

1963

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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.

E D

1963

Supreme Court, Utah

No.

9950

APPELLANTS' BRIEF

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

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Defendants-Respondents.

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9950

APPELLANTS' BRIEF

NATURE OF THE CASE

This is an action brought to recover the fair market value of shooting privileges in the Ogden Duck Club which were terminated as a result of the construction of the Willard Bay reservoir.

DISPOSITION IN LOWER COURT

At the pre-trial hearing in the matter on the day set for jury trial the court by minute entry order (R. 64) entered a "Judgment for non suite" in favor of defendants, and thereafter—even though no jury trial was had, as requested by plaintiffs—entered formal Findings of Fact and Conclusions of Law (R. 65-69), and a Judgment (R. 70) dismissing plaintiffs' Complaint with prejudice, thereby terminating the proceeding before any evidence was submitted to a jury.

Judge Charles C. Crowley, one of the other judges of the same district, had previously refused to dismiss the very same complaint (R. 21) when defendants in a prior hearing had made a formal Motion to Dismiss (R. 11).

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment dismissing the action, and request that they be permitted to submit the facts to a jury for determination of whether a cause of action and damages has been established.

STATEMENT OF FACTS

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. The facts hereinafter set forth will follow the rule laid down by this court in the very recent case of *Baur v. Pacific Finance Corporation* (Utah-July 2, 1963), 383 P. 2d 397, wherein this court stated—

“As we have heretofore declared, the granting of a motion to dismiss, which deprives the party of the privilege of presenting his evidence, is a harsh measure which courts should grant only when it clearly appears that taking the view most favorable to the complaint and any facts which might properly be proved thereunder, no right to redress could be established; and unless it so clearly appears, doubt should be resolved in favor of allowing him the opportunity to present his proof.”

In the year 1936 there lived in the farming community of Plain City, Weber County, a widow by the name of Annie C. Maw. Mrs. Maw and her four sons owned and operated well in excess of 1,000 acres of farming and grazing land in the area north of Plain City, being partly in Weber County and partly in Box Elder County. The particular grazing lands extended westerly into the marsh lands of the Great Salt Lake where individuals from the city of Ogden had organized a club for the purpose of shooting ducks. (See Pl. Exh. E).

This group, known as the Ogden Duck Club, one of the defendants herein, recognized that in order to

utilize lands which they had under lease from the State of Utah for such purposes, it would be well to secure from Mrs. Maw a written right-of-way so as to insure continued passage in the future across her lands in going to and from their clubhouse and duck hunting area. No other route was available. Accordingly, the Ogden Duck Club had its attorneys prepare a Right-of-Way Agreement providing for such passage rights and other matters. The agreement is set forth in its entirety on page (1) of the Appendix of this brief. Further reference will be made to it later in this brief. See also R. 5, 6.

Being solicitous of the future of her four sons and her grandsons, Mrs. Maw executed the agreement which, by its terms, provided that as part of the consideration for the right-of-way her sons would have the privilege of using the duck club's "shooting grounds . . . on days excepting the opening day, Saturdays, Sundays, and holidays, . . .", and that the four designated sons could " . . . designate one son for each thereof to shoot and enjoy the privileges hereunder in place of such son's father; . . . "

Mrs. Maw apparently made a bargain which proved to be very advantageous to her entire family. Not only were the shooting rights and privileges enjoyed by her family non-assessable in that they were not required to pay the annual dues of the club, but it developed that the members of the Maw family soon were in social and business contact with the most elite professional and business leaders of the Ogden area. As an example, the

members of the duck club immediately prior to the bringing of this action included such prominent individuals as A. E. Benning, Frank M. Browning, James M. DeVine, George S. Eccles, Spencer S. Eccles, W. L. Eccles, Robert Nye, J. Fletcher Scowcroft, George L. Abbott, Fred Froerer, Sr., Ed Greenwell, H. A. Benning and a long list of similar well-known individuals (R. 25). An equally prominent membership existed in prior years. These contacts considerably influenced the lives and fortunes of the four Maw sons, helping to provide them with credit, business and social contacts and an open door to many contacts which they would hardly have experienced as ordinary farm boys. Their personal contacts with the bankers, doctors, business leaders and other members of the club, together with the use of boats, clubhouse facilities, blinds, and the experience of social activities involving parties, personal attendants, excellent food and other amenities of the club, all contributed to making the memberships exceedingly valuable.

In the course of time three of the brothers died, leaving at the time when the complaint was filed one brother, George C. Maw, surviving. However, upon the death of the other three brothers at least one, and in some instances two, of their sons were substituted in place of their respective fathers. These grandsons of Annie C. Maw similarly used the duck club facilities and continued to shoot ducks and otherwise partake of the club's facilities in place of their fathers.

Although the lower court took it upon itself in the course of pre-trial proceedings to place a construction of the agreement which would not permit the grandsons to use the facilities, nevertheless all of the affected parties hereto so construed the agreement as permitting these grandsons to continue to use the facilities which their fathers had previously enjoyed.

Along about 1956, or thereabouts, in the course of progress, the Weber Basin District, one of the defendants, acting in conjunction with the United States Bureau of Reclamation, concluded from its studies that there should be built a water storage reservoir to be known as the Willard Bay Reservoir. This particular reservoir was planned to cover a substantial portion of the Maw land holdings and a portion of the leased grounds where the duck club had its clubhouse and part of its shooting area. The Ogden Duck Club did not own any fee ground (R. 46, 48). In the meantime, Annie C. Maw had passed to her reward and her lands were passed down to Grace B. Maw, a widow of one of the sons, and W. John Maw and Sons, Inc., a corporation.

The Weber Basin District contacted the Ogden Duck Club and arranged to physically move its clubhouse about $\frac{3}{4}$ of a mile west from its previous location so that it would not be inundated by the reservoir to be created (R. 72 - p. 33), and its representatives, lawyers and associates contacted Grace B. Maw and W. John Maw and Sons, Inc., for the purpose of acquiring the necessary lands which the Maws owned in the reser-

voir area (R. 72 - p. 47). And, as the plot for this litigation began to develop, it became evident that the construction of the reservoir would obliterate and cover the road which the Ogden Duck Club had been using through the Maw properties. With respect to this road, the Weber Basin District arranged with the Ogden Duck Club to furnish the latter with a road along the top of the reservoir dike. This new road would follow a different route through the Maw property from that which was formerly used, but would still traverse other portions of the same property which the Maws owned both in 1936 and up to the time of the purchase from them by the United States for the Willard Bay Reservoir (R. 72 - p. 52).

When the Weber Basin District and the United States was ready to purchase the lands for the Willard Bay project, several members of each organization contacted Mr. Orlo Maw, one of the plaintiffs, who was also at the time the president of W. John Maw and Sons, Inc., for the purchase of the properties needed for the project (R. 72 - p. 47). Orlo Maw informed the various individuals that his company would not consider selling the lands involved unless his uncle George, himself, and his cousins were protected as to their shooting privileges in the Ogden Duck Club, either in that they would be paid for the privileges or that the privileges would not be disturbed in any way.

Pursuant to negotiations then being undertaken, Orlo Maw received written assurance from the Weber Basin Water District that by signing an out-of-court

agreement for the purchase of the lands, certain other interests, including “ . . . *specifically your duck club shooting privileges,*” would be excluded from the settlement, and that such property interests which would be “ . . . *required in the construction of the Dam or which would be damaged or destroyed would be appraised at a later date and an offer to purchase will be made.*” (Pl. Ex. A.)

Thereupon on July 15, 1957, Orlo Maw executed a Land Purchase Contract with the United States of America for the purchase of the properties, wherein it was stated among other things that the right-of-way which gave the Maws claim to the duck club shooting privileges would not be included in the contract. Its terms provided as follows:

“3a. It is understood and agreed that the rights to be conveyed to the United States . . . shall be free from lien or encumbrance except: . . . and (ii) rights-of-way for roads, (including the right-of-way granted to the Ogden Duck Club across Tract 95), . . . ”

(See Pl. Exh. C—LAND PURCHASE CONTRACT)

For nearly a year thereafter the matter rested quietly until members of the Maw family began to demand that arrangements be made to protect their hunting privileges or that they be paid for them. Correspondence was received from J. Stuart McMaster, field solicitor of the United States Department of Interior at Salt Lake City making mention of the hunting

privileges and suggesting a meeting to determine whether all of the Maw people “ . . . are interested in retaining such hunting privileges.” However, nothing was ever concluded, and the matter dragged until court action was finally brought. (Pl. Exh. D).

In the meantime, and before court action was commenced, the Weber Basin District undertook construction activities, obliterated the old right-of-way which the Ogden Duck Club had been using, created a new roadway over other portions of what were the Maw properties which it had acquired, and the duck club began using the new route. The Ogden Duck Club thereupon notified the Maws that their duck club hunting privileges had terminated.

It later developed in the deposition of Mr. Eubank, secretary of the Ogden Duck Club, that the notice given to the Maws of the termination of their rights was given after the Ogden Duck Club had executed a Quit Claim Deed to the Maws to various lands in the area, which included the right-of-way held out in the Land Purchase Contract with the United States (Pl. Exh. C), and that the deed had been furnished “so that the Maws could get their settlement money” (R. 54, 59). However, the evidence would have actually established that the Weber Basin District was instrumental in securing the deed from the Ogden Duck Club, that none of the Maw family ever knew of its existence, execution or delivery, and that in fact the deed was secured and received by the Weber Basin District people and recorded and returned to themselves (R. 72 - p. 19, 20).

This lawsuit arose when plaintiffs were refused payment for the value of their duck club shooting privileges.

ARGUMENT

I. PLAINTIFFS SHOULD HAVE BEEN PERMITTED TO PUT ON EVIDENCE TO A JURY ESTABLISHING A THIRD-PARTY BENEFICIARY CONTRACT LIABILITY AGAINST THE WEBER BASIN DISTRICT.

During the pre-trial proceedings held immediately prior to the scheduled trial, Orlo Maw (while sitting in the audience area behind the courtroom rail) stated:

“MR. MAW: They informed me that by preparing this letter to protect all rights which I had no right to sell, that we would avoid a condemnation suit by proceeding with the contract, and I refused to sign the contract until the protection, and all of us concerned were given protection, and as a result the letter was prepared before I signed the contract. Otherwise, I would have let it go in the condemnation” (R. 72-p. 51).

It is submitted that Orlo Maw, through W. John Maw and Sons, Inc., created a binding and valid third-party beneficiary contract in favor of himself, his uncle George, and his cousins, relating to the duck club shooting privileges, and that the Weber Basin District received the benefit of, and acknowledged the existence of this agreement by virtue of the following letter pre-

pared by legal counsel for the Weber Basin District and delivered to Mr. Maw *before* the land purchase was signed by his company and Grace B. Maw. The letter which was delivered to him follows (Pl. Exh. A) :

**WEBER BASIN WATER CONSERVANCY
DISTRICT**

**506 Kiesel Building
Ogden Utah**

July 5, 1957

**Harold E. Ellison
President
Win Templeton
Chief Engineer
Jimmy Kostoff
Assistant Engineer**

**Neil R. Olmstead
Legal Counsel
E. J. Fjeldsted
Manager**

**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/d E. J. FJELDSTED

E. J. FJELDSTED

Manager

BOARD OF DIRECTORS

ELMER CARVER, Plain City; WARD C. HOLBROOK, Bountiful; LEROY B. SMITH, Sunset; HORALD G. CLARK, Morgan; D. D. McKAY, Huntsville; EDWARD SORENSON, Oakley; HAROLD D. ELLISON, Layton; FRANCIS V. SIMPSON, Hooper; W. R. WHITE, Ogden

The foregoing letter was prepared by E. J. Skeen, attorney for the District, and was signed by E. J. Fjeldsted, Manager of the Weber Basin Water District. And, as has been stated, notwithstanding the reference in the letter that the contract had been executed, the proof would have established that this letter was received ten days prior to the actual signing of the Land Purchase Contract, and that it would not have been signed had the letter not been furnished. (See Pl. Exh. C).

Although the letter was addressed to W. John Maw and Sons, Inc., no real question can be raised that the corporation ever had any "duck club shooting privileges", as therein contained, since it is clear that all concerned recognized that it had none and that the privi-

leges ran to George C. Maw and to his various nephews. Further, and very significantly, if the court will look at plaintiff's Exhibit A in the record, it will find that Exhibit A consists of *three executed originals and two executed copies of the same letter* which were handed to Orlo Maw for delivery to the various members of the Maw family having the hunting privileges. Orlo Maw would have testified that he insisted that such proof be furnished so that all concerned would have a tangible record that their rights were recognized.

Subsequently, and after more than a year, Mr. J. Stuart McMaster, field solicitor for the United States Department of the Interior, recognized that the various public agencies were considering these rights in the following letter (Pl. Exh. D) :

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR

410 Newhouse Building
10 Exchange Place
Salt Lake City 11, Utah

September 11, 1958

Mr. George C. Maw
Roy, Utah

Dear Mr. Maw:

Thank you for your letter of September 9, 1958 regarding the Ogden Duck Club.

You are advised that the matter has not been finally determined, but we are working on it. Please advise me

if it would be possible for us to meet at a convenient time with the Maw people who are interested in the hunting privileges. We are interested in determining whether or not all of them are interested in retaining such hunting privileges.

I would appreciate hearing from you at your earliest convenience.

Very truly yours,

s/d J. Stuart McMaster
J. STUART McMASTER
Field Solicitor

Copy to: Reg. Dir., BR, SLCU, attn: 4-400
Projects Manager, BR, Ogden, Utah

The cases in Utah clearly recognize that one person can make on behalf of another person a contract which will inure to his benefit, and that the latter can bring an action on the contract. This was done here. Further, Utah law recognizes that a direct beneficiary, whether he be a creditor beneficiary or a donee beneficiary, can bring the action.

It is not entirely clear from Orlo Maw's statement as to whether he felt that W. John Maw and Sons, Inc., owed a duty to these plaintiffs to protect them as to their rights, or whether he was doing so out of other considerations. In any event, whether the contract be founded upon a creditor or a donee relationship, Utah clearly recognizes this type of agreement:

Kelly v. Richards, 95 Utah 560, 83 P. (2d) 731,
129 ALR 164:

“The rule of allowing the third party beneficiary to recover is recognized now in America because it is reasonable and is not merely acceptable as a flat rule of law. It is just and expedient to allow the person for whose benefit the contract is made to enforce it against the person whose duty it is to pay. However, an incidental beneficiary has no rights under the contract. *Robins Dry Dock & Repair Co. v. Flint*, 275 US 303, 48 S Ct 134, 72 L ed 290 and *German Alliance Ins. Co. v. Homewater Supply Co.*, 226 US 220, 33 S Ct 32, 57 L ed 195, 42 LRA (NS) 1000, are to the effect that before a third party can sue for a breach of a contract to which he was not a party he must show that the contract was intended to benefit him directly. The terms of the agreement and the facts and circumstances that surround its making can be examined to determine whether the supposed beneficiary was in fact intended to be such . . . ”

Further—

“A stranger may benefit by a contract if promises are made where the promisee has no pecuniary interest in the performance of the contract, his object being to enter into it for the benefit of such stranger, or where the promisee seeks indirectly to discharge an obligation of his own to the stranger by securing from the promisor a promise to pay such person. Vol. 12, *American Jurisprudence, Contracts*, Section 283.”

The matter is further set forth in a series of cases from Utah, the rule being summarized completely in *Brown v. Markland*, 16 U. 360, 52 P. 597, where the court stated:

“She thereafter had a right to look to him for payment of her claim, under the rule that “where a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon at the instance and in the name of the party to be benefited, although the promise or contract was made without his knowledge, and without any consideration moving from him.” *Montgomery v. Spencer*, 15 Utah, 495, 50 Pac. 624; *Thompson v. Cheesman*, 15 Utah, 43, 48 Pac. 477; *Clark v. Risk*, 9 Utah, 94, 33 Pac. 248; 1 Pars. Cont. p. 465.”

At this point plaintiffs anticipate that defendants will attempt to attack the original 1936 Agreement between Annie C. Maw and the Ogden Duck Club on one or more theories. However, 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. grandsons) were entitled to the duck club shooting privileges, that doubt was resolved and a new contractual arrangement was entered into by the Weber Basin District in the form of a third-party beneficiary arrangement. This is so because W. John Maw and Sons gave up its right 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.

Nowhere in the correspondence of Mr. Fjeldsted or Mr. McMaster does it remotely appear that there was any question as to the validity of these rights; rather, both letters affirmatively recognize the exist-

ence of the duck club shooting privileges. No reference was made of any privileges which "might exist," nor were the words "if any," or other similar language, used. Bear in mind that both letters were written by lawyers. The privileges were recognized in a positive manner and the agreement to appraise and pay for them if damaged or taken was clear-cut.

In 12 Am. Jur., Contracts, Par. 87 at p. 581, the general rule is stated:

"The view is taken by some authorities that although forbearance from suit on a clearly invalid claim is insufficient consideration for a promise, forbearance from suit on a claim of doubtful validity is sufficient consideration for a promise if there is a sincere belief in the validity of the claim. The view is taken that a reasonable and sincere belief in the validity of the claim is necessary and sufficient. It is sometimes stated that if an intending litigant bona fide forbears a right to litigate, he gives up something of value. The reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. There must, according to this view, be a real cause of action—that is, one that is bona fide and not frivolous or vexatious—but it is not necessary that it be a cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case."

Although plaintiffs certainly do not concede that the Agreement executed in 1936 by Annie C. Maw

would not extend to and benefit her grandsons as well as her sons, Mr. Williston on Contracts, Vol. II, Section 399 at p. 1149 clearly shows that by a third-party beneficiary contract rights can be created in third parties greater than might have actually existed between the promisee and the promisor in the first instance:

“As summarized in the Restatement of Contracts: ‘Unless the case is within the rules making contracts voidable for mutual mistake, where performance of a promise in a contract will benefit a person other than the promisee, the promisor’s duty is not avoided or limited by an erroneous belief of the promisor or of the promisee as to the existence or the extent of a duty of the promisee to the beneficiary.’ Where the promise is to pay a specific debt, for example to assume a specific mortgage, especially if the amount of it is deducted from the consideration paid by the promisor for the mortgaged property, this interpretation will generally be the true one. Most of the cases accordingly refuse to allow one who has assumed a specific debt to set up usury or other defense, of which the debtor might have availed himself. It should be noticed that this section presents another instance where the rights of the beneficiary and of the promisee against the promisor may not be identical.”

II. THE WEBER BASIN WATER DISTRICT IS EVEN NOW ILLEGALLY TRESPASSING ON PLAINTIFFS’ LANDS AND RIGHTS.

When the Motion to Dismiss was argued before Judge Cowley, plaintiffs contended that they were

still entitled to their duck club shooting privileges because the original right-of-way had been retained and excepted from the Land Purchase Contract, as has been previously set forth. Unfortunately, a transcript of the entire argument at that time was not available. Judge Cowley denied the motion to dismiss following the same basic argument which is advanced in this brief. Later, when the deposition of Carlyle Eubank, secretary of the Ogden Duck Club was taken, Mr. Eubank stated that the duck club had terminated the rights of the Maws to the shooting privileges because it had issued a quit claim deed (R. 51) to the Maws which covered the same lands previously deeded by the Maws. (Compare Pl. Exh. C—Land Purchase Contract, and Pl. Exh. B—Quitclaim Deed.) This included the area where the right-of-way was located. His statement was as follows (R. 54) :

“A. No, we don't feel we have had anything involved in it, and we felt that by the issuance of this quitclaim deed to the Maws which covered all of that country out there, that it certainly abrogated anything that we would have in connection with the land which we couldn't use anyway because it had been closed off by the Government. We couldn't get across it. We couldn't get through there. We couldn't go across the ditch. We had to go around on the Government road. We did feel, and do feel to this date, by the execution of this quitclaim deed which was executed by the Club which made it possible for the Maws to obtain their settlement from the United States Government on all their prop-

erty that they had out there, that it abrogated anything that we had."

Mr. Eubank again referred to the same quitclaim deed on questioning in his deposition (R. 59), thus arousing the suspicions of this writer and plaintiffs who had never before heard of such a document. Upon later investigation it was found that the Weber Basin District had gone to the Ogden Duck Club to get the quit claim deed involved. Suspicions were further aroused because Mr. Eubank stated that the Ogden Duck Club held no real estate in the area other than through State leases which were not involved in the description later found upon the particular quitclaim deed. Mr. Eubank stated in his deposition that all of the lands used by the Ogden Duck Club were leased grounds (R. 46, 48), and that they did not own a single acre.

It suddenly became clear that the Weber Basin District secured this deed in order to eliminate the right-of-way which was excepted in the original purchase contract which was executed by Grace B. Maw and W. John Maw and Sons, Inc.

A copy of the quitclaim deed was secured from the Weber County Recorder's office by this writer, who found that it did in fact cover the area over which Annie Maw had granted the Ogden Duck Club a right-of-way in the 1936 Agreement. Further examination of the deed revealed that it did in fact run to W. John Maw and Sons, Inc., and Grace B. Maw, who had

previously given a warranty deed to the very same properties.

Theorizing that this quitclaim deed from the Ogden Duck Club to the same persons who executed the original warranty deed to the lands involved would eliminate the right-of-way set forth in the land purchase contract, under the doctrine of after-acquired title, and thereby perfect an unencumbered title in all of the reservoir area in the United States, a further look was had at the deed. Upon examining it more closely (Pl. Exh. B) it revealed that it was recorded for William H. Wilcox, who was at the time an employee of the Weber Basin District.

On checking with the Maws it was found that not one of them or the corporation had any knowledge or information that such a deed had ever been executed or that it had been delivered to anyone, let alone a member of their group. Further, the original of the deed was nowhere to be found and it can only be assumed that it is in some government office or in the possession of the Weber Basin Water District. At any rate, the evidence would conclusively establish that none of the plaintiffs or any of the other Maws ever knew of the deed, that it was never received by them either before or after recording, and that it was undoubtedly secured by underhanded efforts of the Weber Basin District to perfect a land title in an attempt to avoid settling with the Maws either as to the contract which was made for the benefit of these plaintiffs or for the

actual right-of-way in which they had a vital interest. It is submitted by plaintiffs that the Weber Basin District illegally and without authorization of any kind secured and recorded the quitclaim deed itself because it full well knew that had the deed been delivered to the Maws it would not have been released, nor would another quitclaim deed have been given by them, unless full settlement had been made according to the existing understanding.

In view of the unauthorized and unlawful action of the Weber Basin District in recording and retaining the quitclaim deed executed by the Ogden Duck Club, it is submitted that the District is in fact a constructive trustee of the right-of-way property for the Maws, and 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 were tied to the right-of-way and also punitive damages. It is further submitted that the action of the Weber Basin District in this respect, if established by the evidence as here claimed, is so unwarranted, illegal and unauthorized, that it is unnecessary to quote any law on the subject.

And as for the information apparently received by Mr. Eubank to the effect that the quit claim deed had to be secured so that the Maws could get their payment for the lands involved (R. 54), someone apparently seriously misinformed Mr. Eubank because the quit claim deed issued by the Ogden Duck Club was dated

April 7, 1958, almost a year after the land purchase contract of July 15, 1957, and payment thereunder, and because the Ogden Duck Club had no interest in the subject property other than the right-of-way which was specifically excluded from the Land Purchase Contract. It was executed at about the same time the pressure was being brought by the Maws to have their rights recognized or to be paid for them.

Now, so that this court can secure the full import of a sharp issue of fact crucial to this case, reference is made to pages 39 and 40 of the record. There is contained an Amended Answer of the Weber Basin District which was filed in court on February 14, 1963—the date set for trial and the day the Motion to Dismiss was granted. The interesting thing about the Amended Answer is that it affirmatively recognizes the existence of the elusive quitclaim deed (Exh. B) which only came to light in Mr. Eubank's deposition three weeks earlier, and asserted (1) that the deed was delivered to W. John Maw and Sons, Inc., and Grace B. Maw, and *accepted by them*; and (2) that the acceptance terminated the 1936 Right-of-Way Agreement!

It appears that someone moved too fast in setting up this defense, or that there were too many helpers for the defense, because *the Amended Answer clearly recognizes that if the quitclaim deed was not delivered to and accepted by the Maws, then the 1936 right-of-way agreement was not terminated!*

Mr. Eubank in his deposition admitted that the

quitclaim deed was brought to him by the Weber Basin District and Mr. Skeen, attorney for the District, volunteered at the time that the deed had been prepared by the Bureau of Reclamation (R. 55). Eubank further stated that there were no negotiations or discussions concerning the deed between the Maws and the Ogden Duck Club, and that *the issuance of the quitclaim deed was the basis for the termination of the privileges of the Maws in the Club!* (R. 59, 60).

III. THE FACTS RAISE AN ESTOPPEL AGAINST THE WEBER BASIN DISTRICT.

Without belaboring each and every issue upon which plaintiffs should be entitled to recover against the Weber Basin Water District, it is submitted that the facts which have been established to this point, albeit they are incomplete because the proof was never brought to actual trial, establish that the Weber Basin Water District should not now be permitted to employ side agreements or other conduct which would secure a land purchase settlement in one instance upon a representation and a promise made by it, and thereafter renege from its first position. In the case of *Weber Basin Conservancy District v. Hislop*, 362 P. 2d 580, 12 Utah 2d 64, the Weber Basin District was instrumental in negotiating an agreement with the State Road Commission whereby the main highway by-passed around the community of Huntsville because the reservoir created by the District inundated the former road serving the community. The almost complete loss of

traffic and serious resulting property and business damage to the Hislop properties was permitted to go unpaid because this court held that no one had a compensable interest resulting from the flow of traffic passing one's business property and that, apparently, this result would have not been different as to the Hislops or other residents of Huntsville even had the District made no provision for a re-located road, and the town left isolated. Perhaps the Weber Basin Water District is hoping here to by-pass its commitments in the same way, but this is a much different case.

The previously quoted case of *Kelly v. Richards*, recognizes that an action can lie in estoppel on the facts presented here:

“ ‘This estoppel arises when one of his acts, representation or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other right-fully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for the truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained.’ 21 Corpus Juris, pp. 1113, 1114, 1115.

“Essential Elements—a. In General.

‘In order to constitute this kind of estoppel there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive,

of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice. To constitute an 'estoppel in pais' there must concur an admission, statement, or act inconsistent with the claim afterward asserted, action by the other party thereon and injury to such other party. There can be no estoppel if either of these elements are wanting. They are each of equal importance.' 21 Corpus Juris, pp. 1119, 1120. See, also, Pomeroy's Equity Jurisprudence (4th Ed.) p. 1644; Bigelow on Estoppel (6th Ed.) pp. 603, 604.

"It is essential therefore that the representation, whether it arises by words, acts or conduct, must have been of a material fact; that it must have been willfully intended to lead the party setting up the estoppel to act upon it or that there must have been reasonable grounds and cause to think that because thereof he would change his position or do some act or take some course on faith in the conduct, and that such action results to his detriment if the person sought to be estopped may now repudiate the words or interpretation placed upon such conduct. This does not require an actual intent to defraud but only that the circumstances and conduct were such as would perpetrate a fraud or unfair advantage if the party could now deny what he had induced or suffered another to believe and act upon. It is an essential element of estoppel in pais that the person involving it relied upon the representation or conduct of the other party, was influenced in his own conduct by it, and

would not have acted as he did but for the acts of which he complains . . . We do not mean that these are all the elements, nor that in every case all must co-exist equally but some of these elements must be present in every estoppel.”

As previously stated, it is submitted that the interpretation of the 1936 agreement between the Ogden Duck Club and Annie C. Maw would have no bearing upon the liability of the Weber Basin Water District. However, that particular issue could be of some concern as to defendant Ogden Duck Club were it not for Mr. Eubank's admission that the quitclaim deed terminated the hunting privileges. It was upon the court's interpretation of this agreement that both the Ogden Duck Club and the Weber Basin District were summarily dismissed from the lawsuit without considering other matters. But plaintiffs have no intention of letting this appeal become side-tracked into an argument relating to the extent of the 1936 Right-of-Way agreement as to the Weber Basin Water District.

The issue of interpreting the 1936 Right-of-Way Agreement primarily involves a question of whether its benefits extended to the grandsons of Annie C. Maw, who represent all but one of these plaintiffs. On this issue, these points are set forth:

(1) No suggestion was raised by Mr. Fjeldsted in his letter (Exh. A), or in the statements or conduct of other persons negotiating for the land purchase with Orlo Maw, which indicated that only George C. Maw (the one surviving son) had such rights. Otherwise, why would five

executed letters have been delivered to Orlo Maw for further delivery among the family?

(2) Mr. McMaster in his letter clearly acknowledges the existence of the duck hunting privileges (Exh. D), and recognizes that the rights extended to several persons.

(3) Mr. Neilson, one of the three attorneys for the Weber Basin District, stated (R. 73-p. 12):

“ . . . the right-of-way agreement as drawn is in a rather confusing manner.”

(4) Mr. Eubank in his deposition (R. 72 - p. 53, 54, 60) recognizes the existence of the rights of the Maws up to the time he gave the quit claim deed to the Weber Basin District and began using the new road.

(5) All of the plaintiffs would have testified, and Mr. Eubank admitted (R. 72 - p. 40), that they used the duck shooting facilities after their fathers died with full concurrence of the duck club.

(6) Any question regarding the interpretation of the 1936 Right-of-Way Agreement should be made against the Ogden Duck Club for the reason that it was prepared by its own attorneys and not by an attorney for Mrs. Maw (R. 45).

(7) Defendant's attorneys were uncertain whether the 1936 Agreement was a contract or a covenant running with the land. (R. 72 - p. 19).

(8) The court variously commented on the 1936 Agreement: “I have struggled with it a bit . . .” (R. 72 - p. 18); and “I say it is a

vacuum, it is a completed instrument, take it out of a vacuum and put it in life, it might not be, that is what I am wondering." (R. 72 - p. 41).

An analysis of the 1936 Agreement shows that it specifically included four sons of Annie C. Maw — Wilmer J. Maw, Rufus Maw, Gilbert Maw and George Maw. As to these sons it granted "*non-assessable shooting privileges . . .*", and further stated—

" . . . provided that in any year the said Wilmer J. Maw, Rufus Maw, Gilbert Maw, and George Maw designate one son for each thereof to shoot and enjoy the privileges hereunder in place of such son's father; . . . "

Based upon the foregoing, upon the death of the fathers the respective sons used the privileges of the Ogden Duck Club without objection, on the basis that their parents had made a permanent designation entitling them to use the hunting facilities. Although defendants may contend that a designation could only be made on a year-to-year basis, and that the death of any son terminated any rights in their sons, the actions of the parties involved over the years do not bear out this interpretation of the agreement.

Further, the agreement ran to the grantor "*. . . and the members of her family hereinafter mentioned so long as grantees and any successors shall maintain said clubhouse and shooting grounds for the purpose of shooting wild fowl.*" It is interesting to note that had the intention been to limit the contract rights to

Mrs. Maw and her sons it would have been an easy matter to say that it ran to her and her sons; rather, it did not refer to any designated individuals, but referred to the generic and all-inclusive group of "members of her family hereinafter mentioned," and specific mention was made of her sons' sons, as previously set forth.

Black's Law Dictionary, Third Edition, defines a family as including "... a group of blood relatives; all the relations who spring from a common ancestor, or who spring from a common root."

Another issue which was raised at the pre-trial hearing both before Judge Cowley, who denied the motion to dismiss, and before Judge Wahlquist, was that the Ogden Duck Club was not obligated to any of the Maws, even as to George C. Maw, a surviving son, because the Maws no longer had an obligation to maintain a portion of the roadway as the 1936 Agreement requires. But the proof would have been that the Maws were ready, able and willing to maintain the necessary passage of roadway involved, that they had done so in the past, that they were doing so as far as was necessary at the present time, and that they would do so in the future because the portion of roadway which they were required to maintain was never acquired by the Weber Basin District and still lies dormant and unused.

This writer has no intention of picking the 1936 Agreement apart piece by piece, because it is felt that

the court can read the short agreement and determine for itself whether any ambiguity exists in it and whether it even has any bearing on this case—which plaintiffs' sincerely controvert. In any event, it is submitted that the Ogden Duck Club has shown no excuse for relieving itself of an obligation to George C. Maw, one of the surviving sons of Annie C. Maw, nor should the Weber Basin Water District be permitted to go through the back door in an effort to extricate itself from liability in this lawsuit.

Findings of Fact and Conclusions of Law supporting the Judgment in this matter were prepared in the action upon the request of the court that a "memorandum opinion" be prepared for the files, but since they represent nothing more than an attempt to relieve the defendants from liability upon the basis of defendants' own interpretation of what they would like the facts to establish in their behalf, and upon the back-door approach to the matter seeking to undermine the 1936 Agreement, plaintiffs submit that they have missed the issues of this case entirely. Further, Finding of Fact No. 6, which states that the Ogden Duck Club delivered the quitclaim deed involved to the Maws, is absolutely erroneous and unsupported, and is contradicted by the record available at this time.

IV. THE OGDEN DUCK CLUB SHOULD RESPOND IN DAMAGES TO PLAINTIFFS FOR BREACH OF CONTRACT.

The Ogden Duck Club still uses property formerly owned by the Maws in going to and from its clubhouse facilities and shooting grounds. The clubhouse which it maintains is the very same clubhouse which it formerly had, even though it was physically removed about $\frac{3}{4}$ of a mile west of where it was formerly located. And substantially the same shooting grounds are still used by it, less a portion which was taken for the Willard Bay Reservoir site. Although the road which it now uses through the property formerly owned by the Maws runs along the top of the dike constructed by the Weber Basin District for a greater part of its distance, it should be noted that the original agreement between the Ogden Duck Club and Annie C. Maw did not pinpoint the exact location of the right-of-way. It was in the nature of a floating right-of-way following the best available route through a large area, and the evidence would have established that it was altered somewhat from time to time to accommodate water conditions and other factors.

The Ogden Duck Club, in believing the representations of the Weber Basin District that it was necessary to quitclaim the roadway area to the Maws, may have concluded that it had thereby performed its 1936 contract obligations. It obviously felt obligated up to that time. *But the fact remains that the quitclaim deed was never delivered to any of the Maws or to anyone acting in their behalf!* Under the circumstances, it is submitted that the Ogden Duck Club should respond in damages to plaintiffs, and that it might thereafter or simulta-

neously set forth a separate cause of action against the Weber Basin Water District for inducing it to take the action it did in reliance upon statements made to it that the deed was necessary in order to make it possible for the Maws to settle with the government. At any rate, in view of these unsavory facts it is not surprising that the Weber Basin Water District undertook to furnish legal counsel for the Ogden Duck Club instead of having the Ogden Duck Club secure its own counsel (R. 52). Perhaps, with the knowledge now available, the Ogden Duck Club would employ separate counsel should the matter be returned for trial.

Rule 52, Utah Rules of Civil Procedure, provides as follows:

“ . . . Findings of Fact and Conclusions of Law are unnecessary on decisions of motions under Rule 12 or 56, or any other motion except as provided in Rule 41 (b).”

In view of the foregoing rule why were Findings of Fact and Conclusions of Law prepared in this matter? A motion to dismiss is based upon a failure of the complaint to state a claim entitling the pleader to relief. Quite obviously, the Findings of Fact and Conclusions of Law were prepared because the court, in effect, instead of permitting the matter to go to the jury, treated the action as a dismissal under Rule 41 (b), as though the plaintiffs had completed the presentation of their evidence. But such evidence should have been entitled to go before the jury, and the court should not have stepped into the matter as it did.

The dilemma which the plaintiffs faced at pre-trial was that of not only setting forth their theories, as they had previously done in concise and definite form upon the court's request (R. 30-32), but in being forced to reveal every bit of vital and damaging evidence for the scrutiny of the opposition in an effort to avoid being thrown out of court. A pre-trial hearing which requires the moving party to secure from the pockets of each of the plaintiffs their own executed copies of letters furnished them by Mr. Fjeldsted so that a desperate effort could be made to at least preserve one's record for an appeal, and to come forth all other items of documentary evidence and push them upon the Clerk's desk by way of a proffer of proof at the time the court was ruling they could proceed no further, does not appear to serve the purpose of a pre-trial proceeding or a motion to dismiss.

SUMMARY

It is submitted that the facts established from what plaintiffs were able to get into the record, together with those indicated facts which plaintiffs have contended would be proved, show a course of conduct on the part of the Weber Basin Water District of such unauthorized unlawful and outrageous nature that only a minimum amount of legal authority should be advanced to support the position of the plaintiffs. It is hoped that this court approaches the case in its chronological sequence, and that it does not permit itself to fall into

the trap of having both defendants use the back-door approach of attacking the 1936 Right-of-Way Agreement in order to extricate themselves. It is submitted that such approach, even if tried, cannot sustain their defensive position in any respect, but that if it were in fact available to the Ogden Duck Club it would only avail the Ogden Duck Club as to the plaintiffs other than George C. Maw, who still survives as a son of Annie C. Maw.

The gist of this litigation is predicated upon other doings and dealings of the Weber Basin Water District which have been clearly outlined and set forth in this brief.

Plaintiffs recognize that a trial judge is burdened with many cases and that the law and the problems which come before him are often very complex and confusing. But, plaintiffs submit that this very condition is the one which should cause a trial judge to avoid making decisions based on statements and claims of counsel immediately before commencing a trial, thereby becoming side-tracked into a completely erroneous analysis of a case which he has to try.

Judge Cowley heard lengthy arguments on the matter before it ever reached the pre-trial stage, and he took the matter under careful advisement. It was his ruling, exactly contrary to that of Judge Wahlquist, that a motion to dismiss should be denied (R. 21). Nothing substantially different was argued before Judge Wahlquist, at least to the point where it became

clear that he simply was not going to let the plaintiffs go to trial. Actually, Judge Wahlquist had extra material in the form of the exhibits, the deposition of Mr. Eubank and plaintiffs' Statement of Legal Theories (R. 30).

Plaintiffs submit that Judge Cowley was correct in his ruling and that Judge Wahlquist was incorrect in dismissing the action.

CONCLUSION

It is respectfully submitted that the court reverse the ruling of the lower court and that the matter be sent back for a trial before a jury to determine the matter of damages sustained by plaintiffs and such other issues as might be found to exist in this action.

Glen E. Fuller

Attorney for Plaintiffs-Appellants

15 East 4th South Street
Salt Lake City, Utah

APPENDIX

(i)

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 Records 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

STATE OF UTAH }
COUNTY OF WEBER } ss.

On the 29th day of December, 1936, personally appeared before me Annie C. Maw, the signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

Lewis J. Wallace

NOTARY PUBLIC

Residing at Ogden, Utah

(SEAL)