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George C. Maw et al v. Weber Basin Water Conservancy District and Ogden Duck Club : Brief of Respondent

Utah Supreme Court

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

FILED

OCT 4 - 1963

**GEORGE C. MAW, W. EUGENE
MAW, ORLO S. MAW and FER-
RELL J. MAW, R. JOHN MAW
and JUNIOR B. MAW, VIRGIL
G. MAW and VADEL T. MAW,**

Plaintiffs and Appellants,

vs.

**WEBER BASIN WATER CON-
SERVANCY DISTRICT and
OGDEN DUCK CLUB, a Utah
Corporation,**

Defendants-Respondents.

Court, Utah

**Civil No.
9950**

RESPONDENT'S BRIEF

**Appeal from the Judgment of the
Second District Court for Weber County
Hon. John F. Wahlquist, Judge**

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RESPONDENTS' BRIEF

The respondents do not agree with the statement of facts set forth in the appellants' brief. Much of the statement is contrary to the record and other parts are merely arguments. For example, appellants' first assertion under the hearing "Statement of Facts" is:

“Since plaintiffs sustained a dismissal of their complaint *without being afforded the opportunity of presenting the facts to a jury*, they are entitled under the well-established rules of law to have this court consider the evidence which is now in the record and which they might reasonably otherwise contend would be established, in the light most favorable to themselves.” (Emphasis added).

The transcript of the trial discloses that many times the court offered to empanel the jury and to hear the evidence in support of the appellants’ position, and each time the offer was refused. (Tr. 10, 15, 16, 18, 30, 33, 34, 36, 39 and 40).

RESPONDENTS’ STATEMENT OF FACTS

On December 29, 1936, Annie C. Maw designated as “Grantor” and Ogden Duck Club, a corporation, and its members, designated “Grantees”, entered into the following agreement hereinafter referred to as the “1936 agreement”:

RIGHT-OF-WAY AGREEMENT

THIS AGREEMENT made between ANNIE C. MAW of Plain City, Weber County, Utah, Grantor, and OGDEN DUCK CLUB, a Utah corporation, and its members, Grantees.

W I T N E S S E T H :

Whereas, Grantor is owner of lands in Sections 20-17-18, Township 7 North, Range 2 West, Salt Lake Meridian, as now appears of record in the offices of

the County Recorders of Weber and Box Elder Counties, State of Utah; and

Whereas, Grantees and their predecessors in interest are now, and have been, using said lands for many years for right-of-way purposes;

Now therefore, in consideration of \$1.00 in hand paid and other valuable consideration, receipt of which is hereby acknowledged and the matters herein recited, 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, Township 7 North, Range 3 West, Salt Lake Meridian, and the shooting grounds of Grantee lying North of the above described lands and other lands now owned by Grantor, and to construct and maintain a ditch, or ditches, at expense of Grantees, in said Section 18, Township 7 North, Range 2 West, Salt Lake Meridian, for the purpose of conducting water thereon, over, and to said Club House and grounds of said Grantees. This grant shall be exclusive to Grantees as to the purposes herein expressed except as to Grantor and the members of her family hereinafter mentioned so long as Grantees and any successors shall maintain said Club House and shooting grounds for the purpose of shooting wild fowl.

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.

In consideration of the feed and grazing benefits to be enjoyed and hereby granted by the Ogden Duck Club to Grantor or her successors on lands controlled by said Ogden Duck Club and its successors in the vicinity of lands owned by Grantor, Grantor agrees to back up all surplus water of the two creeks running through lands of the Grantor above the present dam located on the North side of the Northeast quarter of said Section 20, and to turn water loose through said dam at the pleasure of Grantees.

This agreement shall be binding upon the heirs and assigns of the Grantor and the successors and assigns of the Grantees.

Annie C. Maw
Grantor

OGDEN DUCK CLUB, a Corporation
Grantee

By: A. W. Hestmark
President

By: W. H. Reeder Jr.
Secretary

(duly acknowledged)

Plaintiff George C. Maw is a son of Annie C. Maw, the grantor under the contract quoted above; plaintiffs W. Eugene Maw, Orlo S. Maw and Farrell J. Maw are sons of Wilmer J. Maw, a deceased son of Annie C. Maw; R. John Maw and Junior B. Maw are sons of Rufus J. Maw, a deceased son of Annie C. Maw; plaintiffs Virgil B. Maw and Vadel T. Maw are sons of Gilbert E. Maw, a deceased son of Annie C. Maw. The sons of Annie C. Maw were Wilmer J. Maw, Rufus J. Maw and Gilbert E. Maw, all of whom are now deceased. George C. Maw is the sole surviving son of Annie C. Maw.

The allegations and admissions in the pleadings establish that the United States determined that it was necessary to acquire the land crossed by the road described in the 1936 agreement set out above, for the construction of the Willard Bay reservoir, a part of the Weber Basin project. (R. 2, 39, 40 and 42). Such land was purchased by the United States from W. John Maw and Sons, Inc., a corporation, and Grace B. Maw. (R. 3). The road to the duck club was obliterated and destroyed as a result of construction activities on the Willard Bay reservoir. (R. 3, 40, 42).

The defendant Ogden Duck Club moved its club house about a mile and a half due west. (R. 46). No further use was made of the road mentioned in the agreement. The Duck Club secured an alternate route. (R. 49, 50).

On July 5, 1957, Mr. E. J. Fjeldsted, manager of

the defendant Weber Basin Water Conservancy District, wrote the following letter to W. John Maw and Sons, Inc.:

**WEBER BASIN WATER CONSERVANCY
DISTRICT**

W. John Maw and Sons, Inc.
Plain City
Utah

Gentlemen:

Tract Nos. 95, 104, and 106
Willard Dam and Reservoir
W. JOHN MAW AND SONS, INC.

It is our understanding that you have executed a contract for the sale to the United States of tract 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 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.

Yours very truly,

/s/ E. J. FJELDSTED
E. J. FJELDSTED
Manager

On or about April 7, 1958, the Ogden Duck Club executed a Quit Claim Deed to W. John Maw and Sons, Inc., and to Grace B. Maw, describing a portion

of the land traversed by the duck club road. (See Ex. B).

The duck club has excluded the Maws from the club facilities. (R. 59).

The defendants moved to dismiss the complaint on the ground that it fails to state a claim upon which relief can be granted. (R. 11). This was denied by Judge Cowley. (R. 12).

When the case was called for trial with the jury present in the courtroom Judge Wahlquist inquired as to whether there had been any change of position and the court and counsel discussed at some length the questions of law involved, particularly those relating to the 1936 agreement and the Fjeldsted letter set out above. The court indicated what the rulings would be on questions of law and many times offered to empanel a jury and to hear evidence. These offers were refused by the plaintiffs. Details and references to the transcript concerning these offers will be supplied in connection with the defendants' argument. The plaintiff offered in evidence Exhibits A, B, C, D, and E, consisting respectively of several copies of the Fjeldsted letter, Quit Claim Deed, land purchase contract, the Solicitors' letter and a map. (R. 38). No formal offer of other proof was made.

The trial court made findings of fact based upon the pleadings and exhibits, and by written judgment ordered the complaint dismissed with prejudice.

STATEMENT OF POINTS

1. The plaintiffs have no rights under the 1936 agreement.
2. The plaintiffs were not denied the right to adduce evidence in support of their contentions.
3. The Weber Basin Water Conservancy District is not illegally trespassing on plaintiffs' lands and rights.
4. There was no proof of estoppel against the Weber Basin Water Conservancy District.
5. There was no breach of contract by the Ogden Duck Club.

ARGUMENT

1. THE PLAINTIFFS HAVE NO RIGHTS UNDER THE 1936 AGREEMENT.

The plaintiffs predicated their case against both the Weber Basin Water Conservancy District and the Ogden Duck Club upon the 1936 agreement. The complaint alleges the execution of the agreement (paragraph 2), the relationship of the various plaintiffs with Annie C. Maw, signer of the agreement (paragraph 3), the obliteration and destruction of the duck club road (paragraph 6), and the breach of the agreement (paragraphs 7 and 8). The allegations of the complaint which relate to estoppel (paragraph 4, 5 and 9) have refer-

ence to the shooting privileges claimed under the 1936 agreement. See complaint (R. 1-8). The plaintiffs' statement of legal theories (R. 30-32) clearly indicates that the claims asserted are based on the 1936 agreement. The only shooting privileges involved are those set out in the agreement.

When the case was called for trial the court very properly proceeded to examine the contract to determine whether the plaintiffs had a cause of action under the 1936 agreement. The first point considered by the court was whether the grandsons of Annie C. Maw had rights under the agreement. It will be noted that the following language covers this subject:

“ . . . 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 th 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 upon the death of a son there could be no designation *in any year*, so the privilege would be gone. The court held that the language was not ambiguous and that the privileges were granted to the sons. (Tr. 10). The complaint (paragraph 2) alleges that all of the sons named in the agreement except George are dead. The only plaintiff who could therefore have a claim under any theory was George C. Maw.

The next point considered was whether the shooting privileges were conditioned by the terms of the 1936 agreement upon the performance of certain acts by the sons of the Grantor. The language is that:

“ . . . In consideration of non-assessable shooting privileges . . . Grantor agrees to maintain in a travelable condition the road . . . 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 . . . ”

It is alleged in the complaint that the road used to travel to the duck club was obliterated and destroyed and “through other arrangements and/or negotiations, . . . defendant duck club secured an alternate route . . . ” (R. 3). It was admitted by the plaintiffs’ counsel that the club house was moved about a mile to the west and that the road which the Maws agreed to maintain could no longer be used. (Tr. 25, 30). Counsel further agreed that the moving of the club house was caused by federal action, that there was no malice involved and that continued performance of the agreement to maintain the road was impossible. The court’s offer to empanel the jury and take further evidence on this point was refused:

“THE COURT: Conceding that the movement of the club house was caused by Federal action and the abandoned useable purpose of the road would be by federal action, no malice or breach of contract or anything else, because of that. It would appear that continued performance of it would be impossible.

MR. FULLER: It would appear that the continued performance, you mean by the Duck Club?

THE COURT: Yes. To use the road or for them to maintain the road.

MR. FULLER: In other words, it would excuse both parties.

THE COURT: Yes.

MR. FULLER: I think that is our lawsuit right here at this point.

THE COURT: You want to empanel the jury, then come back at 2 o'clock and see if you can change my mind?

MR. FULLER: We can't produce any evidence to change your mind.

THE COURT: Would it be correct as I said your position is such that the evidence will not give to this document any special or unreasonable meaning?

MR. FULLER: Other than what you have before you right now, we can't give you anything else.

THE COURT: Any special or unreasonable nature?

MR. FULLER: That is right." (Tr. 35, 36).

The trial court correctly held that the 1936 agreement is not ambiguous. However, the court repeatedly offered to empanel the jury and to permit the plaintiffs to adduce evidence as to possible mutual mistake (Tr. 10, 15, 16, 18); special or unusual meaning of the agreement (Tr. 36, 39, 40); and that something else was intended (Tr. 30, 33, 34). Counsel for the plaintiffs in each instance declined to adduce evidence, stating that he could not produce further evidence.

Following is the trial court's ruling with well-stated supporting reasons:

"THE COURT: The Court rules as follows:

the Court rules that the shooting privileges arrived at under what is market Exhibit A, the shooting privileges were a part of an overall agreement contained in what is entitled "right of way agreement," that the right of way agreement is an instrument defining multiple rights to different individuals named therein, that part of the consideration for each obligation is contained in each and every paragraph of the contract, in other words, I find that paragraph beginning in the consideration of non-assessable privileges was not an entirely separate agreement, it was tied in with the entire agreement, but that *non-assessable* shooting privileges arrived at under this agreement is a right to shoot in return for the obligation to maintain the road in a travelable condition, that on the first day of the instrument there is no ambiguity in this matter, that the parties are in agreement, and, that the club house has been moved as a result of Federal action in the construction of a large Federal Dam, that the right of way referred to in said paragraph is no longer used by this Duck Club, and that the right of way used by the Duck Club is no longer in anyway maintained by the grantors in this instrument, that they agree that said movement of the location of the Duck Club was not for malice or any reason other than the compulsory action brought about by the construction of the Federal dam, that if these are the only facts involved, non-suit should be granted." (Tr. 38, 39).

The ruling of the court gives effect to the intention expressed in the contract and is supported by the law.

It will be noted that at the end of the first para-

graph following the "Whereas" provision, the agreement provides:

"This grant shall be exclusive to Grantees as to the purposes herein expressed except as to Grantor and the members of her family hereinafter mentioned so long as Grantees and any successors shall maintain said Club House and shooting grounds for the purpose of shooting wild fowl."

It was expressly stated that the parties intended the agreement to remain in effect only so long as (1) the club house was maintained, and (2) the shooting grounds were maintained for the purpose of shooting wild fowl. It may fairly be implied that the agreement was to be effective only so long as the club house and shooting grounds were maintained *in the same location*. It would be absurd to assume that the club would intend that they would use a road which did not lead to the club house, and that the Maws would be required to "maintain in a travelable condition" a road which was not used by the club.

When the duck club road was destroyed in the construction of the Willard Bay dam and reservoir the 1936 agreement was terminated as a matter of law. The applicable rule of law is stated as follows:

"Where from the nature of the contract, it is evident that the parties contracted on the basis of the continued existence of the person, thing, condition, or state of things, or of facts, to which it relates, the subsequent perishing of the persons or thing, or cessation of existence of the

condition or state will excuse the performance, or terminate the contract, a condition to that effect being implied, in spite of the fact that the promise may have been unqualified. The rule has been limited to the situation where neither party is at fault and neither has assumed the risk. It has been referred to as the doctrine of supervening impossibility of performance." 17A C.J.S., pages 621, 622.

La Cumbre Golf and Country Club v. Santa Barbara Hotel Co., 271 P.2d 476, 205 C. 422; Johnson v. Atkins, 127 P. 1027, 1030, 53 C.A. 2d 430; Dairy Food Store v. Alpert, 3 P 2d 61, 116 C.A. 670.

The LaCumbre Golf and Country Club case involved a factual situation very similar to that in the instant case. A hotel company agreed to pay to a golf and country club \$300.00 a month for the privilege of having its guests enjoy the benefits of the club. The hotel burned down and the golf and country club nevertheless sued for the \$300.00 per month due under a written contract, claiming that the contract gave them an unqualified right to the money. The court held that the principle stated above applied, that the contract was based upon the assumption that the hotel would continue to be in existence and that there was an implied condition that if the hotel ceased to exist, the contract would be terminated.

There is no provision in the contract for its termination except the one quoted above, and *there is no provision requiring the duck club to continue to maintain its club house in the same location or to continue*

to maintain any shooting grounds for the purpose of shooting wild fowl. The location could be changed without imposing any liability on the club. The Maws had no contract right or other right to have the status quo maintained.

In the case of Southern Pacific Company, et al, v. Spring Valley Water Company, et al, 173 Cal. 291, 159 P. 865, the plaintiff entered into a written contract with the defendant permitting the defendant to lay and maintain a water line within the railroad right-of-way and in consideration thereof the water company agreed to permit the railroad company to have use of the water in the line for railroad purposes. The contract was silent as to the duration of the right. In a suit involving the relative rights of the parties, the court held as follows:

“The water works could, at any time, change the route of its main to other lands without violating the contract, and would thereafter have been relieved of the burden. The waterworks was authorized to own, sell, and distribute water to public use, and the water in question was a part of the water supply which it held, managed, and controlled for that purpose. It could at any time, by purchase, or if necessary, by condemnation suit, acquire a new route for its main. But so long as it maintained the route given, the right of plaintiffs was a burden or servitude thereon which entitled them to take and use water from the main to the quantity necessary for the purposes specified.”

There is nothing whatever in the 1936 agreement

which would prevent the duck club from moving its club house and the change of location did not constitute a breach of contract.

2. THE PLAINTIFFS WERE NOT DENIED THE RIGHT TO ADDUCE EVIDENCE IN SUPPORT OF THEIR CONTENTIONS.

The first point argued by the plaintiffs and appellants in their brief is that they should have been "permitted to put on evidence to a jury establishing a third-party beneficiary contract liability against the Weber Basin District." In support of this point the plaintiffs claim that by writing the letter to W. John Maw and Sons, Inc., dated July 5, 1957, (Pl. Ex. A) the Weber Basin Water Conservancy District entered into a third-party beneficiary contract for the benefit of the plaintiffs which entitled plaintiffs to duck club shooting privileges. (See Appellants' Brief, pp. 12-20). Although the heading under which this argument by the plaintiff is made implies that the trial court refused to permit the plaintiffs to put on evidence in support of this point, there is no argument to this effect in the plaintiffs' brief. There is no claim made that the plaintiffs made any offer of proof on this subject which was refused by the court. The fact is that the letters of July 5, 1957 and September 11, 1955 were actually received in evidence (Exhibits A and D). No argument of the third-party beneficiary theory was made to the trial court.

The court offered to empanel the jury and to per-

mit the plaintiffs to call witnesses to testify. The offer was declined not once, but many times. When the Fjeldsted letter, Exhibit A, was offered in evidence the court and counsel made the following statements:

“THE COURT: That is, evidence alone would not justify a different interpretation of the instrument than appears on its face, it would not carry the burden of proof necessary to give it special or unusual difference. If you want to put your evidence in so I can hear it, I will let you do it, or you can stand on your record and go up.

MR. FULLER: We have Exhibit A that we are offering and it consists of three originals and two executed copies of the letter from Mr. Fjeldsted, and we offer it.

MR. SKEEN: No objections.

THE COURT: It will be received in evidence. Do you want to proceed and see if you can construe this document because it sets special circumstances, or do you want to stand on your ground?

MR. FULLER: I don't think we can show the special circumstance on it other than we have indicated in these arguments.” (Tr. 40, 41).

At another point in the argument the following statements were made:

“THE COURT: I will do this. It would appear to me right now, suppose I do this, let you proceed with your evidence, empanel the jury and see the evidence. I will study it more during the lunch period, take it under advise-

ment until two o'clock, and let you proceed until then on the theory that you are going to show this is an ambiguous instrument and maybe you can come up with some authority or some other persuasion, or two. I will do that.

MR. FULLER: We have no authority. We are going to stand at this point right on the contract. So you can make your ruling accordingly, Your Honor." (Tr. 33, 34).

The record simply does not support plaintiffs' contention that they were not permitted to put on evidence in support of their case. No record was made to raise the question on appeal as to the merits of the third-party beneficiary theory.

3. THE WEBER BASIN WATER CONSERVANCY DISTRICT IS NOT ILLEGALLY TRESPASSING ON PLAINTIFFS' LANDS AND RIGHTS.

The plaintiffs' second point is that "the Weber Basin Water District is even now illegally trespassing on plaintiffs' lands and rights." The argument is that because the land purchase contract, dated July 15, 1957, between the United States and Grace B. Maw and W. John Maw and Sons, Inc., contains a provision to the effect that title to some 988.23 acres of land shall be free from lien or encumbrance except: "... rights of way for roads (including the right of way granted to the Ogden Duck Club across tract 95 . . . ", (See Exhibit C) and because a quit claim deed was made by the Ogden Duck Club to W. John Maw and Sons,

Inc., and Grace B. Maw (Plaintiffs' Exhibit B), and because one William H. Wilcox, who plaintiffs claimed was an employee of the Weber Basin Water Conservancy District (a fact on which the record is silent) recorded the deed, the Weber Basin Water Conservancy District "is in fact a constructive trustee of the right of way property for the Maws." It is then argued that "since the right-of-way has been obliterated and the land made useless, the Weber Basin District should respond in damages both for the value of the shooting privileges which are tied to the right-of-way and also punitive damages." See Appellants' Brief, pp. 20-24).

We are reminded of an argument in the case of *Aetna Life Insurance Co. v. Wertheimer*, 64 F. 2d 438, 439, about which the court said:

"It is so tenuous that it eludes analysis and so insubstantial that it merits no discussion."

The right-of-way which was excepted from the land purchase contract ran to the Duck Club and crossed lands which were sold by W. John Maw and Sons, Inc., and Grace B. Maw to the United States. The deed was from the Duck Club to the Maws. No offer of proof was made to show the connection, if any, of the plaintiffs and the Weber Basin District with these instruments to which they were not parties. No offer of proof was made to present facts regarding any trespass. There was no issue in the pleadings on the subject, and this all appears to be an after thought urged for the first time on appeal. It is entirely without merit.

4. THERE WAS NO PROOF OF ESTOPPEL AGAINST THE DISTRICT.

The plaintiffs contend in the heading of their argument that "the facts raise an estoppel against the Weber Basin District," but it is not pointed out what facts are relied upon to prove estoppel. The argument in the plaintiffs' brief consists of a reference to the case of Weber Basin Water Conservancy District v. Hislop (which had nothing to do with estoppel), a quotation from the case of Kelly v. Richards, setting out the elements of estoppel, and a rambling discussion of the 1936 agreement particularly with reference to the question whether the grandsons are beneficiaries. We have discussed the 1936 agreement under our first point.

Although the Fjeldsted letter as a basis for estoppel is not mentioned in the appellants' brief, it was relied upon in arguments by plaintiffs' counsel at the trial. We point out that the letter is simply a statement that the land purchase contract between the United States and W. John Maw and sons, Inc., and Grace B. Maw does not cover any property interests in the Willard Bay area other than the land specifically described and specifically does not cover the state leases, water rights, easements, licenses and duck club shooting privileges. Mr. Fjeldsted then said that 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 of purchase will be made."

It is not contended by the plaintiffs that any state-

ment in the letter was false. The very first element of estoppel referred to in the case of *Kelly v. Richards*, 95 U. 506, 83 P. 2d 731, cited and quoted from in appellants' brief, p. 27, is therefore missing. The plaintiffs obviously did not make a case on this theory.

5. THERE WAS NO BREACH OF CONTRACT BY THE OGDEN DUCK CLUB.

The last point urged by the plaintiffs is that the Ogden Duck Club should respond in damages for breach of contract. The contract relied upon is the 1936 agreement which we have discussed at length above. The plaintiffs did not, by oral or written evidence, prove or offer to prove the failure of the duck club to perform any act it had agreed to perform. When the location of the club house was changed, this terminated the 1936 agreement.

On page 35 of the appellants' brief reference is made to Rule 52, Utah Rules of Civil Procedure, and a question is raised as to the reason findings of fact and conclusions of law were signed and filed. Although this point is not included in the plaintiffs' statement of points, we take this opportunity to explain why these documents were prepared and submitted to the court. It will be noted from an examination of the transcript that at the time set for trial, the plaintiffs offered exhibits in evidence, caused the deposition of Carlyle Eubank to be published, and made some informal offers of proof. The evidence thus adduced was before the court and was considered in making the decisions. The

plaintiffs declined to call witnesses or adduce further evidence when numerous opportunities were given by the court to do so, and plaintiffs' counsel stated that they would stand on the contract. (Tr. 34). Under the circumstances, the case was tried on the facts and under Rule 52, findings of fact and conclusions of law were necessary.

CONCLUSION

The court correctly ruled on the evidence before it that the plaintiffs had no cause of action for relief under the 1936 agreement. Ample opportunity was given to the plaintiffs to have the jury empaneled and to offer additional evidence in support of their case. They declined. They are, therefore, in no position to urge that the trial court deprived them of a right to a jury trial or of any other substantial or procedural rights.

Respectfully submitted,

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