

1959

In The Matter of the Estate of Hillard L. Voorhees, Deceased, Probate No. 2655, Betty Hayward, Beverly Clyde and Tracy Collins Trust Company (Now Walker Bank & Trust Co.) Administrator of the Estate of Hillard L. Voorhees, Deceased, Civil No. 4784 v. Pearl O. Voorhees and Hanson Land & Livestock Company : Brief of Hanson Land & Livestock Company Intervenor and Appellant

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IN THE SUPREME COURT OF THE STATE OF ILLINOIS

IN THE MATTER OF THE

ESTATE OF

HILLARD L. VOORHEES,

Deceased, Probate No. 2655,

BETTY HAYWARD, BEVERLY

CLYDE, and TRACY COLLINS

TRUST COMPANY (now Walker

Bank & Trust Company), Adminis-

trator of the Estate of Hillard L.

Voorhees, Deceased, Civil No. 4784,

Plaintiffs and Respondents,

— vs. —

PEARL O. VOORHEES,

Defendant and Appellant.

HANSON LAND & LIVESTOCK
COMPANY,

Intervenor and Appellant.

In Probate No. 2655.

BRIEF OF HANSON LAND & LIVESTOCK COMPANY, INTERVENOR AND APPELLANT.

MAX K. MANNING,

Attorney for

Intervenor and

206 El Paso National Bank

Salt Lake City 11, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE
ESTATE OF
HILLARD L. VOORHEES,
Deceased, Probate No. 2655,
BETTY HAYWARD, BEVERLY
CLYDE, and TRACY COLLINS
TRUST COMPANY (now Walker
Bank & Trust Company), Adminis-
trator of the Estate of Hillard L.
Voorhees, Deceased, Civil No. 4784,
Plaintiffs and Respondents,
-- vs. --

Case
No. 9400

PEARL O. VOORHEES,
Defendant and Appellant,
HANSON LAND & LIVESTOCK
COMPANY,
Intervenor and Appellant
In Probate No. 2655.

BRIEF OF HANSON LAND & LIVESTOCK COMPANY, INTERVENOR AND APPELLANT

INTRODUCTION

Hanson Land & Livestock Company, appellant here-
in, will be referred to throughout this brief as "Inter-
venor," appellant having intervened only in the probate

matter (Case No. 2655). Intervenor was never a party to Case No. 4784.

Intervenor adopts the statement of facts of appellant, Pearl O. Voorhees, hereinafter called "Mother," as they relate to the probate matter, and by way of addition there to adds supplemental facts below. Because of the adoption in this brief of facts recited by the Mother in her brief, the latter brief should be read first.

The issue before this Court, insofar as Intervenor is concerned, is whether the lower court, sitting in probate, had authority and jurisdiction to enter its Judgments of Partial Distribution of the disputed land and grazing permits. While the issue is simple, the record is most confused, largely because the lower court consolidated a contested civil matter (to which Intervenor was never made a party) with a probate matter in which it intervened.

SUPPLEMENTAL FACTS

The undated "Memorandum of Understanding" executed by the Mother and daughters in civil No. 4784 was probably signed on or about April 1, 1959 (Tr. 4/1/59 p. 1), but it was not presented to the Court or made a matter of record until August 29, 1959 (Tr. 8/29/59, p. 2). Thereafter, on 9/15/59 Case No. 4784 was consolidated with Probate No. 2655 (R. 4784, p. 40). The document purports to repudiate Intervenor's contract with the Mother and then in one of the concluding paragraphs recites that "the above understanding in principle shall be

reduced to formal stipulation . . . ; and the Court shall thereupon enter judgment upon such stipulation." The parties to the "Memorandum of Understanding" were unable to construe it without disagreement, so the Court was asked to hear the matter in Civil No. 4784 (Tr. 8/29/59, pp. 1-6). Counsel for Mrs. Voorhees (Mr. Christensen) advised the Court that prior to the hearing of August 29, 1959, Mrs. Voorhees was served with a summons and complaint in a suit filed by Intervenor to quiet title to the so-called "Mountain Lands." The Court was further advised by Mr. Christensen that a Lis Pendens was also filed in Sevier County on these lands, and that for these reasons he thought the transfer of these lands to the administrator by Mrs. Voorhees should be held in abeyance (Tr. 8/29/59, p. 6). After considerable discussion it was agreed that evidence would be taken pertaining to the accounting in Civil No. 4784 by Mrs. Voorhees. Following the taking of evidence, the Court stated that an order could be taken that there will be no disposition by sale, lease or otherwise of any property *belonging* to the estate until further order of the Court (Tr. 8/29/59 p. 47). This injunctive order of the Court was continued at the close of the hearing of September 15, 1959 (Tr. 9/15/59, p. 105). Subsequently the Court, in the consolidated cases, ordered the mother to transfer the "Mountain grounds" to the administrator by Warranty Deed. (Decree of 10/2/59, Case No. 4784, R. 40) This same decree of October 2, 1959, is strangely quiet with respect to the 1870 Taylor Grazing permits. No one has ever been directed or ordered to transfer them to the estate.

In January of 1960 Intervenor filed its petition for leave to intervene in the probate matter. This petition was heard and orally granted on 2/1/60. The order of Intervention was signed on March 14, 1960 (R. 265, pp. 321 and 359).

After the Mother had complied with the decree of the Court which compelled her to convey the "Mountain Grounds" to the estate, Intervenor, in an effort to compromise and settle the differences with the daughters and Mother, offered to purchase the disputed lands and permits through the estate at a premium. Counsel for Intervenor stated in open court that if the sale through the estate could be worked out, the whole dispute over ownership of the lands and permits would become moot. This was the reason given for the offer to purchase through the estate (Tr. 2/1/60, pp. 17-18).

The disputed grazing permits were transferred to Hanson Land and Livestock Company as a result of an application filed by the company, which application was with the consent of Henry L. Voorhees and Pearl O. Voorhees, both of whom signed waivers on the transfer (Tr. 2/1/60, p. 51). This transfer was based on Hanson Land and Livestock Company contract of 10/21/58 with Pearl O. Voorhees and contract of 1/5/59 with Henry L. Voorhees (Tr. 2/1/60, p. 51). Hanson Land and Livestock Company also committed additional base lands to the Bureau of Land Management to justify this transfer. The grazing fees have been paid to the BLM by Intervenor since the transfer (Tr. 2/1/60, pp. 39-41). Mr. Nielson, counsel for the daughters, in open court at the hearing

2/1/60, stated that he had no objection to the transfer to Intervenor of the range permits, and he further stated that if Intervenor wanted to keep the permits they would not oppose it (Tr. 2/1/60, pp. 13 and 57). He further stated that the permits had been transferred and title had been conveyed (Tr. 2/1/60, p. 28). Intervenor stated flatly that it was not willing to transfer the permits to the estate (Tr. 2/1/60, p. 47). In the hearing of 2/1/60 the Court said, "Well now, it's never been tried whether the permit was properly or improperly transferred" (Tr. 2/1/60, p. 57).

Intervenor paid \$10,000 to the Mother as an original payment on the land permit contract of 10/21/58. This \$10,000 payment has in turn been accounted for by the Mother to the administrator, Walker Bank and Trust Company, who acknowledges this accounting (R. 2-2655, p. 406), (Tr. 2/1/60, pp. 11-13 and 27). Thus the Mother and the administrator have retained the consideration for the 10/21/58 contract.

ARGUMENT

Intervenor challenges the right and power of the lower court sitting in probate to distribute the "Mountain grounds" and the Taylor Grazing permits to Bette Hayward and Beverly Clyde, hereinafter called the "Daughters." These orders of distribution which dealt with the land and permits separately will be discussed individually in this brief.

DISTRIBUTION OF MOUNTAIN GROUND

Intervenor challenges the attempt of the Mother and Daughters, each of whom had full knowledge of the contract with Intervenor, to compromise or settle their dispute by making an agreement which affected the contractual rights of the Intervenor, without its knowledge or consent or without being a party thereto. More specifically, Intervenor denies the right of the Mother and Daughters to "repudiate" Intervenor's contract with the Mother. In fact, after the Mother was no longer represented by the counsel who participated in the drafting of the "Memorandum of Understanding" she testified that she thought it was for the best interest of the estate that the lands be sold to Intervenor in accordance with the petition of the administrator (Tr. 2/1/60, p. 23). It is obvious from her conduct in this appeal that she does not want to repudiate her contract with Intervenor. She even testified that she felt morally and legally obligated to Mr. Hanson (Tr. 2/1/60, p. 19). At any rate she neither has the right and power nor the present inclination to repudiate Intervenor's contract, while retaining the \$10,000 consideration paid. The estate also finds itself in the embarrassing position of acknowledging the accounting on the \$10,000 consideration paid by Intervenor, and at the same time purporting to distribute lands and grazing permits to the daughters which, by administrator's own accounting, shows that the permits have already been transferred to Intervenor by the Bureau of Land Management (R. 2655, p. 406).

The Mother and Intervenor contracted with full knowledge of the dispute between the Daughters and the Mother. The contract provided that the Mother was to convey to Intervenor all of the described permises in which her interest has been decreed and to which she has established *or can establish a marketable title*. Again they recited that they understood that the Court in the actions already filed (Cases No. 2655, the Probate Case, or Case No. 4784, the suit filed by the daughters against the Mother) *or a court in other legal actions which may or could be filed* might decree the land to belong to the estate. Intervenor agreed that it was contracting for the purchase of the Mother's interest, whatever it might be. Intervenor did not agree that it was contracting for anything less than what belonged to the Mother. Certainly Intervenor did not agree that the Mother and Daughters could compromise and settle their private differences irrespective of Intervenor's contractual interest in the disputed properties.

It has been suggested that the suit filed by the Daughters against their Mother was in the nature of a quiet title suit. This Intervenor denies. An examination of the pleadings refutes this theory. However, if we treat it as a quiet title suit it is immediately obvious that Intervenor was never made a party thereto. It is equally obvious that Intervenor claims an interest in properties involved in that suit, and it is beyond dispute that the Mother and Daughters well knew of Intervenor's claimed interest in said properties. The "Memorandum of Understanding" makes reference to Intervenor's Contract with

the Mother in an abortive attempt to repudiate Intervenor's contract. From the time of the attempted repudiation on, Intervenor not only had the right to move to protect its contract rights but after knowledge of the purported repudiation it had the full right to institute an action to try the title to the disputed lands, and need not be required to await the final outcome of the machinations of those who had already showed their nefarious scheme to deal Intervenor out of the picture. However, the Daughters apparently assumed the right and power to repudiate Intervenor's contract without the knowledge or consent of Intervenor and then also to try Intervenor's interest in property without Intervenor being a participant in the suit. The position of the Mother in this appeal shows that she, too, now recognizes that Intervenor is entitled to be heard, and that his contract rights cannot be dealt away in absentia.

Under Utah law the property of one who dies intestate passes to the heirs of the intestate, subject to the control of the court and to the possession of the administrator, §74-4-2, U.C.A. 1953. Utah law also recognizes the rights of an assignee of an heir, §75-12-1 and 15. See also *Dunn v. Wallingford*, 47 U. 491, 155 Pac. 347. Intervenor's contract with the Mother binds whatever interest she has in the disputed properties, whether her interest is as an heir of her deceased husband or as his grantee during his lifetime.

The record in this case clearly shows that Intervenor has filed a quiet title suit in Sevier County in which action the Mother, Daughters and Administrator have

been joined as parties defendant. The "Mountain Grounds" located in Sevier County which are the subject of the dispute between the Mother and the Daughters, and which are also the subject of the contract between Intervenor and the Mother are before the District Court of Sevier County for determination of title. That case is now ready for trial this fall, and that is the proper court to settle this property dispute, with *all* of the interested parties before it.

The record clearly shows that long before the death of Hillard L. Voorhees he had executed deeds (1940) to the disputed "Mountain Ground" and delivered them to his wife Pearl O. Voorhees. She retained them in a steel box where she kept her other papers until just before Hillard's death, when she took the deeds from her box in June, 1956, and had them recorded. The record title to these lands was thus lodged in the Mother when Intervenor contracted with her to buy whatever interest she had. The Decree of Distribution appealed from herein nevertheless purports to distribute out of Hillard L. Voorhee's Estate to the Daughters an interest in these same disputed lands. By what legerdermain does the Probate Court assume control over the disputed lands? Before the "Memorandum of Understanding" had been filed with the court in Case No. 4784, Intervenor had acquired its contract rights, paid its money, and commenced its quiet title suit in Sevier County and served each of the defendants therein.

A Lis Pendens was also filed of record against the disputed land in August, 1959. From that moment on

the claims of Intervenor were of record and those who dealt with the disputed land did so charged with knowledge of Intervenor's claims. When the Mother and Daughters "repudiated" Intervenor's contract, Intervenor had the right and probably the duty to either intervene in the suit between the Daughters and the Mother or to commence a quiet title suit in the County where the land was situate. Intervenor elected to file the suit in Sevier County where the lands are located and to bring all of the claimants before the court. The "repudiation" of Intervenor's contract by the Mother and Daughters was notice to Intervenor that it would be compelled to interject itself into the conflict to protect its rights. It could no longer assume that anyone was recognizing its contract rights.

Despite the filing of the quiet title suit in Sevier County and the recording of the Lis Pendens in August, 1959, the lower court in the consolidated actions (Intervenor was never made a party in the suit between the Daughters and their Mother) entered judgment on October 2, 1959, directing the Mother to convey the "Mountain Ground" by warranty deed to the Administrator. This judgment concluded with this language, "It is further *ORDERED* that this court shall and does retain jurisdiction over this cause to adjudicate any matter which may arise under the memorandum pending final creation of the trust provided therein and in the further probate proceedings herein." At the time of the entry of this judgment Intervenor was not yet a party to the Probate case.

To this date no trust has ever been created. Thus, this 1959 judgment was never final, and hence no appeal from it was necessary.

On October 13, 1960, the lower court in the probate matter made and entered two separate judgments, one a Judgment of Partial Distribution to the Daughters of the "Mountain Grounds," and the other a Judgment of Partial Distribution to the Daughters of the Taylor Grazing Permits. The findings of fact in support of the land distribution recite that it is for the best interest of the heirs of said estate to distribute to the Daughters a two-thirds individual interest. The record shows that the Administrator, Intervenor and the Mother each opposed this distribution. The record further shows that higher bids were made in open court than the \$15.50 per acre rate charged against the Daughters.

Section 75-12-5, U.C.A. 1953, provides that partial distribution may be made under specified conditions. One of these statutory conditions is that the court find that no person interested in the estate will be prejudiced by the partial distribution. No finding of non-prejudice was made by the Court, and indeed none could be in the face of the higher bids offered and the opposition of the Administrator and one of the heirs. Also, Intervenor is "a person interested in the estate" and certainly, in view of the dispute as to ownership of the land in question, was prejudiced by the Judgment of Partial Distribution. This prejudicial result alone is adequate ground for reversal of the judgment of Partial Distribution of the "Mountain Ground."

Another statutory condition to partial distribution is that it be for the best interests of the beneficiaries of the estate (75-12-5, U.C.A. 1953). This requirement is not met because *some* of the beneficiaries want partial distribution. It must be for the best interests of all beneficiaries. The record will not support such a finding.

These objections were made by Intervenor in the lower court by formal document under oath as follows: (R. 2-2655, p. 325)

“... This objection is based upon the following grounds:

a. Petitioner is the equitable owner of an undivided interest in these lands and thus an objecting beneficiary.

b. Petitioner has offered to purchase these lands from the estate at a greater consideration than will result to the estate if said lands are distributed to Beverly Clyde and Betty Hayward, and therefore distribution to them would be prejudicial

c. Unless this sale is confirmed to petitioner, thereby merging the undivided interests of Henry I. Voorhees and his wife Aileen Voorhees, and of the heirs of Hillard L. Voorhees, costly and necessary litigation to determine the title to said lands and to partition same will be continued, to which litigation the administrator of this estate will also continue to be a party.

d. Not all of the beneficiaries of this estate have joined in requesting partial distribution and it cannot be shown that ‘no person interested in the estate will be prejudiced’ if such a partial distribution were to be made, thus making such a partial distribution a violation of Section 75-12-5, Utah Code Annotated 1953.”

The Decree of Partial Distribution of the land was dependent upon and based entirely upon the "Memorandum of Understanding" which was agreed to in the case wherein Intervenor was never a party. No court can consolidate cases and thereafter enter a consolidated judgment against Party "X" in reliance upon matters heard and determined in the consolidated case to which Party "X" was never a party. Yet this was precisely what was done by the lower court. The "Memorandum of Understanding" was prepared, agreed to, and signed at the hearing of April 1, 1959, in case No. 4784, the suit by the Daughters against their Mother. Intervenor was never a party to this action. Intervenor did not become a party in the Probate Case until 2/1/60. The consolidation with the Probate Case was accomplished on Sept. 15, 1959 (See judgment of October 21, 1959, R. No. 4784, p. 40) and yet the probate court judgment of distribution obviously relies upon and is completely dependent upon the record made in Case No. 4784 prior to consolidation and prior to intervention.

DISTRIBUTION OF TAYLOR GRAZING PERMITS

Hillard L. Voorhees, at one time during his life, was the owner of the Taylor Grazing Permits for 1870 head of sheep on the Milford Unit No. 9, District No. 3. The Daughters' entire claim to a share of these permits is based upon the fact that their father once owned them. The facts of record in this case and the applicable law clearly show the error of the lower court in treating these Permits as an asset of the estate.

The issuance, transfer and termination of Taylor Grazing Permits is controlled by rules and regulations found in 43 C. F. R. 161 and sub-paragraphs thereunder. Subparagraph 161.7 provides that a transfer of a base property or part thereof whether by agreement, operation of law, or testamentary disposition will entitle the transferee, if otherwise qualified, to so much of the grazing privileges as is based thereon. In any event, it is provided that the original license or permit will be terminated or decreased to the extent of *any* transfer of base lands. It is further provided that a transferee shall, within ninety days from the date of transfer, file with the range manager documentary evidence of the transfer and an application for a license or permit, active or non-use, for the grazing privileges based thereon. Two things are obvious under these regulations. First, transfer of the base lands terminates the original grazing permit, and second, the transferee of the base lands gets no permit rights until he proves his qualifications and files an application for the permits.

The record shows that base lands ("Mountain Grounds") were conveyed to the Mother by deeds from Hillard L. Voorhees dated in 1940, which deeds were recorded before Hillard's death in July, 1956. Pursuant to the applicable regulations referred to above, the permits which were once in the name of Hillard L. Voorhees were terminated, either because of the conveyance of the base lands to the Mother, or because of Hillard's death. The Bureau of Land Management has recognized this, and the record shows that these permits are now transferred by the Bureau of Land Management to Intervenor

Finally, Pearl O. Voorhees applied for these permits in August, 1956, and they were transferred to her that year. After they were transferred to her by the Bureau of Land Management she joined Henry L. Voorhees in signing waivers so they could be transferred by the Bureau of Land Management to Intervenor (Tr. 2/1/60, pp. 51 and 28)

Under date of March 23, 1960, Intervenor's objection to partial distribution of the grazing permits was filed of record in the lower court. This objection was under oath and so completely covers the position of Intervenor that it is quoted herein as follows: (R. 2, No. 2655, pp. 362-365)

"This objection is based upon the following grounds:

1. The subject grazing permits are not now and never have been assets of the estate of Hillard L. Voorhees, deceased, as will be more fully shown hereinafter. The base lands to which these permits were attached during the life of Hillard L. Voorhees are the subject of a suit to partition and to try the title to said lands, which suit is before the only proper court to partition and try the title to said lands, all as will be more fully shown hereinafter.

- "2. In August 1956, Pearl O. Voorhees made application to the Bureau of Land Management on Form 4-1174 for a section 7a transfer to herself from Hillard L. Voorhees for grazing privileges for 1870 head of sheep in the Milford Unit No. 9, District No. 3.

- "3. This section 7a transfer from Hillard L. Voorhees to Pearl O. Voorhees was duly approved in 1956 by J. Pratt Allred, Range Manager, Bureau of Land Management.

“4. Under date of October 21, 1958 Pearl O. Voorhees contracted in writing with Hanson Land & Livestock Company to sell all of her right, title and interest in and to the Voorhees Mountain Lands, which had previously been used as base lands for most of the 1870 grazing permits described above. In July 1959 Pearl O. Voorhees and Hanson Land & Livestock Company both made written application to the Bureau of Land Management for transfer from Pearl O. Voorhees to Hanson Land & Livestock Company of the 1870 head grazing permit. Under date of August 31, 1959, by certified mail, the Bureau of Land Management notified Pearl O. Voorhees that unless she objected within fifteen days to cancellation of grazing permit No. 183473 for 1870 sheep on the Pahvant Grazing District No. 3 it would be cancelled in its entirety because of the transfer of a portion of the base property and all Federal range privileges to Hanson Land & Livestock Company. No protest was made within said fifteen days by Mrs. Voorhees. Grazing permit for 1606 AUMS was thereafter transferred under Section 7a, using the Voorhees Mountain Lands under contract to Hanson Land & Livestock Company as base lands. Hanson Land & Livestock Company supplied 1688.4 acres of fee lands located in Township 16 South, Range 1 East (Juab County) as base lands under a section 7b transfer for 750 AUMS of privilege (the balance of the 1870 permits) and the transfer to Hanson Land & Livestock Company was duly recorded and approved by the Bureau of Land Management. The Permit in the name of Pearl O. Voorhees was duly cancelled when the transfer was made to Hanson Land & Livestock Company.

“5. Thus the grazing permit for 1870 head of sheep which petitioners are asking to be distributed to them out of their father's estate has already

been transferred to Hanson Land & Livestock Company, and 750 AUMS of these privileges have been severed from the original base lands and attached to new base lands controlled by said transferee.

“6. The original transfers from Hillard Voorhees to Pearl O. Voorhees and the contract rights upon which they were based both antedated the attempted repudiation (undated, but apparently as of April 1, 1959) of the October 21, 1958 contract between Pearl O. Voorhees and Hanson Land & Livestock Company. Both petitioners and Pearl O. Voorhees had full knowledge of the October 21, 1958 contract with Hanson Land & Livestock Company, and yet neither moved to make this company a party to their action wherein they purported to repudiate these contract rights. Both petitioners and Pearl O. Voorhees are now retaining the consideration paid by Hanson Land & Livestock Company, to-wit, \$10,000.00 cash, which \$10,000 in cash has been accounted for by Pearl O. Voorhees to Walker Bank & Trust Company, Administrator of the estate of Hillard L. Voorhees, deceased, which administrator has receipted for said \$10,000. Thus as a matter of law, by retaining said consideration, petitioners and Pearl O. Voorhees and the estate have ratified said contract of October 21, 1958, in spite of their unilateral declaration of repudiation made in a case wherein Hanson Land & Livestock Company was not a party.

“7. On August 28, 1959 Hanson Land & Livestock Company and Henry L. Voorhees and Aileen Voorhees, his wife, commenced an action in the Sixth Judicial District Court at Richfield, Utah, naming and serving as defendants the following:

Walker Bank & Trust Company, Administrator of the Estate of Hillard L. Voorhees, Deceased,

Pearl O. Voorhees
Betty Hayward
Beverly Clyde

“Also on August 28, 1959, a notice of Lis Pendens was duly filed and recorded in connection with this Richfield suit, which Lis Pendens specifically relates to the Voorhees Mountain Land, currently being used as base lands for the 1600 AUMS of grazing privileges which petitioners are asking to have distributed to petitioners. Furthermore this same Richfield suit (filed in the county wherein the lands are located) is a complaint to try the title to these same lands and to partition same, and is a proper action in which to determine these title problems. Both the filing of the suit and the recording of the Lis Pendens occurred (Aug. 28, 1950) before the hearing (Sept. 15, 1959) in this court, which resulted in the entry of the order compelling Pearl O. Voorhees to execute and deliver to the Administrator of the Estate of Hillard L. Voorhees, deceased, a warranty deed to that certain real property known as “the mountain ground.” This ‘mountain ground’ is one and the same lands as were the subject of the Lis Pendens, and also as were used as base for the grazing permits aforesaid.

“8. In view of the foregoing this court has no current jurisdiction to enter an order of distribution with respect to aforesaid grazing permits.”

The permits are not an asset of the estate and under the statutes of Utah and federal regulations could not become estate assets. This is so because even if we assume that Hillard owned the “Mountain Ground” when he died, §74-4-2, U.C.A. 1953, provides that the property of one who dies intestate passes to the heirs by operation of law. This being so, the permits would be terminated

by the death of Hillard, and until the heirs applied for new permits, they would be non-existent. This is precisely the holding of the only Federal Court decision on this point. We refer to the case of *Wilkinson v. U. S.*, 189 Fed. Supp. 413 (U. S. Dist. Ct., D. Ore. 1960).

Thus the record compels a reversal of the decree distributing permits out of the estate.

The permits never were in the estate.

Finding No. 9 in support of the judgment of partial distribution of the permits (R. 3, No. 2655, p. 442) recites

“All of the parties now before the Court, by their conduct and actions and representations in Court and by the petition and protests heretofore filed herein, have acknowledged and agreed that said Taylor Grazing Rights are assets which belong to the estate of Hillard L. Voorhees, deceased, and subject to the Order and direction of this Court in connection with said probate proceedings.”

Obviously this finding to which Intervenor took formal exception, is at complete variance with the record. Even counsel for the Daughters refutes this Finding as he on three separate occasions at the hearing of Feb. 1, 1960, made these comments:

1. The permits had been transferred and title had been conveyed (Tr. 2/1/60, p. 28).
2. It is not the Daughters' intention to object to the transfer of the range rights. Mr. Hanson went ahead and transferred the permits and has been using them for two years (Tr. 2/1/60, p. 13).

3. If they (Intervenor) want to restore the permits we will take them, if they want to keep them we would not oppose it (Tr 2/1/60, p. 57).

In addition counsel for the Daughters asked Mr. Hanson if he was willing to return the permits to the estate, and was twice given a flat "no" answer (Tr 2/1/60, p. 47). Furthermore, Intervenor's offer to purchase the permits through the estate was specifically made as a compromise effort, which if it had been successful would have made the whole dispute over ownership a moot question. Certainly, Intervenor by making this compromise offer did not concede ownership of the permits to be in the estate.

CONCLUSION

The lower court, former counsel for the Mother, and counsel for the Daughters, have all ignored Intervenor and its claim and rights. The judgments appealed from are dependent upon the "repudiation" of Intervenor's contract in a case to which Intervenor was never a party. The judgment compelling the Mother to convey the disputed "Mountain Grounds" to the estate was the direct result of the "Memorandum of Understanding," a document which came into existence before there was any consolidation of the two cases and before Intervenor was a party in the Probate Case. Thus, under no possible basis could it be argued that Intervenor was a party to or bound by this agreement. The blatant effort to deal behind the back of Intervenor in the summary manner attempted should not be approved by this court.

The judgments of Partial Distribution must be reversed and the case returned to the lower court for proper disposition. Title to the disputed lands should be determined in the Sevier County quiet title action, and then distribution of estate assets would be in order.

MAX K. MANGUM,

*Attorney for
Intervenor and Appellant*

206 El Paso Natural Gas Bldg.
Salt Lake City 11, Utah