

1965

Daisy Helen Kinsley, Sometimes Known as Helen D. Kinsley, Individually and as Executrix of the Estate of Otho v. Kinsley, Also Known as Otho Verne Kinsley, Deceased v. Lewis H. Larsen and Dorothy G. Larsen, His Wife, Individually, and Doing Business As Larsen Enterprises and Belco Petroleum Corporation : Appellant's Reply Brief

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Verl C. Ritchie; Attorney for Appellant

---

#### Recommended Citation

Reply Brief, *Kinsley v. Larsen*, No. 10339 (1965).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/3583](https://digitalcommons.law.byu.edu/uofu_sc2/3583)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

DAISY HELEN KINSLEY, sometimes  
known as HELEN D. KINSLEY,  
Individually and as Executrix of the  
Estate of Otho V. Kinsley, also known  
as Otho Verne Kinsley, Deceased,

*Plaintiff & Appellant,*

v.

LEWIS H. LARSEN and  
DOROTHY G. LARSEN, his wife,  
Individually, and doing business as  
LARSEN ENTERPRISES and  
BELCO PETROLEUM  
CORPORATION, a corporation,

*Defendants & Respondents.*

---

UNIVERSITY OF UTAH

OCT 15 1965

LAW LIBRARY,  
Case No.  
10339

---

## APPELLANT'S REPLY BRIEF

---

Appeal from the Summary Judgment of the  
Third District Court for Salt Lake County  
Before Honorable A. H. Ellett, District Court

Verl C. Ritchie  
Of MOYLE & MOYLE  
810 Deseret Building  
Salt Lake City, Utah  
*Attorneys for Appellant*

George E. Ballif  
Of BALLIF & BALLIF  
84 East 100 South  
Provo, Utah  
*Attorneys for Respondent  
Belco Petroleum Corporation*

H. H. Halliday  
400 Executive Building  
Salt Lake City, Utah  
*Attorneys for Respondents  
Lewis H. and Dorothy G. Larsen  
and Larsen Enterprises*

FILED  
OCT 15 1965

Supreme Court of Utah

---

---

## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS .....	1
ARGUMENT .....	3
POINT 1. LEWIS H. LARSEN, ONE OF THE DEFENDANTS, AS AN ADVERSE PARTY IN THIS LITIGATION, IS CLEARLY DISQUALIFIED AS A WITNESS TO MATTERS WITHIN THE EQUAL KNOWLEDGE OF HIMSELF AND DECEASED BY VIRTUE OF 8-24-2(3) U.C.A., 1953 .....	3
CONCLUSION .....	7

## CASES AND AUTHORITIES

### Cases Cited

Maxfield v. Sainsbury, 110 Utah 280, 172 P 2d, 122, 127.... 6

Morrison v. Walker Bank & Trust Co., 11 Utah 2d 416,  
360 P. 2d 1015 .....

7

### Texts and Annotations

78-24-2(3) Utah Code Annotated, 1953 .....

3

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

DAISY HELEN KINSLEY, sometimes  
known as HELEN D. KINSLEY,  
Individually and as Executrix of the  
Estate of Otho V. Kinsley, also known  
as Otho Verne Kinsley, Deceased,

*Plaintiff & Appellant,*

v.

LEWIS H. LARSEN and  
DOROTHY G. LARSEN, his wife,  
Individually, and doing business as  
LARSEN ENTERPRISES and  
BELCO PETROLEUM  
CORPORATION, a corporation,

*Defendants & Respondents.*

Case No.  
10339

---

## APPELLANT'S REPLY BRIEF

---

### STATEMENT OF FACTS

This reply is necessary to answer new matters set forth in the brief of respondent Belco Petroleum Corporation concerning the competency of the defendant Lewis H. Larsen as a witness in view of the "Dead Man's Statute," 78-24-2(3) Utah Code Annotated, 1953.

The Statement of Facts contained in the brief of respondent, Belco, is replete with references to the deposition of the defendant Lewis H. Larsen, which is not in evidence. Its argument is centered primarily around the self-serving statements in Larsen's desposition which the trial court refused to consider at the hearing upon the Motion for Summary Judgment as Larsen was disqualified as a witness by the statute. Objection to the competency of Lewis H. Larsen as a witness by virtue of the "Dead Man's Statute" was made at the time Belco took his deposition (R 82, p 21) and also by formal objection served and filed prior to the time of the hearing on the Summary Judgment (R 68). The only facts considered by the trial court were those recited in the judgment of dismissal (R 72, 73).

Respondent's brief seriously misstates the facts and record in several important respects. An example is the claim on pages 4 and 6 of its brief that attempts have been made to collect on a promissory note in this lawsuit and previously (R. 7, 8). The note was never accepted by plaintiff nor was any withholding of proceeds or loss authorized at any time, (R. 66) nor is this an action on the note (R. 11).

Further, the respondent claims at page 6 of its brief that the only evidence which indicates that Kinsley received the royalties on the oil and gas leases in question direct from Belco is contained in the Answers to Interrogatories by Lewis Larsen (R. 5). It is an uncontroverted fact that the royalty payments were paid direct to Kinsley by Belco on these same leases for many, many

months prior to the sale which has not been questioned by Belco and is not disputed (R. 5, 30, 66, 67a).

Respondent on page 5 of its brief claims that Kinsleys were apprised of the negotiations and again refer to the deposition of Larsen, which is not in evidence. The fact remains that at no time did Larsen or respondent ever advise Kinsleys that they were entering into the agreement of March 16, 1962 (R. 82, Ex. 10) whereby payment was to be made to Larsen, as agent, and there is no evidence to the contrary (R. 66).

## ARGUMENT

### POINT I

**LEWIS H. LARSEN, ONE OF THE DEFENDANTS, AS AN ADVERSE PARTY IN THIS LITIGATION, IS CLEARLY DISQUALIFIED AS A WITNESS AS TO MATTERS WITHIN THE EQUAL KNOWLEDGE OF HIMSELF AND DECEASED BY VIRTUE OF 78-24-2(3) UCA, 1953.**

The purpose of the statute is clearly to prevent the proving by false testimony of claims against the estate of a deceased person. In this case Belco seeks to controvert the statute by saying that the interests of Belco and Larsen are not adverse to the interest of the deceased and that Larsen by testifying in Belco's favor would mean that he is testifying in favor of the estate and against his own interest. Such reasoning is ridiculous and untenable, to say the least. To refuse to invoke the Dead Man's Statute and allow Larsen to attempt to help Belco squirm out of its liability would aid in the per-

petration of a fraud contrary to the intent and purpose of the statute.

More basic, it would allow the admission of testimony which on its face would not be worthy of belief in view of the admitted facts. There is no claim that Kinsleys were advised of the agreement of March 16, 1962, between Belco and Larsen (R. 82, Ex. 10) under the terms of which Larsen was to receive the money as agent. There is no evidence other than Larsen's deposition (p. 50) that Larsen requested a loan from decedent during his lifetime, or that Larsen advised him of the receipt of the checks representing the purchase price (R. 2, 29, 6, 7, 56, 57a). Larsen, according to his answer to plaintiff's Requests for Admissions, received the check in question on March 22, 1962 (R. 2, 29). Kinsley died in Arizona on March 28, 1962 (R. 60). Larsen did not even write Kinsley that he had received the checks until March 31, some three days after Kinsley's death, nor did he write Kinsley of the amount of the sale or that it would be closed until March 26th, 1962, *after he had received the money* (R. 6, 7). It is plain that Larsen did not want Kinsley to know that payment was to be made by Belco to Larsen, or exactly how much was involved until he had safely deposited the money in his account. On March 26th, about four days after receipt of the money, Larsen wrote Kinsley as follows: "The deal seems to be progressing satisfactorily but there may be a few days delay in completing all of the paper work, but it appears that the deal will be closed for the full amount of \$192,000.00." (R. 6) It was in that letter that Larsen made the initial request for a loan (R. 6), and there is

no evidence of a reply as Kinsley's death on the 28th prevented it.

This was ten days after Larsen had signed the letter agreement with Belco where the price was fixed and agreed upon (R. 82, Ex. 10) and after Larsen had received and deposited the funds to his account under the name of Larsen Enterprises (Ex. 56, 57a). It was not until at least March 31st, several days after the death of Kinsley on March 28, 1962, that Larsen wrote Kinsley that he had received the money from Belco and withheld \$100,000.00. This was in fact nine days after Larsen received the money by his own admission (R. 2, 29), yet in his deposition (p. 52) Larsen said that the deal was not completed until March 30th or 31st when he wrote Kinsley "I was able to close the deal with Belco, etc." (R. 7, Deposition p. 52).

Also of interest is the purported receipt acknowledging the checks *dated March 27, 1962* given by Larsen to Belco (R. 82, Ex. 15) which on its face is clearly erroneous, fictitious or fraudulent. That date cannot possibly be accurate as shown by Belco's own evidence. The photo copies of the reverse side of the checks dated March 22nd (R. 56, 57a) and submitted by Belco attached to Mr. Ruben's affidavit, clearly show a bank stamp endorsement by Walker Bank & Trust Company on March 26, 1962, *one day prior to the date on the purported receipt*. See Larsen's admission that he received the checks on March 22, 1962 (R. 2, 29).

The case at bar would not have arisen without the negligence or inadvertence of Belco, and as a result of its actions a fraud was perpetrated upon an innocent party



and his estate. Belco now contends that Larsen is not incompetent under the provisions of the Dead Man's Statute as he has admitted liability, qualifiedly. The fact remains that he is an adverse party and his testimony pertains to the transactions with decedent involved in this lawsuit and is equally within the knowledge of both. See *Maxfield v. Sainsbury*, 110 Utah 280, 172 P.2d 122. No judgment has been entered against Larsen who is opposing the claim of the plaintiff as executrix, which is unsatisfied to the extent of \$77,599.89, plus interest (R 35). Here the defendant Larsen was placed in a position by Belco to misappropriate \$100,000.00 to his own use. This could not have occurred had Belco merely given notice to Kinsley of its intention to pay Larsen or by the simple expedient of making the checks payable jointly to Kinsley and the Larsens.

Larsen now claims that he made arrangements with the decedent for a loan of the money. If in fact there was an agreement between Larsen and Kinsley whereby Kinsley was authorized to withhold the money, appellant may have no claim against Belco, but it is plain to see that such could not have been the case. This is the crux of the case and the testimony on this point must certainly be equally within the knowledge of the decedent and Larsen. To allow Larsen to testify to such matters in view of these facts would be contrary to all basic concepts of justice, as well as the statute.

There can be no question but that Larsen as a party defendant is an adverse party within the meaning of the Dead Man's Statute in direct opposition to the claims of the executrix. Belco, through Larsen, is seeking to offer

evidence against and adverse to the decedent's estate in a belated attempt to cover up the misappropriation of decedent's funds, and to avoid liability for wrongfully paying the money to Larsen as agent.

Respondent at page 21 of its brief contends that the statute is inapplicable to the testimony by an agent of the deceased and cites *Morrison v. Walker Bank & Trust Co.*, 11 Utah 2d 416, 360 P.2d 1015 in support of this proposition. While the law does not specifically disqualify agents as such, this court held that where the agent is also a party or a person having a direct adverse interest in the estate of the deceased, he would be precluded from testifying to transactions with the deceased. In other words, a person otherwise incompetent to testify under the Dead Man's Statute cannot be rendered competent by the fact that he was an agent.

### CONCLUSION

It is respectfully submitted that the defendant Lewis H. Larsen is an adverse party with a direct interest in the action adverse to the estate, and therefore incompetent as a witness within the meaning of the "Dead Man's Statute." As such his deposition should not now be admitted or considered. The judgment dismissing the plaintiff's Complaint as to Belco should be reversed and plaintiff's Complaint reinstated.

Respectfully submitted,

**MOYLE & MOYLE**

By Verl C. Ritchie

Attorneys for Appellant

810 Deseret Building

Salt Lake City, Utah