1967

Orlo S. Maw, R. John Maw, and Vadel T. Maw v. Weber Basin Water Conservancy District : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

ORLO S. MAW, R. JOHN MAW, and VADEL T. MAW,
Plaintiffs and Appellants,

vs.

WEBER BASIN WATER CONSERVANCY DISTRICT,
Defendant and Respondent.

Case No. 10823

RESPONDENT'S BRIEF

Appeal from the Ruling and Orders of the Second District Court of Weber County Hon. Charles G. Cowley, Judge

NEIL R. OLMSTEAD
2324 Adams Avenue
Ogden, Utah

E. J. SKEEN
522 Newhouse Building
Salt Lake City, Utah

REID W. NIELSON
New Federal Building
Salt Lake City, Utah
Attorneys for Defendant-Respondent

GLEN E. FULLER and
ORVAL C. HARRISON
15 East 4th South
Salt Lake City, Utah
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

ORLO S. MAW, R. JOHN MAW, and VADEL T. MAW,

Plaintiffs and Appellants,

vs.

WEBER BASIN WATER CONSERVANCY DISTRICT,

Defendant and Respondent.

Case No. 10823

RESPONDENT'S BRIEF

The respondent does not agree with the appellants' statement of facts. Very pertinent facts are omitted from, and unsupported conclusions and argumentative statements are included in, the appellants' brief. We submit our own statement. The appellants are referred to as the "plaintiffs" and the respondent is referred to as the "defendant."

STATEMENT OF FACTS

The Ogden Duck Club, a corporation of the State of Utah, leased Sections 1 and 12, Township 7 North, Range 3 West, from the State of Utah upon which they established a club house and shooting facilities. (R. 39, Tr. 33). The Ogden Duck Club was the successor in interest to the Lakeshore Duck Club (R. 39, Tr. 37) and the Duck Club contended that it had established a right of way by usage for 30, 40 or 50 years (R. 39, Tr. 49). On December 29, 1936, Annie C. Maw and the Ogden Duck Club, a Utah corporation, entered into a right of way agreement, which is set out in full as an appendix to Appellant's Brief herein (Plaintiffs' Exhibit A). Of the four sons of Annie C. Maw named in the agreement Wilmer J. Maw died in 1953 (R. 39, Tr. 5), Rufus J. Maw died in 1949 (R. 39, Tr. 20), Gilbert E. Maw died in 1954 (R. 39, Tr. 24), and George C. Maw is the sole survivor. (R. 39, Tr. 5).

Eugene Maw, Orlo S. Maw, and Farrell J. Maw are sons of Wilmer J. Maw; R. John Maw and Junior D. Maw and sons of Rufus J. Maw; and Virgil B. Maw and Vadel T. Maw are sons of Gilbert E. Maw (Amended Complaint and Answer). The Appellants herein are Orlo S. Maw, one of the sons of Wilmer J. Maw, R. John Maw, one of the sons of Rufus Maw, and Vadel T. Maw, one of the sons of Gilbert E. Maw (R. 4).

The 1936 right of way agreement describes the location of the right of way: "Grantor does hereby give and grant unto grantees and their successors in interest

a convenient right-of-way over and across said lands for the purpose of going to and from the club house owned by Grantees in Section 12, T. & N., R. 3 W. . . .'' The location of this right-of-way is shown on Defendant's Exhibit 3. The 1936 agreement describes that part of the right-of-way to be maintained in a travelable condition by the grantor as ''a part of the right-of-way herein granted to Grantees, now existing in said Section 20, T. 7 N., R. 2 W., Salt Lake Meridian along the north rod of the east half of said section. . . .'' This half-mile section of road to be maintained by Annie C. Maw was not included in the land purchase contract (Plaintiffs' Exhibit D) nor the warranty deed (Plaintiffs' Exhibit E).

The allegations and admissions in the pleadings establish that the United States of America, Bureau of Reclamation, in conjunction with the Weber Basin Water Conservancy District, determined it was necessary to acquire approximately 1,000 acres from W. John Maw and Sons, Inc., a corporation, and Grace B. Maw for the construction of the Willard Reservoir (R-4, Tr. 15). W. John Maw and Sons, Inc. and Grace B. Maw were the owners of the land to be acquired by the United States (R-39, Tr. 6). Neither George Maw nor any of the cousins, the sons of Rufus or Gilbert, owned any stock or interest in the lands (R-39, Tr. 6). W. John Maw and Sons, Inc. and Grace B. Maw still owns other property south of the property acquired by the United States (R-39, Tr. 6).

The allegations and admissions in the pleadings disclose that the road through the properties acquired by the United States from Grace B. Maw and W. John Maw and Sons, Inc., a corporation, was obliterated and destroyed during the construction of the Willard Reservoir and that an alternate access road was provided for the Ogden Duck Club (R-4, R-15). The State leases of the Ogden Duck Club in their old location were cancelled and a new lease obtained from the State of Utah for a quarter section of ground for parking facilities and where their buildings are relocated (R-39, Tr. 43). The Ogden Duck Club moved its club house about a mile and a half west because its shooting grounds were used for the Willard Bay Reservoir. Since the move it has not used the right-of-way through the property formerly owned by W. John Maw and Sons, Inc. and Grace B. Maw, and it now has access over a public road on Government land (R-39, Tr. 41, 42, 47). The Maws did not do any maintenance work on the half-mile lane. The Ogden Duck Club graveled and scraped it every year (R-39, Tr. 34), obtained assistance from Weber County and Box Elder County, built up the road, and later graded the entire road (R-39, Tr. 49 and 50). The right-of-way agreement was for the mutual benefit of the Ogden Duck Club and Annie C. Maw and her successors in interest (R-39, Tr. 49). In 1956 the United States and Weber Basin Water Conservancy District initiated negotiations with W. John Maw and Sons, Inc. and Grace B. Maw for the acquisition of approximately 1,000 acres to be used for the construction of the Willard Bay Reservoir (R-39, Tr. 6). The President of

W. John Maw and Sons, Inc. requested that letters be prepared "to protect our interest in regards to severance rights, hunting privileges, and a right-of-way which we had given to the Ogden Duck Club (R-39, Tr. 7)." Mr. Maw met with Mr. E. J. Skeen, attorney for Weber Basin Water Conservancy District, in the Village Building in the Office of the Bureau of Reclamation (R-39, Tr. 9). A rough draft of a letter was prepared which Orlo J. Maw asked Mr. Skeen to write to protect their interests if they signed the contract with the United States Government (R-39, Tr. 10, Exhibit B). Subsequently five separate letters were prepared by Mr. Skeen and signed by E. J. Fjeldsted (Plaintiffs' Exhibit C, R-39, Tr. 11). Each letter was on the stationery of the Weber Basin Water Conservancy District, each dated July 5, 1957. Three of the letters were addressed to:

> "W. John Maw and Sons, Inc.
> Plain City, Utah
> Gentlemen:
> Tracts Nos. 95, 104 and 106, Willard Dam and Reservoir, W. JOHN MAW AND SONS, INC."

The other two copies were addressed to:

> "Grace B. Maw
> Plain City, Utah
> Dear Mrs. Maw:
> Tract Nos. 95, 104 and 106, Willard Dam and Reservoir, W. JOHN MAW AND SONS, INC."

The balance of each letter is identical and reads as follows:

"It is our understanding that you have executed a contract for the sale to the United States of Tracts Nos. 95, 104 and 106, Willard Dam and Reservoir.

This letter will assure you that the land purchase contract does not cover your other property in the Willard Bay area, and specifically your state leases, water rights, easements, licenses, duck club shooting privileges or land other than those described in the land purchase contract. Any such property interest which will be required in the construction of the dam or which will be damaged or destroyed will be appraised at a later date and an offer to purchase will be made.

Very truly yours,

s/d E. J. Fjeldsted
E. J. Fjeldsted
Manager"

Following the delivery of the letters the land purchase contract between the United States of America and Grace B. Maw and W. John Maw and Sons, Inc., dated July 15, 1957 (Plaintiffs' Exhibit D) was executed by the corporation and Grace B. Maw (R-39, p. 13). Article 3 of said contract (Plaintiffs' Exhibit D) provides:

"3. The Vendor shall sell and by good and sufficient deed with covenants of warranty convey to the United States free of lien or encumbrance, except as otherwise provided herein, the following described real estate situated in the Counties of Box Elder & Weber, State of Utah, to-wit: . . .

"3a. It is understood and agreed that the rights to be conveyed to the United States as described in article 3 hereof shall be free from lien

> or encumbrance except: (i) coal or mineral rights reserved to or outstanding in third parties as of the date of this contract; and (ii) rights-of-way for roads, (including the right-of-way granted to the Ogden Duck Club across Tract 95), railroads, telephone lines, transmission lines, ditches, conduits or pipelines, on, over or across said lands in existence on such date.

Subsequent thereto on September 19, 1957 a Warranty Deed (Plaintiffs' Exhibit E) was executed by the corporation and Grace B. Maw pursuant to the above land purchase contract.

The President of W. John Maw and Sons, Inc. later during the same year contacted Mr. E. J. Skeen respecting the shooting rights (R-39, Tr. 15). Mr. George Maw contacted Mr. J. Stuart McMaster, Field Solicitor of the Department of the Interior of the United States Government and received a letter (R-39, Tr. 17 and 18, Plaintiffs' Exhibit F).

On April 7, 1958 the Ogden Duck Club as grantor executed a Quit Claim Deed to Grace B. Maw and W. John Maw and Sons, Inc., as grantees, conveying all of its right, title and interest in and to the identical land conveyed by the Warranty Deed (Plaintiffs' Exhibit E) and the land described in the purchase contract with the United States (Plaintiffs' Exhibit D). The Quit Claim Deed made it possible for the Maws to obtain their settlement with the United States Government on their property (Eubank deposition, p. 54). The Ogden Duck Club excluded the Maws from the use of its facilities (Eubank deposition, p. 59).

This action was commenced against both the Ogden Duck Club and the Weber Basin Water Conservancy District to recover the value of duck shooting privileges. The trial court dismissed the complaint on a motion for a summary judgment. The plaintiffs appealed. This Court affirmed the District Court's holding that the Ogden Duck Club was not responsible for breach of contract (*George C. Maw* v. *Weber Basin Water Conservancy District and Ogden Duck Club,* 15 Utah 2d 271; 391 P.2d at page 301). Grace B. Maw and W. John Maw and Sons, Inc. are not parties plaintiffs herein. The Ogden Duck Club is no longer a party to the lawsuit and the United States of America has not been joined as a party defendant.

After the case was remanded for trial, the complaint was amended by adding allegations relating to the execution and delivery by the Ogden Duck Club of the Quit Claim Deed mentioned above and by adding a prayer for punitive damages. (R. 4, p. 4). The defendant moved to strike those portions of the complaint relating to the claims of grandsons and to punitive damages. (R. 7, p. 1). The motion was taken under advisement and was not ruled upon until the trial. A jury determined the fair market value of the shooting privilege of George C. Maw. The court entered judgment for George C. Maw for the amount so determined, but denied relief to the other plaintiffs. This appeal was taken by three of the seven grandsons of Annie C. Maw named in the complaint.

STATEMENT OF POINTS

1. THE PLAINTIFFS HAVE NO RIGHTS UNDER THE 1936 AGREEMENT AND THE TRIAL COURT DID NOT COMMIT ERROR WHEN IT REFUSED TO SUBMIT TO THE JURY THE ISSUE AS TO THE CONSTRUCTION OF THE AGREEMENT.

2. THE TRIAL COURT PROPERLY REFUSED TO SUBMIT TO THE JURY THE THIRD-PARTY BENEFICIARY ISSUE.

3. THE ISSUE ON PUNITIVE DAMAGES WAS PROPERLY EXCLUDED.

ARGUMENT

1. THE PLAINTIFFS HAVE NO RIGHTS UNDER THE 1936 AGREEMENT AND THE TRIAL COURT DID NOT COMMIT ERROR WHEN IT REFUSED TO SUBMIT TO THE JURY THE ISSUE AS TO THE CONSTRUCTION OF THE AGREEMENT.

The plaintiffs' claims for compensation for shooting privileges on the Ogden Duck Club area which they contend were taken from them by the defendant at the time of the construction of the Willard Bay Reservoir are predicated on the 1936 agreement. See appendix to the Appellants' Brief. None of the plaintiffs are parties to the agreement and none are successors in interest to

Annie C. Maw. None of the plaintiffs were landowners in the Willard Bay area. Their claimed rights are asserted as third-party beneficiaries under the 1936 agreement.

Each plaintiff is a grandson of Annie C. Maw — a son of each of Annie C. Maw's deceased sons who are named in the agreement which provides:

> ". . . In consideration of non-assessable shooting privileges on said shooting grounds of Grantees on days excepting the opening day, Saturdays, Sundays, and holidays, *to be enjoyed by, and hereby granted to, the sons of Grantor named as follows, to-wit:*
>
> *Wilmer J. Maw, Rufus J. Maw, Gilbert Maw, and George Maw,* Grantor agrees to maintain in a travelable condition the road which is a part of the right-of-way herein granted to Grantees, now existing in said Section 20, Township 7 North, Range 2 West, Salt Lake Meridian along the North rod of the East half of said section; provided that *in any year* the said Wilmer J. Maw, Rufus Maw, Gilbert Maw, and George Maw may designate one son for each thereof to shoot and enjoy the privileges hereunder in place of such son's father; but it is expressly understood that blinds on the shooting grounds of Grantees being used at any time by said sons shall be given up to members of the Ogden Duck Club upon request . . ." (Emphasis added).

The agreement specifically provides that the privileges are granted "to the sons of Grantor". The only reference to the grandsons is found in the proviso which reads:

> "... provided that *in any year* the said Wilmer J. Maw, Rufus Maw, Gilbert Maw and George Maw *may designate* one son for each thereof to shoot and enjoy the privilege hereunder in place of such son's father ..." (Emphasis added).

The intent is clear that the grant of privilege was to the sons of *Grantor* with the *right in any year* for the son to designate one of his sons to shoot in his place. It is further clear that after the death of a son there could be no designation *in any year,* so the privilege would be gone.

There is no evidence that any deceased son of Annie C. Maw designated a particular son to shoot in his place *in any year* or at all. There is no evidence that any plaintiff succeeded to the shooting privilege of his father, whether it be a property right, or a contract right, by will or by succession under state law. The evidence is undisputed that each deceased son of Annie C. Maw had two or more sons. (R. 39, Tr. 27-29). There is nothing in the record to show how the three plaintiffs were selected as the recipients of the shooting privileges out of a total of seven grandsons. The law is clear that property rights and contract rights can be transferred only by deed or assignment during lifetime, and by Will or by statutory succession after death. The record is entirely silent as to how the appellant, Orlo S. Maw, instead of his brothers, Eugene and Farrell (who did not appeal) obtained his right as a successor to Wilmer Maw; as to how the appellant, R. John Maw, instead of his brother Junior B. Maw (who did not appeal) obtained his right

as a successor to Rufus Maw; or as to how the appellant, Vadel T. Maw, instead of his brother Virgil B. Maw (who did not appeal) obtained his right as successor to Gilbert E. Maw.

The Trial Court found:

> ". . . 4. That said agreement dated December 29, 1936 does not by its terms or by interpretation nor usage established over a period of years, or at all, run to the benefit of each and all of the plaintiffs, but benefits only the plaintiff George C. Maw . . ." (Findings of Fact No. 4, p. 6 of findings, R. 38).

Although the trial court permitted the plaintiffs to adduce evidence as to usage, acts and conduct to show construction of the 1936 agreement by the parties, and testimony was given (R. 39, Tr. 19-30), the court made no finding that the agreement was ambiguous. He properly refused to submit to the jury the issue as to the meaning of the agreement. (R. 39, Tr. 57(c)). The court's finding quoted above is supported by the evidence. Its refusal to submit a legal issue to the jury is fully supported by the law.

The trial court held there was no jury issue present as to interpretation of the 1936 agreement:

> "THE COURT: And so we wouldn't give it to the jury anyway unless there was a conflict of facts.
>
> MR. FULLER: Well, we don't care on that just so long as it's well understood that there's

no conflict and the answer to that is yes, so that the court can take it from there."

(R39, p. 57(b))

In *Kimiko Toma* v. *Utah Power & Light Co.*, 12 Utah 2d 278, 365 P.2d 788, the rule allowing a court to take a matter from a jury is set out on page 193, P.2d, as follows:

". . . A judge is generally allowed to withdraw a case from a jury wherever there is insufficient competent, relevant and material evidence to support the issue, or where the evidence is contrary to all reasonable probabilities or is uncontroverted. . . ."

The same rule was announced by this Court in *Hall* v. *Blackham*, 18 Utah 2d 164, 417 P.2d 664, on page 666 P.2d:

"Where the trial is by jury it is the province of the court to decide question of law as distinguished from questions of fact. In the performance of that duty it is incumbent upon the court to instruct the jury on the law applicable to the theories of parties insofar as such theories are supported by some evidence. Where the evidence is such that all reasonable minds would agree, there is no substantial dispute and thus no issue of fact for the jury to determine, and the court rules as a matter of law."

"THE COURT: Well, let me state it this way, though. Is there any conflict of evidence for the jury to find anyway?

MR. FULLER: I don't think there's any conflict."

(R39, p. 57(a))

There being no conflict in the testimony, and hence no jury question, the court had the duty to determine the issue as a matter of law.

Unless there is ambiguity or uncertainty in a contract the court cannot consider extraneous evidence and is bound to enforce the contract in accordance with the intent expressed therein.

> Ephriam Theater Co. v. Hawk, 7 Utah 2d 163, 321 P.2d 221.

The plaintiffs do not point out any ambiguity or uncertainty in the 1936 agreement and we believe there is none. Their argument on this point is based entirely on certain general language in this Court's opinion on the previous appeal from an order granting a summary judgment for the defendants. This general language is as follows:

> "However, we cannot agree with the other conclusions of the court."

The Court then made the following significant statement to support its reversal of the summary judgment:

> "There can be no doubt that at the time the land purchase contract with the United States was executed, George C. Maw, one of the appellants and a named son in the 1936 'Right of Way Agreement' was entitled to the shooting privileges provided therein." *Maw* v. *Weber Basin Water Conservancy District*, 15 Utah 2d 271, 391 P.2d 300 at page 302.

This Court did not have before it on the previous appeal any testimony whatever and had before it no

findings and conclusions of the trial court. The legal effect of the reversal was to set aside a summary judgment and to direct that the case be tried on its merits. This Court did not tell the trial court how to decide the legal and factual issues which might or might not be encountered during the trial.

If the rights under this agreement are in the nature of an easement in gross in the shooting grounds of the Ogden Duck Club then such rights are so exclusively personal that they are not assignable or inheritable. They are so personal that they cannot take another in company with them. *Ernst* v. *Allen,* 55 Utah 272, 184 P. 827, 829. Even if the right be created by a document of conveyance it is personal to the named sons and is not assignable or inheritable. *Haynes* v. *Hunt,* 96 Utah 348, 85 P.2d 861.

The trial court permitted the plaintiffs to testify that they and their brothers had shot ducks on the Ogden Duck Club since the deaths of their fathers and that when they were boys they accompanied their fathers on duck hunts. (R. 39, Tr. 8, 9, 20-22, 25-30). Mr. Eubank testified that there was a very cordial relationship with the Maw family and that as a matter of courtesy they were permitted to shoot on the club. (R. 39, Tr. 36-38).

We quote:

> "We liked the boys. If the boys came out—I don't know of the younger boys ever shooting out there at the time when they were young. And if they did, I never saw them. But the facilities of the club was for the members. I mean, the inner

facilities of the club was for the members. I don't say that Rufus or Wilmer was never invited into the club house, because at times they were. But it was a purely social gesture on behalf of the members or some of the members who happened to have been there at that time."

"Q. Are you acquainted with R. John Maw and Vadel Maw who just testified?

A. I am with Vadel. I guess I know R. John. I don't know whether I do or not, to be honest with you. I know Vadel, yes.

Q. Do you recall either of the boys accompanying their fathers, shooting on the club at the same time as their fathers?

A. Personally I do not.

Q. Did the club ever extend any courtesies on the shooting?

A. Oh, sure. I mean, I don't think any of the boys were ever turned down if they came out there and wanted to go out to shoot, but it was a pure courtesy situation. I don't think there was ever a thought of a contract involved or anything else." (R39, Tr. 37-38)

The trial court properly held that this general evidence did not create any factual issue. (R.39, Tr. 57 a, b, c.). There were obviously many reasons for permitting the boys to shoot.

Orlo S. Maw, R. John Maw and Vadel T. Maw, the plaintiffs herein, were not parties to the 1936 agreement, but by their own self serving testimony are attempting to become beneficiaries of that agreement. Their interpretation of what they want the contract to be is not competent evidence. Their testimony is that

they hunted as soon as they were old enough, had worked for the club and stayed on the club with their friends and relatives who were the caretakers of the club (R. 39, pp. 20, 22, 23, 25, 26, 27 and 29). There is no evidence that the *parties* interpreted the 1936 agreement so as to extend the benefits thereof to plaintiffs herein.

To warrant the court in adopting a practical construction by the parties it is necessary that each party shall have placed the same construction on the contract. *Hodges Irr. Co.* v. *Swan Creek Canal Co.*, 111 Utah 405, 181, P.2d 217, 220.

Plaintiffs say that the letter of the defendant to W. John Maw and Sons, Inc. and Grace B. Maw is an admission that the grandsons of Annie C. Maw used the shooting grounds of the duck club and hence that they were beneficiaries under the 1936 agreement. The defendant was not a party to the agreement and its supposed interpretation is not material here. The letter does not contain any interpretations of the 1936 agreement at all. Likewise the letter from J. Stuart McMaster, Field Solicitor, U. S. Department of the Interior, to George C. Maw, is recited for the same purpose. The United States was not only not a party to the 1936 agreement and is not a party to this lawsuit, and obviously cannot aid the plaintiffs.

The evidence before the court was not in conflict and such that reasonable minds could not differ on its effect and the court correctly held there was no jury

issue and correctly held that the plaintiffs were not beneficiaries under the 1936 agreement.

The trial court's refusal to submit the contract construction issue to the jury, and its finding that sons of deceased sons have no rights under the 1936 agreement must be sustained because, (1) the plaintiffs have not proved that they are successors in interest of the right to shoot or were designated by the deceased sons as recipients of the rights; (2) the 1936 agreement is not ambiguous and grants no right to sons of deceased sons after the death of such deceased sons, and (3) there was no competent extraneous evidence that the plaintiffs were intended to succeed to the shooting privileges.

2. THE TRIAL COURT PROPERLY REFUSED TO SUBMIT TO THE JURY THE THIRD-PARTY BENEFICIARY ISSUE.

At the conclusion of the trial the plaintiffs requested the court to submit to the jury the following special interrogatory:

> "2. Did Orlo Maw, at the time he executed the sale of the lands in the Willard Bay area, enter into an agreement with the Weber Basin Water Conservancy District whereby the latter agreed to pay for 'shooting privileges' of Maw family members other than George C. Maw?"

This request was denied.

The plaintiffs argue under Point II of their brief (p.26) that the Fjeldsted letter, dated July 5, 1957, con-

stitutes an agreement to pay for shooting privileges of grandsons, Orlo Maw, R. John Maw and Vadel T. Maw whether or not they actually had shooting privileges under the 1936 agreement. Their theory is that the letter evidenced a new contract that created new rights in the appellants to shoot ducks on the Ogden Duck Club. See p. 34 of Appellants' Brief where it is stated:

> "At this juncture it should be pointed out that, even if some doubt could have existed as to whether or not the Maws of the second generation, i.e., the grandsons of Annie C. Maw, were entitled to the duck club shooting privileges, that doubt was resolved and a new contractural arrangement was entered into by the Weber Basin Water Conservancy District in the form of a third-party beneficiary contract. This is so because W. John Maw and Sons, Inc. gave up its rights to litigate the matter of compensation in a court of law in exchange for the recognition and protection of the duck shooting privileges in the Ogden Duck Club . . ."

This claim was not pleaded and was not included in any pre-trial discussion until November 21, 1966, eight days before the trial. (R. 39, Tr. p. 4).

The letter (Pl. Ex. C) contains no language which by the greatest stretch of imagination can be construed to support such a contention. It must be recalled that it is addressed to W. John Maw and Sons, Inc. and to Grace B. Maw, the owners of the land acquired by the United States for the Willard Bay Reservoir. It says in the second paragraph:

> "This letter will assure that the land purchase contract does not cover your other property interests in the Willard Bay Area, and specifically your state leases, water rights, easements, licenses, duck club shooting privileges, or lands other than those described in the land purchase contract. Any such property interests which will be required in the construction of the Dam or which will be damaged or destroyed will be appraised at a later date and an offer to purchase will be made."

It will be noted that in line two of the excerpt it refers to "your other property interests in the Willard Bay Area." Clearly these are existing property interests, and there is no intention expressed in the letter to create new "property interests" including duck shooting privileges. Furthermore, it is obvious that the District had no authority to create duck shooting privileges in the Ogden Duck Club (over which it had no control) for the sole purpose of taking them for the project and of paying for them. The mere statement of the plaintiffs' argument refutes it.

The letter simply and clearly states that the land purchase contract does not cover state leases, water rights, easements, licenses, duck club shooting privileges or lands other than those described in the contract, and further, that if such property interests are required for the project they will appraised and an offer to purchase will be made. The plaintiffs do not contend that the land purchase contract actually covers the duck shooting privileges, but they claim that in some myster-

ious way that the letter *created* duck shooting privileges in grandsons, who as shown above, are not beneficiaries of the 1936 agreement and are not mentioned in the letter.

The testimony of Orlo S. Maw (R. 39, Tr. 5-16) does not support the third-party beneficiary contract theory of creation of new rights to be paid for by the District. Judge Cowley properly held that as a matter of law the Fjeldsted letter did not create new property rights but obligated the District only to pay for the existing George C. Maw right. The jury was instructed to determine the value of the George C. Maw right. The value was found to be $2040.00 as of the date of taking. This amount with interest was paid and the significance of the Fjeldsted letter has now become moot.

3. THE ISSUE OF PUNITIVE DAMAGES WAS PROPERLY EXCLUDED.

The claim for exemplary or punitive damages herein is contained in paragraph 10 of the Amended Complaint (R. 4). The defendant moved to strike paragraph 10 and paragraph 2 of the prayer of the amended complaint (R. 7). At the pre-trial on November 21, 1966 the court ruled as follows:

> THE COURT: ". . . And what next? Punitive damages?
>
> MR. SKEEN: On the matter of punitive damages you remember I briefed the question very fully, and if this is a contract theory the law is pretty clear that you can't give punitive damages.

THE COURT: Well, I'm going to hold for you on that and let Mr. Fuller take his exception to it, make his record.

MR. FULLER: Alright." (R. 38, p. 4).

The issue of trespass upon and destruction of property rights was not pleaded.

Assuming as we must that the allegations contained in the amended complaint are true, then the acts relied upon in paragraph 10 are:

> "Defendant caused to be prepared a quit claim deed from the Ogden Duck Club to *W. John Maw and Sons and Grace B. Maw of the identical real properties included in the original warranty deed from them to the United States of America* . . . but the same was not at any time delivered to . . . the grantees . . . defendant caused said deed to be recorded, but did so for the sole and exclusive purpose of clearing the title of the United States . . . upon recording said deed and by the Doctrine of after-acquired title . . . all the *real property rights* of W. John Maw and Sons, Inc. and Grace B. Maw, or either of them, or *of any of the plaintiffs herein, thereby became extinguished.*" R. 4, p. 4). (Emphasis added.)

From and after the date of the Warranty Deed to the United States dated September 19, 1957 (Plaintiffs' Exhibit E) the Maws did not own any right, title or interest, or right of possession of the property over which the right of way of the Ogden Duck Club ran. The rights of the Ogden Duck Club conveyed to W. John Maw and Sons Inc. and Grace B. Maw by the

Quit Claim Deed dated April 8, 1958 (Plaintiffs' Exhibit B, under offer of proof in the prior appeal) passed by the after-acquired title doctrine to the United States.

The plaintiffs were not parties to the land purchase contract, Warranty Deed or the Quit Claim Deed and if they had any rights in such land they still have such rights for strangers could not convey their rights.

For plaintiffs to sustain a claim that defendant is trespassing on or has destroyed their property rights they must affirmatively show that they had a property right involved. See 52 Am. Jur. *Trespass* Sec. 21, p. 851, 87 C.J.S. Trespass, Sec. 21, P. 972. In *Salt Lake City* v. *East Jordan Irrigation Co.,* 40 Utah 126, 121 P. 592, 598 this court announced the following rule:

> "In making compensation for taking or damaging property by the exercise of the right of eminent domain, two elements must be considered: (1) is there *any property taking or damaged* in fact; and (2) if so, what is the value in dollars, or in case it is only damaged, what is the money value of the damage sustained by the *owner* thereof? . . ." (Emphasis added).

In *State* v. *Tedesco,* 4 Utah 2d 31, 286 P.2d 785, 786, the rule is stated:

> "The defendant can prevail here only if the facts clearly establish that it has a present, direct and real interest in the lands thought to be condemned by the State and defendant concedes this is so . . ."

And later on page 788:

> "We believe and hold that to graft charges onto and create interest in real property, which is the subject to condemnation, there must be clear and convincing evidence establishing such charge or interests, . . ."
>
> See *State* v. *Valentine*, 10 Utah 2d 132, 349 P.2d 321, and *Utah Road Commission* v. *Hansen*, 14 Utah 2d 305, 383 P.2d 917.

The only allegation of property rights of plaintiffs is in paragraph 10 of the amended complaint, the crux of which is:

> "Defendant, acting . . . in concert with . . . the United States of America, Bureau of Reclamation, did fraudulently, unlawfully and maliciously attempt to deprive plaintiffs of their rights and properties hereinabove set forth . . ."

The prior paragraphs of the amended complaint discloses: (1) that Annie C. Maw entered into an agreement with the Ogden Duck Club dated December 29, 1936, wherein the named sons of Annie C. Maw were entitled to shooting privileges in consideration of the granting to the Ogden Duck Club of a certain right-of-way across the lands owned by Annie C. Maw; (2) that the successors in interest of Annie C. Maw are W. John Maw and Sons, Inc. and Grace B. Maw; (3) "Plaintiff Orlo S. Maw, acting as President of W. John Maw and Sons, Inc. and acting for and on behalf of the other plaintiffs, entered into the land purchase contract with the United States in reliance on the assurance and promise . . . set forth in Exhibit B and would not have entered into said contract except for the assurances and promises . . .

Plaintiffs acted to their damage''; and (4) the amount of damages claimed by the plaintiffs.

To recover under the first 9 paragraphs of the amended complaint the plaintiffs must (1) establish a right under the 1936 agreement; (2) the right was lost by the conveyance of the property to the United States of America; (3) and are third-party beneficiaries under the letter from defendant (Plaintiffs' Exhibit D). The allegations of the amended complaint establish that the only claim against defendant is upon the assurances and promises contained in its letter to W. John Maw and Sons, Inc. and Grace B. Maw, as third-party beneficiaries and the alleged damages for failure to perform.

> ''A suit or action upon the contract ordinarily will not afford an opportunity for a recovery of punitive damages.'' *Weber* v. *Austin,* 184 Ore. 586, 200 P.2d 593-599.

''. . . it is settled that punitive damages may not be awarded . . . in an action based on breach of contract even though defendant's breach was wilful or fraudulent.'' *Contractor's Safety Association* v. *California Compensatory Ins. Co.,* 48 Cal.2d. 71, 307 P.2d 628-629. See also 25 C.J.S., *Damages,* Sec. 120, p. 1128; 22 Am. Jur. 2d, *Damages,* Sec. 245, p. 337. This Court adopted the above rule in *Graham* v. *Street,* 14 Utah 2d 144, 270 P.2d 458.

In *Mayberry* v. *Western Casualty & Surety Co.,* 173 Kan. 586, 250 P.2d 824, 830, the exception to the rule is stated:

> "Here, as in that case, no tortious act is alleged to have been committed in connection with the alleged breach of contract, and, as there said, the mere use of words such as, 'wilfully, wantonly, fraudulently and oppresively' standing alone, is not a substitute for essential allegations disclosing wanton and malicious conduct . . ."

There is no allegation in the amended complaint of any independent tortious activity in connection with the breach of contract, and no disclosure of any compensatory damages suffered by plaintiffs by the acts complained of in paragraph 10. Since there is no offer of proof that plaintiffs have sustained any compensable damage because of the execution and recording of the Quit Claim Deed the rule announced in *Graham* v. *Street*, supra, at page 459, P.2d, is applicable:

> ". . . the general rule is that there can be no punitive damages without compensatory damages based on the tort. *Gilham* v. *Devereaux*, 67 Mont. 75, 214 P. 606, 33 A.L.R. 381. And see *Falkenburg* v. *Neff*, 72 Utah 258, 269 P. 1008; *Evans* v. *Gaisford*, 122 Utah 156, 247 P.2d 431; and cases cited in annotation in 33 A.L.R. 384. Hence, the failure to allege and prove a tort giving rise to compensatory damages vitiates the claim for punitive damage."

The amended complaint in paragraph 10 claims that plaintiffs should be awarded punitive and exemplary damages and this is carried into the prayer of said complaint. "Generally jurisdictions which allow awards of exemplary damages have a rule that there is no cause of action for exemplary damages alone." 22 Am. Jur.

2d, *Damages,* Sec. 241, page 328. See also the annotation, 17 A.L.R. 2d 518 *et seq.*

The plaintiffs have not alleged that defendant committed any tortious act against them. Eliminating all the extraneous matter it appears that the whole thrust of the claimed unlawful acts are, that someone misinformed the Ogden Duck Club that it was necessary to obtain a Quit Claim from it to W. John Maw and Sons, Inc. and Grace B. Maw so they could obtain their settlement with the United States, and obtained and recorded the deed without knowledge of the plaintiffs or W. John Maw and Sons, Inc. and Grace B. Maw.

Appellants contend that such acts were unlawful, fraudulent and malicious and constitute a fraud upon the grantees of said Quit Claim Deed. If so then, the grantees of such deed, W. John Maw and Sons, Inc. and Grace B. Maw are the persons defrauded but they are not parties to this action. The plaintiffs are strangers to the Warranty Deed to the United States and the Quit Claim Deed from the Ogden Duck Club and as strangers have no right to delivery of the deed, nor do they have any objection to its recording. Since they did not have the right to have the deed delivered to them as strangers it is difficult to see how any handling thereof could in any way affect them.

The plaintiffs have not pleaded facts upon which a claim upon which punitive damages could be awarded. and the trial court properly struck pragraph 10 and paragraph 2 of the prayer from the Amended Complaint.

CONCLUSION

The trial court's disposition of this case must be sustained because, (1) the 1936 right-of-way agreement does not grant duck club shooting privileges for the benefit of sons of deceased sons of Annie C. Maw, (2) the findings of the trial court that the 1936 agreement as interpreted by usage established over a period of years does not benefit the plaintiffs is fully supported by competent evidence, (3) the Fjeldsted letter did not create new duck hunting privileges for the benefit of the plaintiffs as third-party beneficiaries and (4) the issue of punitive damages was properly excluded.

We respectfully submit that the judgment appealed from must be affirmed.

NEIL R. OLMSTEAD
E. J. SKEEN
REID W. NIELSON

Attorneys for Respondent