

1959

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Maw v. Noble*, No. 9107 (Utah Supreme Court, 1959).
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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

NOV 17 1959

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

Clerk, Supreme Court, Utah

Plaintiffs and Respondents,

vs.

Case No.
9107

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

BRIEF OF PLAINTIFFS AND RESPONDENTS

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

Attorneys for Plaintiffs and Respondents

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STATEMENT OF FACTS

The respondents do not controvert the statement of facts of the appellants so far as the same are stated, but the respondents desire to supplement by further statement of facts.

The property of the appellants was located partly in Davis County and partly in Salt Lake County, containing a total of 8.63 acres of land. The State Road Commission commenced two separate suits, one in Salt Lake County, Civil No. 105534, in which suit was included 8.01 acres and the other action in Davis County, Civil No. 6132, in which was included .62 acres which was owned by the appellant subject to a right of way in favor of North Salt Lake. The State Road Commission filed the action in Salt Lake County on June 30, 1955, and the action in Davis County on November 3, 1955.

The Salt Lake County case, Civil No. 105534, is exhibit "3P" in the instant action and Civil No. 6132, in Davis County, is exhibit "2P". Herbert B. Maw made an appearance in both cases for the appellants and filed an answer in the Salt Lake County case on December 12, 1955, praying for judgment on \$275,000.00 plus interest. Mr. Maw made his first appearance for the appellants in the Salt Lake County case on July 20, 1955, and in the Davis County case on November 21, 1955.

The agreement for employment of attorneys which appears as exhibit "1D" and is set forth in appendix A of appellants brief, was dated January 12, 1956.

The Salt Lake County Case was first tried before a jury who returned a verdict on April 7, 1956, of \$150,000.00 and judgment upon the verdict was entered May 14, 1956, but the cause was appealed to the Supreme Court of the

State of Utah and reversed for new trial. The second trial of the cause was before a jury who returned a verdict on April 9, 1958, of \$175,000.00, and upon refusal of the State to accept a settlement upon remittitur of \$35,000.00, judgment was entered for \$175,000.00 plus interest in the further sum of \$28,520.98, from which judgment the State appealed. However, pending appeal the State paid on June 5, 1958, the sum of \$72,000.00 to the Nobles, this being the highest appraisal placed upon the property by the State. In an opinion filed March 2, 1959, the Supreme Court of the State of Utah held that the evidence supported a judgment of \$140,000.00 with interest and costs. On March 17, 1959, judgment was entered in favor of the Nobles and against the State of Utah for \$95,093.37 as the balance due in the Salt Lake County case.

The Davis County case was settled by stipulation and judgment was entered on March 5, 1957, in the sum of \$1,975.00 in full settlement including all interest, costs and claims of every nature. (Exhibit "2P")

By way of further statement of facts, the respondents quote from the findings of fact of the Trial Court: (R 70)

"That the amount recovered in Civil No. 6132 in Davis County, Utah was \$1,975.00, which sum was paid to the defendants. The amount recovered in Civil No. 105534 in Salt Lake County was \$169,593.37. The total amount recovered from the State of Utah from said condemnation proceedings was the sum of \$171,578.37.

That according to the terms of said agreement between the plaintiffs and defendants, the fee due the plaintiffs is computed as follows:

- (a) 15% of amounts over \$80,000.
to \$90,000. = \$1,500.00
- (b) 25% of amounts over \$90,000.
to \$110,000. = \$5,000.00

- (c) 30% of amounts over \$110,000.
to \$120,000. = \$3,000.00
(d) 50% of amount over \$120,000.
to \$171,578.37 or \$50,578.37 = \$25,789.18
-

Total fee due plaintiff \$35,289.18

That the defendants have paid to the plaintiffs the sum of \$24,038.60, leaving a balance due to the plaintiffs under the terms of said agreement the sum of \$11,250.58."

Counsel for the appellants stated to the Trial Court that there was no dispute about the work done by the respondents (R 24), and that there was no question that the attorneys went to the Supreme Court twice and brought excellent results (R 26).

POINT I

THE CONTRACT FOR EMPLOYMENT OF ATTORNEYS WAS NOT AMBIGUOUS AND AS CONSTRUED BY THE TRIAL COURT, CORRECTLY REFLECTS THE INTENTION OF THE PARTIES.

Respondents acknowledge that if the contract between an attorney and client is ambiguous wherein one of the reasonable interpretations of the contract would result in an injustice to the client, then meaning should be given to the contract which results in doing justice to the client. However, in the instant case, the contract was not ambiguous and the interpretation of the contract as given by the trial court does not work an injustice upon the client, since the client acknowledged that the attorneys' services were substantial and satisfactory and made no claim that the resulting fee to the attorneys was in any way excessive.

The case of *Pinto v. Seely*, 22 Cal. App. 318, 135 P. 43, (App. Br. 8), after stating that any ambiguity should be construed most favorably to the interests of the client also added the following:

"We do not understand, however, that the rule in this behalf is so inflexible that it may be invoked to perpetrate a palpable injustice, or that it calls for a construction of such contract beyond the express covenants of the parties."

The case of *Waugh et al v. Q. & C. Co. et al*, CCA 7th (1926) 16 F. 2d 363 cited by (App. Br. 8), in fact found the agreement fair and unambiguous.

Before considering in detail the case law, we refer to *Webster's New International Dictionary*, Second Edition, 1938, the meaning given to the words "Recover," and "Recovery":

"Recover":

14. LAW. To gain as compensation; to obtain in return for injury or debt; as, to recover damages in trespass; to recover debt and costs in a suit at law; to obtain title to or possession of something by final decree or judgment in a court of law; as to recover lands in ejectment or real action; to gain by legal process; as, to recover judgment against a defendant.

"Recovery":

7. LAW. The obtaining in a suit at law of a right to something by a verdict, decree or judgment of court, esp. by the final one deciding the issues involved; specif. a common recovery. A final recovery is one obtained by a verdict or final decree or judgment. Its total is the sum awarded and does not include interest *after* the verdict or decision.

A layman referring to Webster's Dictionary could easily determine that all interest up to the time of final verdict, judgment or decision is included in the words "recover" or "recovery", and more certainly would be included in the words "amounts recovered" and "any amounts recovered", which being in the plural must embrace interest as well as principal.

POINT II

INTEREST AWARDED IN A CONDEMNATION SUIT IS FOUNDED UPON THE SAME CASES AND REASONING AS INTEREST UPON CONTRACT OBLIGATIONS IN GENERAL.

Respondents do not dispute the contention of the appellants in Point II (App. Br. 9) that interest awarded in a condemnation suit is awarded as a matter of right and not as a matter of judicial discretion, where allowable. This means, however, that interest will be awarded, allowed, and paid, only at such time as the claim for the principal is fully established, and when it is so established the interest becomes as much a part of the recovery as the principal and is included in the final judgment.

The case of *Fell v. Union Pacific Railroad Co.*, 32 Utah 101, 88 P. 1003, cited by the (App. Br. 9) was a suit to recover damages for the injury to livestock which were injured while in transit. The trial court entered judgment for the damages plus interest on the damages from the date of injury, which judgment was affirmed on appeal, the court holding in the last paragraph of its opinion as follows:

“The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value. The same rule under the same conditions would of necessity apply to actions for breach of

contract. This is illustrated by some of the California cases, as well as by the Nevada case cited by counsel for appellant. As the case at bar falls clearly within the rule where the amount is computed as of a fixed time, and in accordance with fixed rules of evidence as to value, the court did not err in computing, on the amount of damages found, interest at the legal rate.

The judgment therefore is affirmed, with costs."

In the case of *Oregon Shortline Railroad Co. v. Jones*, 29 Utah 147, 80 Pac. 732, where no occupancy or possession had been taken of the land until after judgment, the landowner contended they were entitled to interest from the date of the summons. The court held that the landowner was not entitled to interest from the date of the summons, but if at all, only from the date of occupancy. We quote from the last paragraph of the opinion of the court:

"To allow appellants' claim of interest to prevail, we are obliged to read something into the statute not found there. Nor does it come within any of the rules of the cases where interest has been allowed. Here there has been no entry or occupation of the property. Nor was there any time prior to the verdict of the jury when the amount of plaintiff's liability had been determined. Nor was there any time when it could have taken possession and given a writ of assistance therefor until final judgment and order of condemnation. And the authorities seem to be that one or more of these things must be shown to entitle the landowner to interest."

In the case of *Kimball v. Salt Lake City*, 32 Utah 253, 90 Pac. 395, where the landowner claimed interest from the city for damages caused by change of grade of a street by the city, the court in following the case of *Fell v. Union Pacific Railroad* allowed interest on damages found as of the date of completion of the change of grade, stating that this allowance of interest on a claim for unliquidated da-

mages is based on the contract principles announced in *Fell v. Union Pacific Railroad Co.*

The case of the *Salt Lake and Utah Railroad Co. v. Schramm et al.*, 56 Utah 53, 189 Pac. 90, the court held that the landowner was entitled to interest from the date of the order of occupancy and not from the date of the commencement of the action, following the case of *Oregon Shortline Railroad Co. v. Jones*, and the Supreme Court ordered the judgment modified to allow interest on the verdict from the date of occupancy rather than the date of commencement of the action.

The foregoing review of the Utah decisions would seem to indicate that interest allowed in condemnation suits is based upon contract principles and that such interest as accrues from the date of occupancy or injury is included in the judgment.

POINT III

THE INTENT OF THE PARTIES AS SHOWN BY THE CONTRACT WAS THAT THE WORDS "AMOUNTS RECOVERED" AND "ANY AMOUNT RECOVERED" IN EFFECT MEAN AMOUNTS COLLECTED, WHETHER INTEREST OR PRINCIPAL.

The appellants seek to exclude all interest on the first \$80,000.00 of the principal, and apparently base their contention upon the unfounded assumption that the State had set aside \$80,000.00 as an award to the defendants prior to condemnation.

As appears from exhibit "3P", Civil No. 105534, the Salt Lake County case, condemnation proceedings were filed June 30, 1955; whereas the agreement with the attorneys was dated January 12, 1956. If, in fact, the appellants had

been offered \$80,000.00 before June 30, 1955, and if the appellants had really intended to exclude interest from the amounts recovered they should have commenced the division of the fees at \$82,400.00 to include interest which had accrued from June 30, 1955, to January 12, 1956, the date of the agreement. Furthermore, the appellants elected to gamble when they refused to accept the \$80,000.00 from the State of Utah by way of settlement. As shown by the record in Civil No. 105534, the State appraisers had appraised the property of the appellants at \$57,000.00 and \$72,000.00 respectively. Thus the appellants had no assurance that they would receive even \$80,000.00 principal and interest. Also, as in all litigation, a lump sum settlement by way of compromise without trial was probable, in which event the settlement figure would have included interest and principal without distinction as to whether interest or principal were being compromised. In fact the Davis County case was settled on March 5, 1957, for \$1,975.00 including interest and costs, (exhibit 2P).

We now review the cases cited by the appellants dealing with contingent fee contracts based upon recovery or similar terms. *Sanders v. Riddich*, 127 Ten. 700, 156 S. W. 464, was a case where the client employed the attorneys in a damage suit wherein no interest was contemplated to be included in the judgment, under an agreement as follows:

"I, W. B. Sanders, hereby employ Marion G. Evans and T. K. Riddich as my attorneys to represent me in my suit against Memphis Street Railway, and I hereby agree that they may retain as their fee one-third of the recovery in case the same is under \$12,000.00 and one-fourth in case the same is \$12,000.00 or over."

The trial court construed the agreement in favor of the attorneys saying that the interest which accrued after

judgment would not be considered part of the recovery to defeat the attorneys one-third fee and require the attorney to take one-fourth. It is to be noted here that at the time the agreement was made the attorneys and client did not anticipate any interest to be included in the recovery, this being a personal injury matter.

The case of *Covert v. Randles* (App. Br. 13) was also decided in favor of the attorneys in a case where the client employed the attorneys to recover approximately \$41,000.00 worth of bonds which were stolen from her and she agreed to pay 8% of the amount recovered up to the sum of \$20,000.00, and 5% of the balance recovered. About \$24,500.00 worth of bonds which included accrued interest, were impounded in the United States District Court at Los Angeles and about \$7,000.00 in the United States District Court for Arizona, leaving about \$10,000.00 in the hands of thieves or persons who had purchased the same from the thieves. The attorneys, by way of compromise before judgment, obtained the bonds from the district court and approximately \$4,000.00 of the other bonds. The client contended they were not entitled to any fee because the word "recovered" required judgment and execution. The court quoted from 53 Corpus Juris 655, Section One, as follows:

"Recover. (sec. 1) A. In Broad General Sense. To collect; to come into possession of; to get, obtain, procure, receive, and the like; ***

"(Sec. 2) B. In Narrower Legal Sense the term has a well defined meaning; and has been variously defined as to be successful in a suit; to collect or obtain the amount, possibly by a suit at law; to have judgment; to obtain a favorable or final judgment; to obtain by course of law; to obtain by judicial action or proceeding, or in any legal manner;

to obtain by means of an action, in contrast to voluntary payment; to obtain title to by final decree or judgment in a court of law; to succeed in an action, or in a law suit; and in this legal sense, it has been held not to include necessarily, or even ordinarily, the actual payment of the money sued for."

The Arizona court did not seek to give the word "recover" the narrow meaning suggested by the text quoted, and stated that the intent of the parties governs, and if it appears from the contract that the parties intended the word "recover" as used therein should mean the same as to collect, "to come into possession of, to get, etc." we should so construe it. The court then affirmed the judgment which granted the attorneys their percentage upon all of the bonds that they recovered, whether by suit or otherwise. Under comment nine, the court stated that the compensation of the attorney should be based on the cash value of the bonds, and not the par value, and as such the cash value of the bonds necessarily included the accrued interest.

The case of *Bassford v. Johnson*, 172 N.Y. 488, 65 N.E. 260 (App. Br. 14) where the landowner agreed to pay the attorney "10% of whatever award may be obtained for my land", the appellate court awarded the attorney 10% of all interest as well as the principal amount of the award. The Bassford case conclusively holds that interest down to date of payment is included in the award for the purposes of the attorneys fee. For the appellants to contend that the instant case should be considered as if an award of \$140,000.00 had been made on July 30, 1955, is to substitute in the contract for the words "amounts recovered" the word "verdict." If the contract had been for a prorated share of the verdict then the reasoning of the appellants would apply. It will be seen in this case that the jury verdict was \$175,000.00, to which interest was to be added; however,

this was in no sense the amount recovered, since until the Supreme Court made its decision, and the State of Utah made payment, the amount was not recovered.

In the case of *Smith v. Whitman*, 159 Md. 478, 150 A. 856 (App. Br. 15) the court found the agreement was for "one-third of the amount they might recover for the defendants, less the sum of \$3,000.00 which had been awarded to the defendants by the Aberdeen Proving Ground Land Commission . . ." A careful reading of this case shows the facts to be that the attorneys had told the clients at the outset, that no interest was recoverable on their claim against the government, so that the parties contracted without anticipating any interest to be a part of the recovery. The total final award was \$63,500.00 principal, and \$42,572.29 interest, making a total of \$106,072.29. The trial court granted a prayer for directed verdict of the attorneys wherein it deducted \$3,000.00 plus interest on said \$3,000.00 from the total award before giving the attorneys their one-third. However, this case was reversed because the trial court did not permit the jury to find the facts stated in the attorneys' prayer. Thus the appellate court never did pass upon the question of whether the \$3,000.00 plus interest was to be excluded, and this \$3,000.00 plus interest was volunteered by the attorneys to be excluded by their own prayer. The appellate court, at the close of comment three, stated:

"The suit was upon a contract whereby the plaintiffs were to be paid a contingent fee of one-third of the amount recovered, which amount, in our opinion, included not only the sum awarded to the trustees for the land taken and the damage to the other lands caused by such taking, but also the amount received as interest thereon, and the right of the plaintiffs to recover one-third of the entire amount,

principal and interest, awarded to the trustees was in no way affected by the fact that the plaintiffs at one time told the defendants that in their opinion no interest could be collected upon their claim."

Hence, the courts never did pass upon the question as to whether or not the interest on the first \$3,000.00 was to be included or excluded from the contract under an agreement as worded above, and in fact the portion of the opinion quoted above shows that the appellate court felt the attorneys entitled to one-third of the entire amount of principal and interest.

It is questionable that appellants are serious in their contention that to allow attorneys interest on this \$80,000.00 is unconscionable, when the facts are that the attorneys put in double the work contemplated, with two trials and twice before the Supreme Court. In fact, the only way such extra work may be even partly compensated is by allowing interest on this part of amount recovered, which the contract, under any reasonable meaning, surely included. Also from the total amount recovered in the sum of \$171,578.37, the attorneys claimed only \$35,289.18, leaving the clients \$136,289.19.

POINT IV

IN EMINENT DOMAIN PROCEEDINGS, BOTH PRINCIPAL AND INTEREST ARE AWARDED AS A MATTER OF LEGAL RIGHT, HOWEVER, THE AMOUNT OF EACH AND THE RECOVERY THEREOF IS ONLY ACCOMPLISHED WITH EFFORT.

The appellants in point IV of their brief regard interest as a matter of legal windfall which is obtained without effort once the value of the land at the time of the taking

is determined. Certainly interest could not be recovered without litigating the matter of principal, and although the law is now established that the owner is entitled to interest in certain cases as a matter of legal right, nevertheless, it requires the efforts of the attorneys to assert such legal right. The matter of interest in eminent domain proceedings has been the subject of litigation in this state which has established the rules pertaining to the award of interest in absence of an express statute awarding interest in eminent domain proceedings. *Oregon Shortline Railroad Co. v Jones* (supra) stated the rule that interest was not allowed from the date of summons, but would be allowed only from the date of occupancy. In *Kimball v. Salt Lake City* (supra) this court held that the landowner was entitled to interest from the date the street improvements were completed in changing the grade of the street, as a matter of legal right; but this legal right was not established without litigation. In the case of *State v. Peek*, 1 Utah 2d 263, 265 P. 2d 630 (1953) the court held that it was not violative of the constitutional provision that "private property shall not be taken or damaged for public use without just compensation" to disallow interest in condemnation proceedings after service of summons but before occupancy. There is an inference here that if interest is allowed from the date of occupancy, the denial thereof would be a taking of the property without just compensation as such interest is considered part of compensation for the land taken.

Considering now some of the cases cited in point IV of the appellants brief, the case of *People v. Kelly* (App. Br. 19) was a case in which the landowners had already obtained a judgment against the city for land condemned by the city, and the interest in the controversy arose upon and after the judgment. The judgment itself was paid, but interest on the judgment accruing after the date of the judg-

ment was not paid. The legislature authorized the city to issue bonds to pay matured bonds and judgment debts. The appellate court held that the interest on the judgment was not authorized by the legislature to be paid from the new bonds. Under comments three and four the court said:

“It is to be observed that two classes of interest are contemplated by the statute, i. e., that which accrues prior to the judgment, and interest which accrues after the judgment is entered. Interest accruing before judgment is expressly made a part of the judgment, but no such provision is made as to interest accruing on a judgment after it is entered.”

Thus the holding in the case of *People v. Kelly* when considering the portion quoted by the appellant and the portion quoted by the respondents indicates that the court considered interest accruing before judgment as being part of the value of the land taken.

The case of *Hollingsworth v. Lewis* (App. Br. 19) in addition to the portion quoted by the appellants, said:

“In very short, we are asked to determine the length and breadth of the meaning of the word ‘refunds’ as used in the contract executed by the parties.”

Then quoting Webster's Dictionary they found the word “refund” means to repay. The court then further stated:

“As the defendants never paid any interest to the railroad company, in no proper sense can it be said that any railroad company . . . repaid (that is refunded) any interest money. By the terms of the contract executed by the parties, the plaintiff was never authorized to receive 50% of all moneys collected.”

By implication, the court held that if the contract had been for 50% of all moneys collected, it would have included interest.

In the case of *Atlantic Coast Line Railroad Company v. Coachman* (App. Br. 21), the court was construing a statute relating to claims against common carriers for damage or overcharge in connection with freight carried. The statute required the carrier to pay claims within 60 days from presentation and upon failure to do so

"Shall be liable to the claimant for the amount of his claim and fifty per cent per annum interest on the principal sum of said claim from date of filing . . . and when the said claimant shall bring suit and recover judgment for his claim against said common carrier, he shall be allowed the said fifty per cent per annum in addition to the principal sum of said claim, and the same shall be allowed in the verdict giving him judgment; . . . in the event that the claimant shall prevail in an action to recover on his claim, [the carrier shall] be liable for a reasonable attorney's fee . . . which shall be fixed by the court, not to exceed fifteen dollars if the amount recovered does not exceed one hundred dollars, and not to exceed fifteen per cent on any amount recovered greater than the sum of one hundred dollars."

The court said the intent of the statute was not to allow attorney's fees upon the fifty per cent interest, saying:

"Especially is this clear in that part of the statute providing that attorney's fee shall be fixed by the court, not to exceed fifteen dollars if the amount recovered does not exceed one hundred dollars."

The court construed this particular statutory use of "amount recovered" to exclude interest.

We now cite to the court other cases which construe the terms "recover" or "recovery".

Manzo v. Dullea, 96 F. 2d 135, Second Circuit Court (1938), 116 A.L.R. 1241. An attorney agreed with the client to sue to recover on an insurance policy upon a retainer agreement of 25% of any amount recovered by trial, or 20% of any amount realized by settlement. Judgment was recovered consisting of \$13,500.00 damages plus \$919.42 interest plus \$164.87 costs. From this amount a mortgagee was first paid, leaving a check of \$9,423.06. The attorney claimed a fee based upon the full recovery of \$15,429.33, but the client contended he should only get a fee based upon the \$9,423.06, which was the net amount of the check. The Circuit Court of Appeals held that the attorney was entitled to one-fourth of the \$15,429.33, including the costs.

Vaughan v. Humphreys, Ark. (1922), 239 S.W. 730, 22 A.L.R. 1201. In this case the attorney contracted to bring suit against a life insurance company and to receive as compensation 40% of the recovery. Judgment was obtained against the insurance company for \$5,000.00, plus accrued interest, and attorneys fees as allowed by the statute were fixed by the court at \$500.00. The attorney claimed that he was entitled to the entire \$500.00 attorney's fee, plus 40% of the rest of the recovery. Trial judge awarded the attorney 40% of all of the recovery, which included \$5000.00 plus the accrued interest, plus \$500.00 attorney's fees. The Supreme Court in affirming the trial court said, under comment two:

(2) The legal meaning of the word "recovery" is the obtaining of a thing by the judgment of the court as a result of an action brought for the purpose. The contract under consideration provides that the attorney shall have 40% of the recovery. This

means 40% of the amount recovered by the policy holder which, as we have seen, includes the amount of the attorney's fee allowed by the statute to the policy holder, under the statute this is as much a part of the recovery of the policy holder as is the face of the policy and the penalty provided by the statute."

POINT V

DEFENDANTS ARE NOT ENTITLED TO INTEREST ON ANY SUM ADVANCED PLAINTIFFS, AND IF OTHERWISE ENTITLED TO INTEREST, THEY WAIVED THE SAME AT THE TIME OF TRIAL.

On June 5, 1958, the State Road Commission paid to the defendants the sum of \$72,000.00, pending appeal of the cause to this court following the second trial, to apply towards any final recovery in the cause. (R23) From this \$72,000.00, the defendants paid the attorneys \$3,500.00 and retained the balance.

It is conceded that if the recovery had not exceeded \$72,000.00 the attorneys would be required to repay the \$3,500.00 plus interest thereon; however, the recovery having been \$171,568.37, the advance payment by the State should have been considered as an advance payment on the final recovery in the cause, and as such, the attorneys would have been entitled to their proportionate share of the \$72,000.00 when received. The appellants (App. Br. 22) concede that the \$3,000.00 paid to the attorneys was advance attorneys' fees.

At the close of arguments before the trial court the discussion concerned whether or not the attorneys were entitled to interest on the balance claimed for attorneys' fees since the defendants had deposited \$12,000.00 with the clerk as a bond to guarantee payment of the services. The

court inquired whether counsel wanted the court to consider interest, and the following discussion is taken from the additional transcript of proceedings made by B. M. Goodpasture, the court reporter:

THE COURT: Well, I want to know something about what you want me to do, to decide on that phase, because we will just come back to another feature here that will have to be heard.

MR. FADEL: Your Honor, since the time is so short I would say that we could make this determination, not considering any interest on the attorneys' fees.

MR. COTRO-MANES: We waive interest, your Honor, on ours.

THE COURT: One way or the other?

MR. COTRO-MANES: That's right.

THE COURT: Just these figures that you have submitted here. I will have to look at some of your cases.

At the hearing on the objections of the defendants to the findings of fact, the trial court stated to counsel that the court was of the opinion that the court was relieved of considering the question of interest claimed by either parties on the balance due for attorneys' fee or interest on advanced attorneys' fees. Even if the trial court were mistaken, and the defendants were in fact, entitled to interest, the total amount as claimed by them on page 23 of their brief is \$161.00, which would scarcely require or justify a new trial. Furthermore, the defendants had the use of \$2,500.00 collected from the house they retained on the premises from July, 1955; and the use of \$1,975.00 paid on the Davis County case, March 5, 1957, and \$68,500.00 from June 5, 1958, so that the attorneys did not participate in

any interest in which these sums would have earned as interest from the dates received by the defendants to the date of payment of the attorneys' fees.

CONCLUSION

It is respectfully submitted that the trial court's Findings of Fact, Conclusions of Law, and Judgment are fully supported by the evidence and the law in the case.

The cases cited by the appellants, when analyzed, support the judgment for the respondents. The instant case is stronger than most cases previously cited, for the reason that in the instant case the parties at the outset contracted knowing that interest would be included in the amounts recovered, and the use of the plural "amounts recovered", and "any amount recovered" clearly applied to amounts paid by the State Road Commission in settlement of the final judgment.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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