONE

A contract of employment between an attorney and a client, if there is ambiguity, must as a matter of law be construed against the attorney and for the client.

POINT TWO

Interest awarded in a condemnation suit under Utah law is awarded as a matter of right and not as a matter of judicial discretion.

POINT THREE

A contingent fee contract which excludes \$80,000.00 from the computation of attorney fees, likewise, as a matter of law, excludes the accrued interest upon that amount.

POINT FOUR

A contingent fee contract for attorneys fees which is based upon obtaining compensation for land being condemned does not include as part of the recovery the interest paid as an incident to the recovery.

POINT FIVE

Defendants are entitled to interest on all sums advanced

plaintiffs from the time of the advance until time when plaintiffs were entitled to attorney fees.

ARGUMENT POINT ONE

A CONTRACT OF EMPLOYMENT BETWEEN AN ATTORNEY AND A CLIENT, IF THERE IS AMBIGUITY, MUST AS A MATTER OF LAW BE CONSTRUED AGAINST THE ATTORNEY AND FOR THE CLIENT.

The annotator writing in 2 ALR 844 sets forth the general law of the American courts in the opening paragraph of his work in stating:

"It is a general law that, on account of the confidential relation between them, contracts made between an attorney and a client, after the relation has been established, are to be construed against the attorney."

It is undisputed that this contract was entered into some months after the employment of the plaintiff attorneys by the defendants to protect their interests and defend them in the suit filed by the State of Utah condemning their land. (R. 23, R. 29, Exhibit 1-D, Exhibit 2-P) State of Utah v. Noble, ___ U. ___ P2d ___,

The ambiguity which is contained within this contract is whether or not interest should become a part of the "amount recovered" and be divided as set forth in the contract, or whether or not the interest should be divided prorata between the parties based upon what each party is entitled to based upon the principal amount recovered, which was \$140,000.00.

The California courts in speaking on the subject of attorney-client contracts where there is an ambiguity as to the

intent of the parties, stated in the case of *Pinto v. Seely*, 22 Cal. App. 318, 135 P. 43:

"It may be conceded that in construing contracts between attorneys and clients concerning compensation, in which there is any ambiguity as to the intent of the parties, it is the rule, generally accepted by the courts, to adopt such a construction of the contract as will be most favorable to the interests of the client."

The federal courts in addition to the state courts have adopted the rule that where doubtful or ambiguous language in an agreement for fees has been used the agreement must be construed most favorably to the client. *Waugh et al. v. Q & C Co. et al.*, CCA 7th, (1926) 16 F.2d 363. Other authorities citing the general rule are: 5 Am Jur 356, Attorneys at Law, Sect. 159; 7 CJS 1055, Attorney and Client, Sect. 182; Restatement of Law, Contracts, Sec. 236, p. 330.

Based upon the above cited authorities, the contract now before this court, must, as a matter of law, be construed in the light most favorable to the Nobles and against the interests of the attorneys.

A duty devolved upon the attorneys to affirmatively define what was meant by the terms "any amount recovered" and "all amounts recovered" in the contract of employment itself. Their failure to do so must be construed against them, and therefore the inclusion of interest into "all amounts recovered" is erroneous and the district court in ruling that the interest should be included was in error.

POINT TWO

INTEREST AWARDED IN A CONDEMNATION

SUIT UNDER UTAH LAW IS AWARDED AS A MATTER OF RIGHT AND NOT AS A MATTER OF JUDICIAL DISCRETION.

Interest has been defined as:

"Interest is compensation for the use or forbearance of money."

30 Am Jur 7, Interest, Sect. 2

The Utah courts recognize that interest is compensation for the use of money or property and have so held. The Supreme Court in ruling on the matter stated:

"If he had loaned the money to someone, he certainly would be entitled to interest, and if he borrowed it from someone, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is simply placed in status quo, and nothing short of this is full compensation, and that is just what the law aims to accomplish."

Feil v. Union Pacific Ry. Co.
32 U. 101, 88 P. 1003, 1005

This case was cited with approval in the condemnation suit of San Pedro, L.A. & S.L. Ry. Co. v. Board of Education of Salt Lake City, 35 U. 13, 99 P. 263, 267. This court has ruled that in a condemnation suit, interest may be given only at 6 per cent, the statutory legal rate, under 15-1-1, Utah Code Annotated, 1953, which provides:

"Legal Rate.—The legal rate of interest for the loan or forbearance of any money, goods or things in action shall be six per cent per annum."

This was set forth in the Utah case of State v. Danielsen, 122 U. 220, 247 P.2d 900. The basis upon which the court has ruled that the 6 per cent is applicable is that until final

determination there is no judgment, and as there is a "forbearance" the statutory amount must apply.

The interest which is awarded in condemnation suits in the State of Utah is not awarded as a judicial act as such, but is awarded by the mandate of the legislature, which passed legislation which makes it mandatory to pay interest where there is a "forbearance" of money. This principle has been recognized by this court in many cases. *State v. Danielsen*, 122 U. 220, 247 P.2d 900; *State v. Peek*, 1 U.2d 263, 265 P.2d 630.

In the leading Illinois case of *Blakeslee's Storage Warehouse v. Chicago*, 369 Ill. 480, 17 NE 2d 1, 120 ALR 715, the court declared:

"In determining whether interest on a judgment is a part of it, the character of a judgment and the authority for imposing interest are important factors to be considered. A judgment is the sentence of the law pronounced by the court upon the matter contained in the record. 3 Blackstone's Com. 395. It is the law's last word in a judicial controversy and may be defined as the final consideration and determination of a court upon matters submitted to it in an action or proceeding. 15 RCL, Judgments, 569. A judgment is the judicial act of the court. *Dorman v. Usbe Building and Loan Assn.* 115 NJL 337, 180 A. 413. On the other hand the right to interest apart from contract, such as interest on a judgment, does not emanate from the controversy, or from the judgment, or from anything of a judicial nature."

In a later Illinois case of *Chapalis v. City of Chicago*, 389 Ill. 269, 59 N.E. 2d 641, the Supreme Court affirmed the *Blakeslee's* case and said:

"In the latter case (*Blakeslee's*) it was said, 'If

appellant is entitled to interest on the judgment it is not by virtue of the judgment or the judicial proceeding culminating therein, but arises solely under the provisions of the statute,"

Interest, then, awarded as a matter of right cannot be said to be a part of the "amount recovered" due to a judgment. The interest attaches, by operation of law, to the amount recovered. Therefore the right to a part of that interest depends upon the right to a part of the principal and the proportion of the principal claimed determines the proportion of the interest which goes with that principal.

POINT THREE

A CONTINGENT FEE CONTRACT WHICH EXCLUDES \$80,000.00 FROM THE COMPUTATION OF ATTORNEY FEES, LIKEWISE, AS A MATTER OF LAW, EXCLUDES THE ACCRUED INTEREST UPON THAT AMOUNT.

An examination of the contract under review (Appendix A of this brief) shows that it was the agreement between the parties that \$80,000.00 would be excluded from the contract under which the plaintiffs were to receive their compensation for legal services. Plaintiffs contend that the interest earned by this \$80,000.00 would be subject to their proportional attorneys' fees. The defendants contend that as the \$80,000.00 was excluded from the contract, so then, is the interest upon that amount.

As pointed out in Point Two of this brief, interest is awarded in condemnation suits as a matter of right and the court could not withhold the award of interest. Therefore,

the employment of legal counsel to secure this interest was not only unnecessary but was not contracted for by the parties involved.

The intent of this contract, and the legal proposition that the contract must be construed in favor of the client, clearly shows that the parties excluded from this employment contract that which was already vested, that is, the \$80,000.00, (Exhibit 1-D, R-40). The right to interest had likewise vested on this \$80,000.00 prior to the employment of the attorneys under the contract, and litigation was unnecessary to recover it; therefore it cannot be said that the interest was contemplated by either party to be a part of "any amount recovered" or "of amounts recovered." The reason for the exclusion of the \$80,000.00 from the contract was that the Nobles could collect this amount without the necessity of litigation, likewise the interest upon this amount from the time of the taking under the Order of Immediate Occupancy until paid. The intent is clear and the legal inference in favor of the client shows that the interest on the \$80,000.00 was not to be taken into account under the contract.

A similar case to the one now under review by this court arose in Tennessee in *Sanders v. Riddich*, 127 Tenn. 700, 156 S.W. 464. In that case the attorney and client entered into a contingent fee contract which provided for attorney's fees of one-third of any recovery if under \$12,000.00 and one-fourth if over \$12,000.00. Judgment was recovered in the amount of \$11,500.00, but with accrued interest the total amount collected amounted to \$12,788.00. The plaintiff in this action, the client, contended that the attorney was entitled to one-fourth

only, as the amount recovered was in excess of \$12,000.00. The Supreme Court of Tennessee rejected the claim of the client and in ruling in favor of the attorney said:

"That recovery was for less than \$12,000.00 and the rights of the attorneys attached thereto on a 1/3 basis. The interest accrued, in legal contemplation, on the respective aliquot parts."

The Arizona Supreme Court in dealing with a similar situation involving a contingent fee contract said in the case of *Covert v. Randles*, 53 Ariz. 225, 87 P.2d 488:

"We think the correct rule for construing contracts for contingent fees is well stated in 7 Corpus Juris Secundum, Attorney and Client, p. 1089, Sec. 191, as follows:

'A contingent fee is generally reckoned on the net amount actually recovered by the client through the efforts of the attorney, or through a proper settlement by the client.'

'Under a contract for a contingent fee, the percentage to which the attorney is entitled and the amount or property on which it is to be based depend on a fair and reasonable construction of the terms of the agreement; and such fee generally is recoverable only on the property or funds, within the terms of the contract, which are recovered by reason of the attorney's efforts, and, therefore, is not recoverable on uncontested claims or sums voluntarily paid.' "

Under the definition as adopted by the Arizona court, where the attorney does nothing to earn the fee he is not entitled to any part of that amount which is recovered. In the present case, the interest which is awarded by the State of Utah as a matter of right stands as a payment on an uncon-

tested claim or which is a voluntary payment by the people of the State of Utah to a citizen who has had his property taken for the public good, but who has been delayed in the receiving of the money.

The State of New York has settled the matter of the interpretation of a contingent fee contract in condemnation cases where there is difficulty in the division of the interest between attorney and client. This matter has been litigated repeatedly and the Supreme Court of New York relies upon its decision in *Bassford v. Johnson*, 172 N.Y. 488, 65 N.E. 260, in rendering its opinions. In that case certain land was being taken by condemnation. The landowner retained an attorney on a contingent fee contract which provided that the attorney was to collect as his fee "10% of whatever award may be obtained for my (Johnson's) land." A judgment was obtained and interest allowed by the court on the judgment, which interest was in excess of \$13,000.00. The defendant, Johnson, the landowner, contended that the attorney was entitled only to 10% of the judgment and none of the interest. The Supreme Court of New York ruled that the attorney was entitled to his proportional share of the interest. The court said:

"By its terms the attorney was to receive for his services 10% of whatever award may be obtained for Johnson's land. The title to the land was taken, as we have seen, by the city on the 1st day of July, 1897, and, if the award had been then made, the attorney, unquestionably would have been entitled to 10 per cent thereof and the interest thereon that thereafter accrued down to the date of the payment; but the award was not made until nearly four years thereafter. But when

made, it was for the value of the land at the time that the title was taken by the city, and therefore, so far as interest is concerned, the award is deemed to have been made of that date, so that the effect is the same as if the award had been made on that day and payment postponed for four years thereafter."

It is submitted that this is exactly the same situation in the case now before the court. The award of \$140,000.00 made by this court, *State v. Noble*, --- U. ---, --- P.2d ---, relates back to 1955 when the land in question was taken. The recovery in this case then was the amount of the award of the court. The accrued interest would attach to the respective pro rata parts of this recovery, which was divided between the attorney and client under the employment agreement. The interest, therefore, on the excluded amount of \$80,000.00 was not a part of the "amount recovered."

A case wherein a similar problem of dividing interest arose in *Smith v. Whitman*, 159 Md. 478, 150 A. 856. This case involved the taking of land by condemnation by the federal government during World War I. At the time of the taking in 1917 the government offered the landowners \$3,000.00, which was unacceptable to them. The landowners, defendants, retained the plaintiffs to fight the case for them. They entered into a contingent fee contract wherein the attorneys were to get one-third of all amounts recovered in excess of \$3,000.00. At the time of the making of the contract between the attorneys and clients, the federal government did not pay interest on land taken by condemnation for actions prosecuted through the federal court of claims. However, in 1923, during the pendency of the action, the Supreme Court of the United States, in a decision, ruled that interest would be paid from

the time of the taking of the land until entry of judgment. The attorneys for 10 years pursued the case until eventually they received a judgment for \$106,072.29, which included interest, principal and court costs. In computing the attorney fees the following method was used: The first \$3,000.00 was excluded as provided in the contract of employment, then the interest which had accrued on this \$3,000.00 likewise was excluded. This interest amounted to \$3,513.75. The attorneys then computed their fee upon the one-third basis as set forth in the contract. This method of computation was adopted by the trial court as correct. The Supreme Court of Maryland concurred with the computation method, but reversed on the grounds that even though there was no dispute as to the method employed, it was a jury's prerogative to decide this matter and not the courts.

The defendants in the case now before this court contend that the same method of computation with regard to the \$80,000.00 excluded from the contract should be employed as was done in the Smith v. Whitman case. In the present case the interest upon the \$80,000.00 amounts to the sum of \$13,865.35 (Exhibit No. 10) which, when added to the \$80,000.00, makes a total exclusion from attorneys fees of the sum of \$93,865.35.

Under the contention of the plaintiffs (attorneys), this entire amount of \$13,865.35 is subject to the contingent fee scale, which places the entire amount in the bracket of 50% attorney fees or, in other words, the interest on the \$80,000.00 excluded under the terms of the contract is divided one-half to the attorneys and one-half to the clients, or \$6,932.67 to the

attorneys as fees upon an amount excluded from the contract of employment.

It may be readily seen that it would be to the advantage of attorneys to extend as long as possible the adjudication of matters such as this where such a contract of employment exists.

Such a division of this interest is not only unconscionable but was not the intention of the parties at the time of the making of the contract. It is inconceivable that anyone would exclude \$80,000.00, the amount that they had already been offered, and would offer to share the interest which would accrue upon this amount and which would be payable without the necessity of litigation or representation of an attorney.

As nothing was required on the part of the attorneys to obtain this interest, they are not entitled to any part of it. As stated in the *Covert v. Randles* case cited above:

"If the contingent fee agreed upon were out of proportion to the services to be rendered, it would be the duty of the court to deny recovery on that account."

Covert v. Randles

53 Ariz. 225, 87 P.2d 488

The trial court erred in allowing the plaintiffs one-half of the accrued interest on the exempted \$80,000.00, and this ruling must as a matter of law be reversed and the amount of interest allowed by the trial court to the plaintiffs be returned to the defendants.

POINT FOUR

A CONTINGENT FEE CONTRACT FOR ATTORNEYS FEES WHICH IS BASED UPON OBTAINING COMPENSATION FOR LAND BEING CONDEMNED DOES NOT

INCLUDE AS PART OF THE RECOVERY THE INTEREST
PAID AS AN INCIDENT TO THE RECOVERY.

The plaintiffs, attorneys, were retained by the defendants to represent them in the litigation with the State of Utah to determine the value of the land being condemned. The exact scope of the plaintiffs' employment is set forth in the employment agreement in plaintiffs' own words (Exhibit 1-D):

"3. Attorneys agree to represent Client in a good, diligent and professional manner in obtaining compensation for Client from the State of Utah for land being condemned."

As stated heretofore, interest is awarded in the State of Utah in condemnation matters as a matter of right, and therefore it is unnecessary for anyone, including the defendants in this action, to retain attorneys to enforce his right to interest on awards in eminent domain cases. This fact was well known to the attorneys at the time of the making of this contract. Therefore, as the question of interest was not under dispute with the State of Utah, the attorneys were not representing the "Client," defendants, in obtaining interest as a part of the compensation for the taking of the land.

As seen heretofore, the Supreme Court awarded the sum of \$140,000.00 as compensation to the Nobles for the taking of their land. The interest was awarded under the mandate of the Legislature, which provides that interest will be awarded where there has been a forbearance of money. The attorneys themselves stipulated that their services were to the obtaining of compensation for the land, and the schedule of fees to be charged was for that service.

The headnotes of a series of condemnation cases decided

in 1941 in Illinois, entitled *People ex rel v. Kelly, Mayor et al*, 32 N.E. 2nd 920, 921 (Case No. 1 and 2) 922, 923, states:

"The interest on a condemnation judgment cannot be considered part of the value of the land taken, and right to interest is not by virtue of judgment or the judicial proceedings culminating therein but solely under statute."

Therefore, the entire interest which had accrued under the award of \$140,000.00 was excluded from the contract, but accrued as to the aliquot parts that the attorneys and the defendants were entitled to after the division of the \$140,000.00 under the terms of the contract.

The cases cited in Point Three of this brief are all applicable as to the proposition of law that the entire amount of interest should be excluded from the contract as the interest does not constitute a part of the "amount recovered" under the contract under review.

The schedule of attorneys' fees is based upon "services to be rendered in this matter" (Exhibit 1-D, Paragraph 2). No services were expended for the collection of interest.

In the California case of *Hollingsworth v. Lewis*, 93 Cal. App. 526, 269 P. 709, the Court examined a contingent fee contract which provided for "50% of refunds" as compensation for the attorney's services. The court stated:

"As the contract was made between an attorney and his client, the ambiguity should be resolved against the attorney and in favor of the client."

The ambiguity of which the court speaks is whether or not interest awarded on the refunds made is a part of the

"refund." The court ruled that under the terms of the contract the attorneys were to receive as compensation 50% of the "refunds" and not of all sums collected, and therefore the interest was excluded from the contract as interest is not a refund.

This is the same situation as in the instant case. Here, the attorneys contracted to use their best efforts in securing compensation for the taking of the land. This could only mean the value of the land at the time of the taking. *Bassford vs. Johnson*, cited in Point Three.

The plaintiffs insist that the words "amounts recovered" and "any amount recovered" mean both principal and interest. Under their theory, costs awarded by the court likewise should be included as part of the recovery to which the attorneys are entitled, even though the defendants have borne all the costs themselves. It is obvious that this is not the law.

It is submitted that the entire contract must be read and interpreted in light of the meaning of the entire document, and not upon a single phrase of that contract.

"An agreement should be interpreted as a whole and the meaning gathered from the entire context, and not from particular words, phrases or clauses. In fact, the entire agreement is to be considered to determine the meaning of each part."

12 Am. Jur. 772, Contracts, Sec. 241

The Utah Supreme Court, in the case of *Vitagraph Inc. v. American Theatre Co.*, 77 U. 71, 291 P. 303, 306, stated:

"In construing a contract, however, the interpretation must be upon the entire instrument and not merely on disjointed or particular parts of it. The whole con-

text is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause.' "

It is conceded that the words used in the agreement must be examined to see what their meaning is, and therefore we wish to cite additional authority as to the meaning of the words "amount recovered." The meaning must, however, be applied to the intent of the entire contract.

The Supreme Court of New Mexico, in the case of *Candelaria v. Cutierrez*, 28 N.M. 434, 213 P. 1037, ruled that the meaning of the phrase, "amount of judgment," means the "amount for which a recovery is to be had, without reference whatever to the accumulations attaching thereto by way of interest and costs." This case centered around the interpretation of a statute of New Mexico which required the posting of a supersedeas bond for the "amount of the judgment."

The Supreme Court of Florida, in the case of *Atlantic Coastline R. Co. v. Coachman*, 52 So. 337, 59 Fla. 130, rendered an interpretation of the meaning of the phrase "amount recovered." In that case, the court said:

"We think the amount recovered means the amount of claim recovered, and not that amount plus the 50% interest. The amount of claim recovered is made the basis of the 50% interest and the attorney fees allowed by the statute. * * * The amount of recovery relates to the disputed amount of the claim; and 50% not being recovered in this sense but allowed by the statute."

As stated before, in Utah the disputed claim is as to the value of the property at the time of the taking by the party condemning it. Therefore, interest which is awarded for the

time of the forbearance of the payment of this sum is not included in the "amount of recovery." The Utah courts have defined "compensation" in the law of eminent domain as a recompense in value, a quid pro quo, and stated that it must be paid in money. *Oregon Short Line R. Co. v. Fox*, 28 U. 311, 78 P. 800.

Under the ruling of the Tennessee case of *Sanders v. Riddich*, cited in Point Three, which cited with approval the New York case of *Bassford v. Johnson*, likewise cited in Point Three, the entire amount of interest "accrued in legal contemplation, on the respective aliquot parts" of the judgment. That is to say, the attorneys were entitled to the interest that their proportional share of the \$140,000.00 earned during the period of forbearance, and the Nobles were entitled to the interest that their proportional share of the \$140,000.00 earned during the same period.

POINT FIVE

DEFENDANTS ARE ENTITLED TO INTEREST ON ALL SUMS ADVANCED PLAINTIFFS FROM THE TIME OF THE ADVANCE UNTIL TIME WHEN PLAINTIFFS WERE ENTITLED TO ATTORNEY FEES.

The record shows, and it is not disputed, that the defendants advanced the plaintiffs sums of money which were retained by the attorneys as advanced attorney fees. These sums are \$360.00 paid July 5, 1956, and \$3,500.00 paid June 5, 1958 (Exhibit No. 11).

Defendants filed a counterclaim against the plaintiffs, and alleged the payment of the \$3,500.00, and the plaintiffs in

replying to the counterclaim admitted receiving the money.

The trial court erred in refusing to award defendants interest upon the sums so paid the plaintiffs. Defendants are entitled to this interest as at the time of the payment of the \$360.00 no judgment had been rendered in the condemnation suit, and this constituted a payment of attorneys fees which were contingent upon there being a recovery in excess of \$80,000.00. Likewise, the \$3,500.00 was paid prior to the confirmation of the judgment by the Supreme Court and was paid out of the \$72,000.00 paid by the State to the Nobles in June, 1958. As the entire \$72,000.00 belonged to the Nobles free of any attorneys fees, an advance to the attorneys constituted merely a loan to them on which the Nobles are entitled to interest. As shown under Exhibit 8, the interest upon this \$3,500.00 amounted to \$161.00.

The court failed to make any findings of fact or conclusions of law with regard to the defendants' counterclaim, wherein the interest upon this \$3,500.00 was claimed, or any findings of fact or conclusions of law with regard to the claimed offset of the interest upon the \$360.00 from 1956 until 1959 on the claimed attorney fees. This constitutes error and the defendants are entitled to a new trial to determine the matter of their counterclaim.

The defendants, in their proposed Findings of Fact and Conclusions of Law, set forth this counterclaim and offset, but the court refused to sign them.

3 Am. Jur. 660, Appeal and Error, Sec. 1147, states:

"The failure or refusal of the trial court to make findings of facts material to the decision is ground for reversal on appeal by a party prejudiced thereby * * * "

It is obvious that the ignoring of defendants' counterclaim by the court in making its findings and conclusions has prejudiced the defendants and they have suffered materially.

Rule 52 of the Utah Rules of Civil Procedure declares:

"Findings by the Court. (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

The court did not adhere to this rule and therefore it committed reversible error, and the defendants are entitled to a new trial to determine their counterclaim and offset to the claimed attorneys' fees.

CONCLUSION

It is respectfully submitted that the court erred in awarding plaintiffs judgment in the amount of \$11,250.58, and, further, the court erred in not granting a judgment in favor of the defendants and against plaintiffs in the amount of \$227.15, as interest on the amount advanced to the plaintiffs by the defendants out of their own funds.

If the plaintiffs are entitled to anything, they are entitled only to judgment in the amount of \$1,125.03, less the amount of \$227.15 accumulated as interest in favor of defendants and against plaintiffs.

The court further erred in not making a finding of fact or conclusion of law relating to the interest claimed by the defendants on the amount advanced to plaintiffs as hereinabove mentioned, and therefore it is respectfully submitted that the

court made a reversible error and defendants are entitled to a new trial as more particularly set forth under Point Five of this brief.

Respectfully submitted,

COTRO-MANES & COTRO-MANES
Attorneys for Defendants and Appellants

APPENDIX A

AGREEMENT FOR EMPLOYMENT OF ATTORNEYS

BRACK H. NOBLE and ANN C. NOBLE, his wife, hereinafter called the Client, hereby agree with HERBERT B. MAW, WENDELL B. HAMMOND, & GEORGE K. FADEL, attorneys at law, hereinafter called Attorneys, as follows:

1. Client hereby engages, designates and appoints Attorneys to represent Client in the pending condemnation proceedings by State of Utah against Client, involving about nine acres of land of Client's located East of U. S. 91 and along the Davis-Salt Lake County boundaries.

2. Client agrees to pay said Attorneys for services to be rendered in this matter as follows:

- (a) 15% of amounts recovered over \$80,000.00 up to \$90,000.00.
- (b) 25% of amounts recovered over \$90,000.00 up to \$110,000.00.
- (c) 30% of amounts recovered over \$110,000.00 up to \$120,000.00.

(d) 50% of any amount recovered over \$120,000.00.

3. Attorneys agree to represent Client in a good, diligent and professional manner in obtaining compensation for Client from the State of Utah for the land being condemned.

WITNESS the hands of the parties this 12th day of January, 1956.

/s/ B. H. Noble

/s/ Ann C. Noble

CLIENT

/s/ Herbert B. Maw

/s/ Wendell B. Hammond

/s/ George K. Fadel

ATTORNEYS