1970

Lyman Grazing Association v. George W. Smith, Eleanor N. Smith and Keith Smith : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

LYMAN GRAZING ASSOCIATION, a corporation,

Plaintiff and Appellant,

vs.

GEORGE W. SMITH, ELEANOR N. SMITH and KEITH SMITH,

Defendants and Respondents.

Case No. 11849

BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial District Court
Summit County
Hon. Merrill C. Faux, Presiding

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STATEMENT OF KIND OF CASE

This is an action to quiet the plaintiff's title to the "New Hickey" and "Parley Madsen" irrigation ditches and for damages against the defendants for wrongful use of such ditches.

DISPOSITION IN LOWER COURT

The trial court granted to the defendants the right to convey water in the ditches and awarded damages

to them, but did not determine whether the plaintiff owned the ditches or had the right to use them.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to reverse the judgment with directions to the trial court to enter a decree quieting its title to the irrigation ditches and restraining the defendants from using them.

STATEMENT OF FACTS

The appellant will be referred to as the "plaintiffs" and the "respondents" will be referred to as the defendants. The transcript will be referred to as "Tr." and the blue files which contain the pleadings, findings, judgment and copies of certain exhibits will be referred to as "R."

The New Hickey ditch diverts water from the West Fork of Beaver Creek in Summit County and is used to irrigate land in Utah and Wyoming. The Parley Madsen Ditch hereinafter referred to as the "Madsen" ditch diverts water from the same creek at a point about 30 feet downstream from the New Hickey diversion and the Carter ditch referred to in the evidence diverts from the same creek at a point below the Madsen ditch. (Tr. 14, 21) The locations of the ditches are shown on Ex. 1-P. The New Hickey ditch and the Madsen ditch come together in the Northeast Quarter

of Section 25 shown on the Map, Ex. 1-P, (Tr. 34) and the Madsen ditch flows in a northerly direction. The ditch below the confluence of the New Hickey and Madsen ditches is designated on the map as "Parker Madsen ditch". This ditch was in existence and use in 1919 when witness Harry Buckley first became acquainted with the area and has been used for the irrigation of the land now owned by the plaintiff ever since. (Tr. 52) In 1953 when the State Engineer surveyed the area for the purpose of a statutory determination of the water rights in Beaver Creek there were turnouts for laterals to irrigate the plaintiff's land (then owned by Joe C. Hickey). (Tr. 15, 16, 22, 23).

The New Hickey ditch was constructed by Joe C. Hickey about 1955 and was used by Mr. Hickey to carry water to the Madsen ditch which as indicated above carried it to the Hickey land in Section 24 shown on the Map Ex. 1-P. (Tr. 51)

As shown on the map and as explained by state adjudication engineer Donaldson the defendants' land in 1953 when the survey was made was irrigated by means of the Carter ditch which diverts from the West Fork of Beaver Creek about 2000 feet below the New Hickey and Madsen diversions. (See Ex. 1-P) The Carter ditch was used by the defendants until the changes in the headings and ditches were made by the defendants which precipitated this suit. (Tr. 16, 17, 23).

In 1961 Joe C. Hickey and his wife made an agreement to sell the land and the water rights now owned by the plaintiff to Lewis H. Larsen, Dorothy G. Larsen, his wife, Bette G. Larsen Bowes and Wana Lee Larsen and Lewis H. Larsen, Trustee. (R. 74-82) Ex. 8-D. The agreement contained the usual provision for retention of title by the Sellers until payment of the purchase price. (R. 79) The Buyers were given possession on June 1, 1961.

It was stipulated in open court that before the purchase of the Hickey property by Larsen " . . . . Joseph Hickey had ownership of the Parley Madsen ditch and the right to use water out of the Parley Madsen ditch as it was then located. . . . " (Tr. 31, 32)

The deposition of Lewis H. Larsen was read into the evidence at the trial. (Tr. 103) Mr. Larsen testified, over the objection that it was hearsay made at the time the deposition was taken and at the trial (Dep. p. 8, Line 20, Tr. 104), that in 1962 he had a telephone conversation with defendant Keith Smith relating to the moving of the defendants' water from the Carter ditch into the New Hickey and Madsen ditches. The following is quoted from the deposition:

> " . . . Q. What was said between you and Keith at that time?
>
> A. Oh, I had asked Keith to show me where he would like to move the ditch. I told him we was having a lot of trouble in the meadows down there where his ditch went through. These hea-

vers kept damming his ditches off and flooding my meadows and making a regular swamp down in there. And he said if he could move it up on the higher ground, it would help him and help me both. And I met him out here on this property and we walked this ditch out, and there was an old ditch going down there—

MR. BACKMAN: May the record show Mr. Larsen was pointing to a line called the New Hickey Ditch and running through the west half of the east half of Section 24. Okay.

THE WITNESS: There was already a ditch there, so I told him I could see it would do no harm to this property and it would help my meadows considerably if he would clean this out big enough to handle his load until he got down to here at the end of the present ditch. He'd have to make a new ditch, stay along the fence and make the curve and follow the fence and go down the edge back to his original ditch, join his original ditch here.

MR. BACKMAN: All right. May the record show that Mr. Larsen—

THE WITNESS: And I walked it out with him and agreed to do that, and I watched him as he—a few days later when he came in and did the work and everything seemed satisfactory . . "
(Deposition of Lewis H. Larsen, pp. 10, 11)

The court reserved his ruling on the admissibility of this evidence.

There is no evidence that the owners of the title to the land which was sold to Larsen agreed to the use by the defendants of the New Hickey and Madsen ditches.

The significant dates relating to the defendants' alleged right to use the two ditches are:

Construction of Madsen Ditch (Tr. 51)—Prior to 1919

Construction of New Hickey Ditch (Tr. 51)—between 1953 and 1955

Sale agreement Hickey to Larsen (R. 74, Ex. 8-D) ..... May 26, 1961

Conversation between Larsen and Keith Smith about using ditches (Larsen dep. pp. 10, 11) — 1962

Defendants built new heading and enlarged ditches (Tr. 114) 1962, 1963

Larsen quit claimed to Beehive State Bank (abs. of title, Ex. 6-P, pp. 492 and 494) ..... July 26, 1963

Application to state engineer for change of defendants' point of diversion from Carter ditch to New Hickey ditch ..... October 23, 1963

Final decree adjudicating water rights on Beaver Creek awarding water rights and use of Madsen ditch to Joe C. Hickey and wife (R. 82) .....September 25, 1964

Deed from Joe C. Hickey and wife of land water rights, easements and appurtenances to Beehive State Bank (Abs. of title, Ex. 6-P, pp. 495-498) .....April 30, 1965

Deed from Beehive State Bank to plaintiff covering lands, water rights and appurtenances (Abs. of title, Ex. 6-P, pp. 499-501) .....April 30, 1965

Keith Smith testified that in 1965 he told Jack Buckley, then the manager of plaintiff association, that the plaintiff should pay part of the cost of repairing the headworks of the New Hickey ditch and of enlarging that ditch and the Madsen ditch and he suggested payment of $100. (Tr. 150) This was about one-half the cost. (Tr. 150) In the Spring of 1966 Keith Smith told Mr. Phillips, an officer of plaintiff that the defendants were taking over the ditches. (New Hickey and Madsen) (Tr. 77) On May 10, 1966 the plaintiff filed a temporary change application No. 66-27 to change its point of diversion from the Madsen ditch heading to the New Hickey ditch heading. (Tr. 43) A hearing was held before the state engineer and this application was approved July 8, 1966. (Tr. 43) A few days later the plaintiff constructed a new heading for the Madsen ditch below the New Hickey heading and since then has diverted water entirely through the Madsen ditch. (Tr. 197)

The state engineer appointed Willard J. Stringer water commissioner on the West Fork of Beaver Creek in 1966 and he has distributed water to the plaintiff and to the defendants since such date. (Tr. 97-99)

The defendants alleged in their amended answer and counterclaim that during the year 1962 the defendants entered into an oral agreement with Lewis H. (Dude) Larsen, *who was then the owner* of and in possession of certain property described in the complaint which said Larsen was purchasing under a real estate

contract from Joseph C. Hickey for the relocation of the Carter ditch. (R. 17, 18)

The defendants further alleged in their amended answer and counterclaim that they had been and would be damaged in the sum of $5,000.00 by plaintiff's interference with their rights in the use of their water and that plaintiff had at times cut off the flow of water to them. They also alleged that they had been required to employ an attorney to represent them in this action and that $2,500.00 was a reasonable attorney's fee. (R. 19)

The trial court decided that Larsen as contract purchaser "occupied a status which enabled him to effectively transact business with the defendants relative to the Hickey ditch and its extension," that Larsen and Keith Smith for a valuable consideration made an arrangement which resulted in the abandonment of the Carter ditch by the defendants and Larsen's consent to their use of the relocated ditch, that the relocation and enlargement of the Hickey ditch was an accomplished and visible fact when the plaintiff acquired the land " . . . through which the ditches proceed." (R. 33)

The court further decided that the defendants were entitled to an attorney's fee for services rendered in obtaining an injunction " . . . and related matters but that the defendants are not entitled to an attorney fee . . . for services in this action and directly related matters." (R. 33)

With respect to damages the court said, "6. That defendants' evidence of damage to crops is indefinite as to extent and amount. Both counsel may want to talk to me further in this regard. If so, I will arrange time. I will also consider reopening for additional testimony." The case was not reopened for additional testimony. (R. 33)

Findings of fact, conclusions of law and a judgment following generally the memorandum decision summarized above were filed. (R. 34-40)

The plaintiff filed timely objections to the findings, conclusions and judgment upon the following grounds:

1. That the court made no findings, conclusions or judgment determining whether the plaintiff is the owner of or has an interest in the Madsen ditch and the New Hickey ditch, both of which are described in the complaint.

2. That the court did not determine the interest, if any, of the defendant in either of such ditches but entered a judgment granting to the defendants, " . . . the right in the Hickey Ditch and its extension . . . "

3. That it cannot be determined whether the plaintiff and defendants are co-owners of the ditch and if so what percentage of ownership of the ditch is owned by each. (R. 43)

The plaintiff moved to amend the findings, conclusions and objections to set out with particularity the

plaintiff's and defendants' ownership of and rights in the New Hickey and Madsen ditches. (R. 43, 44) The objections and motion were denied. (R. 49)

STATEMENT OF POINTS

1. A permanent right to use a ditch is real estate and cannot be transferred by parol.

2. The court erred in admitting the testimony of Larsen and Keith Smith regarding use of the New Hickey and Madsen ditches over the objection that it was hearsay.

3. The contract purchasers, Larsens, had no legal authority to grant to the defendants the *permanent* right to use the New Hickey and Madsen ditches.

4. The defendants are bound by the final decree adjudicating to plaintiff's predecessor the use of the Madsen ditch.

5. The approval by the state engineer of application No. a-4379 did not create a right in defendants to use the New Hickey and Madsen ditches.

6. The court erred in awarding damages to the defendants.

7. The court failed to make findings of fact on all material issues.

ARGUMENT

1. A PERMANENT RIGHT TO USE A DITCH IS REAL ESTATE AND CANNOT BE TRANSFERRED BY PAROL.

As indicated in the statement of facts the parties stipulated in open court that before the purchase of the Joseph Hickey property by Larsen, (referred to in the transcript as Joe C. Hickey), Joseph Hickey, plaintiff's predecessor in title, had ownership of the Madsen ditch and the right to use it as it was then located. (Tr. 31, 32) The defendants contended and the trial court found that, "Because of the excessive water on a part of said lands caused by Beaver Dams, Larsens and Smiths decided it would be to the best interests of both that the ditch be relocated." (Finding No. 3, R. 35) The court further found, "That at the sole cost and expense of defendants Smiths and as directed by said Lewis H. Larsen, the said defendants Smiths relocated said ditch . . . " (Finding No. 4, R. 35) The conclusions of law are in the language of the court's memorandum decision.

When the findings are read in the light of the court's memorandum decision it is apparent that the court decided that the oral permission given by Larsen to Smiths to carry water in the New Hickey and Madsen ditches followed by enlargement of the ditches before the plaintiff acquired the Joe C. Hickey land created a permanent right in defendants to use the ditches. This was error.

Section 25-5-1, Utah Code Annotated, 1953, provides:

> "No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

A right to use a ditch is an easement and an easement is an interest in real estate.

See Kinney on Water Rights, 2nd Ed. Sec. 978. We quote:

> "Rights of way over private lands for the construction and use of ditchs, canals or other works may be acquired by contract between the one seeking the right, and the owner of the land based, of course upon the consent of the latter. The right of way being an easement over the land, the general law of contracts applies for securing rights of way for these purposes as applied to the acquisition of rights of way for other purposes. To become a permanent easement the right of way must be acquired by a deed, or as a result of an executed contract founded upon a good and sufficient consideration, to entitle the party seeking the right to a specific performance of the contract by the court or by operation of law by prescription."

It will be noted that an interest in real estate can be transferred only by a deed of conveyance in writing, by executed contract with the owner, or by operation of law. See *Mannix vs. Powell County*, 75 Mont. 202, 243 P. 568. Admittedly there was no deed or conveyance of an exclusive right or any right in the New Hickey and Madsen ditches or either of them, and there is no pleading or evidence of transfer of title to real property from Hickey to the defendants by operation of law. There has been insufficient time for a prescriptive right. No ditch right has been transferred under the plain provisions of the statute quoted above.

The map Ex. 1-P and the abstract of title Ex. 6-P and the testimony of Harry Buckley (Tr. 51) shows that the ownership of the land traversed by the New Hickey and Madsen ditches and the extension thereof was as follows:

W½NE¼, Section 25—United States
SW¼SE¼, Section 24—United States
NW¼SE¼, Section 24—Harry D. Buckley
SW¼NE¼, Section 24—Harry D. Buckley
NW¼NE¼, Section 24—Harry D. Buckley
NE¼NE¼, Section 24—Joe Hickey
NW¼NW¼, Section 19—Joe Hickey

The users of the New Hickey and Madsen ditches had an easement for carriage of irrigation water. The fact that Larsen, while a contract purchaser from Hickey, authorized the change of location of the ditches did not establish a contract "with the owner" within

the meaning of the rule. Even if Hickey, the user of the ditch with a decreed right to use it had authorized the change it would not have been binding on the United States and Harry D. Buckley! Neither Larsen nor Hickey had any right to grant an easement for the construction and enlargement of the ditches on the lands of the United States and Buckley. The case must be reversed for this reason alone.

2. THE COURT ERRED IN ADMITTING THE TESTIMONY OF LARSEN AND KEITH SMITH REGARDING USE OF THE NEW HICKEY AND MADSEN DITCHES OVER THE OBJECTION THAT IT WAS HEARSAY.

Both the testimony of Lewis H. Larsen quoted in this brief above from the deposition (pp. 10, 11) and the testimony of Keith ~~Larsen~~ Smith (Tr. 106-111) as to conversations with Larsen *not in the presence of any representative of the plaintiff were and are inadmissible as hearsay,* unless such testimony falls within an exception to the hearsay rule. The exceptions are listed in Wigmore on Evidence, 3rd Ed. Volume V, pp. 208-209. They are:

1. Dying Declarations.
2. Statements of Fact against Interest.
3. Declarations about Family History.
4. Attestation of a Subscribing Witness.
5. Regular Entries in the Court of Business.
6. Sundry Statements of Deceased Persons.

7. Reputation.
8. Official Statements.
9. Learned Treatises.
10. Sundry Commercial Documents.
11. Affidavits.
12. Statements by a Voter.
13. Declarations of Mental Condition.
14. Spontaneous Exclamations.

It is clear that the testimony in question does not fall within any recognized exception.

In the case of *Cook vs. Rigney,* 113 Mont. 198, 126 P.2d 325, which was a contest between two claimants to real estate, an effort was made to put in evidence certain declarations made by a former owner, J. W. Cook. The court said:

> "The statements allegedly to have been made by J. W. Cook were patently hearsay, and unless they come within one of the recognized exceptions to the hearsay rule, they were not competent for any purpose.—To make such declarations admissible, as repeatedly said by this court, the party offering such testimony must show that the declarations were made while the declarant was holding title to the property in controversy; that the declarant was, in fact, the grantor of the party against whom the declaration is offered; and that the declaration was against interest."

As shown by the abstract, Larsen was not a grantor in the chain of title and was not the grantor of Lyman Grazing Association. (Ex. 6-P)

See also, *Savage vs. Nielsen,* 114 Utah 22, 19 P.2d 117.

The court clearly erred in admitting the hearsay testimony of Larsen.

3. THE CONTRACT PURCHASERS, LARSENS, HAD NO LEGAL AUTHORITY TO GRANT TO THE DEFENDANTS THE PERMANENT RIGHT TO USE THE NEW HICKEY AND MADSEN DITCHES.

The sales agreement between the Hickeys, vendors, and the Larsens, purchasers, dated May 26, 1961, gave the purchasers the right of possession of the Hickey land, ditch rights, water rights and appurtenances, but provided that the legal title would be retained by the vendors until payment in full of the purchase price. (R. 79) Assuming for the sake of this argument only that the hearsay testimony of Larsen and Keith Smith was admissible nevertheless such testimony does not create any permanent legal right to use the ditches in question. First, the testimony of Larsen quoted above and of Keith Smith is very general and does not show an intent to create a permanent right and, second the purchaser Larsen had no ownership of the property which would enable him by his words or acts to change the fee title to the land subject to an easement for the Carter ditch from one location to another location or to grant a *permanent right* to defendants to take their water through the New Hickey and Madsen ditches on the land owned by Hickey. As

we have pointed out above, neither Larsen nor Hickey could impose an easement on the land owned by the United States and by Buckley.

It is fundamental that a person cannot by his acts or conduct confer on a third person a greater right than he possessed. *Lesser vs. Dame,* 77 Miss. 798, 26 So. 961. In the case of *Chandler vs. Hamell,* 67 N.Y.S. 1068, a purchaser in possession of land under a sales agreement permitted a third party to construct a building on the property. The court held:

> "A purchaser in possession of land under an executory contract of sale cannot, without the consent of the vendor, create a right in a third person to erect thereon and remove buildings placed on blocks and posts."

Larsen's right as a purchaser was a possessory right only until he got the fee simple title and he could permit the defendants to use the ditches only while he, Larsen, had possession. He had no authority to change the basic property rights by changing the location of a permanent easement.

4. THE DEFENDANTS ARE BOUND BY THE FINAL DECREE ADJUDICATING TO PLAINTIFF'S PREDECESSOR THE USE OF THE MADSEN DITCH.

The pages in the general adjudicaton of water rights in the West Fork of Beaver Creek (R. 136) show that on the date of the decree, September 25,

1964, Joe C. Hickey and wife were the owners of a right to convey their water under right No. 141 through the "Parley Madsen Ditch." Such a decree speaks as of its date and is conclusive proof of the right to the use of the ditch as of that date. There has been no proof by the defendants of any fact which would defeat the plaintiff's right of use of the Madsen ditch since September 25, 1964. The converse is true. There is no proof of any fact or event which occurred since September 25, 1964, which would create in the defendants the right to use the ditch. The defendants were parties to the decree and their water rights and ditch rights were likewise adjudicated in the Carter ditch (R. 134) All parties were bound by the decree.

5. THE APPROVAL BY THE STATE ENGINEER OF APPLICATION NO. a-4379 DID NOT CREATE A RIGHT IN DEFENDANTS TO USE THE NEW HICKEY AND MADSEN DITCHES.

Keith Smith testified that he used the New Hickey ditch and the Madsen ditch to carry the water he was entitled to carry in the Carter ditch during the 1963 irrigation season. He filed no change application until October 22, 1963. The statute, Section 73-3-3 Utah Code Annotated 1953 requires the filing of a change application before changing the point of diversion from one ditch to another and provides:

> " . . . Any person who changes or who attempts to change a point of diversion, place of

purpose of use, either permanently or temporarily without first applying to the state engineer in the manner herein provided, *shall obtain no right* thereby and shall be guilty of a misdemeanor, each day of such unlawful change constituting a separate offense, separately punishable . . . " (emphasis added)

The application was approved April 3, 1964, when the applicant for the first time could legally, *from a water right standpoint only,* change the point of diversion.

The New Hickey and Madsen ditches were privately owned and the state engineer had no power or authority to permit one water user to use another water user's ditch or to enjoy an easement belonging to another. The state engineer's power and authority are stated in Section 73-2-1 Utah Code Annotated 1953 as follows:

"There shall be a state engineer, who shall be appointed by the governor by and with the consent of the senate. He shall hold his office for the term of four years and until his successor is appointed and qualified. He shall have general administrative supervision of the waters of the state, and of the measurement, appropriation, apportionment and distribution thereof. He shall have power to make and publish such rules and regulations as may be necessary from time to time fully to carry out the duties of his office, and particularly to secure the equitable and fair apportionment and distribution of the water according to the respective rights of appropriators . . . "

It is apparent from the wording of the statute a from the cases construing it that the state engineer an *administrative officer only* with authority to ma decisions which do not and cannot create or dest vested property rights.

United States vs. Fourth Judicial District Cou 121 Utah 1, 283 P.2d 1132.

Little Cottonwood Water Co. vs. Kimball, 76 Ut 43, 289 P. 116.

American Fork Irr. Co. vs. Linke, 121 Utah 239 P.2d 188.

Section 73-1-7 Utah Code Annotated 1953 perm a water user to make use of another person's ditch whi is already constructed upon compensating the own of the ditch and Section 73-1-6 Utah Code Annotat 1953 grants the right of eminent domain to constru a ditch across another person's land. In this case t defendants erroneously assumed the right to take ov another person's ditch and to construct a new dit without complying with the law cited above. The tr court's findings relating to the action of the state eng neer (findings Nos. 4 and 6) (R. 35, 36) have relevancy to the questions here involved and do n support the conclusions and judgment.

6. THE COURT ERRED IN AWARDIN DAMAGES TO THE DEFENDANTS.

The court awarded damages as follows:

1. The defendants were required to make numerous trips from Lone Tree, Wyoming to Salt Lake City on hearings before the state engineer and to consult their attorney. See Finding No. 6 (R. 36)—$150.00, Conclusion No. 5 (R. 38)—$50.00.

2. The defendants were required to make numerous long distance telephone calls because of the acts of the plaintiff. See Finding No. 6 (R. 36)—$50.00. Conclusion No. 5 (R. 38)—$150.00.

3. Attorneys fees for obtaining a restraining order. Finding No. 7, (R. 36, 37)—$700.00.

4. Costs of making trips to open ditches which had been obstructed by plaintiff. (R. 37)—$500.00. testified as follows:

On direct examination defendant Keith Smith

"... Q. Will you state what damage you have sustained?

A. Well, shall I list them off?

Q. Recite them.

A. Attorney's fees to date relative to this matter, $700. For the costs, etc., $150—expenses to Salt Lake City for hearing, etc., $150. Now, this occurred in 1966, and this that I note relates, then, to their forcing their way into the ditch and inteferring with our water, it has been necessary to make many trips to get our water past their turn-outs—pardon me—

* * *

A. The road is very rough and slow and t
would make it hard on vehicles; and I beli
I made about fifty trips, ten miles; fig
about $10 a trip. This is my time and wea
and-tear on the truck. That would be in t
amount of $500. This all occurred in 19
due to having to make the above trips,
was necessary to neglect other irrigation
other lands; . . . " (Tr. 121, 122)

On cross examination Smith testified:

" . . . Q. Now, referring to the year 1966, y
said you had suffered damages, then, of
$150; what was that for?

A. Now, there was so many phone calls I ha
the things were—

Q. That was phone calls over the water?

A. Over the matters, and—yes, uh-huh.

Q. You were complaining about someone ste
ing your water, were you?

A. Among other things, uh-huh, (yes).

Q. And you were having worries about you
water rights, and, so, you made $150 in pho
calls?

A. I believe there was, yes." (Tr. 156)

* * *

"Q. All right. Now the first item I have men
tioned in '66—phone calls, $150, over you
water right problem. Now, the next item
also '$150'; what is that for?

A. For trips to Salt Lake in regard to hearing

and to see Mr. Backman, and that sort of thing.

Q. Does that include the hearing before the State Engineer on the Temporary Change Application?

A. I am not sure.

Q. Who would know about it?

A. Well, I would know about it, but I just can't recall without—from this page—whether that was included, or not.

Q. You protested the temporary change application filed by Lyman Grazing Association, didn't you?

A. That's right.

Q. And you went to Salt Lake in the summer of 1966 and appeared at a protest—

A. That's right.

Q. —hearing; and testified, didn't you?

A. Uh-huh, (yes).

Q. And you hired an attorney to represent you—

A. Uh-huh, (yes).

Q. —at that hearing. And you consulted the attorney on the trip?

A. Uh-huh, (yes).

Q. Now, is that what that $150 is for?

A. No, it isn't. I have attorneys' fees of $700.

Q. Okay. Now, is that attorneys' fees on the hearing on the Temporary Change Application?

A. No, I believe that this was in regard to the filing of a lawsuit by the Lyman Grazing against us, and we had to employ counsel. (Tr. 157, 158)

The trial court sustained the plaintiff's objection to testimony relating to attorneys fees. (Tr. 166)

It will be noted that the only damages pleaded by the defendants in their counterclaim are as follows:

"8. Defendants have been required to employ the undersigned attorneys to represent them in this action and will be required to expend a reasonable sum for attorneys' fees which is the sum of $2500.00.

9. The defendants have done and will suffer damages as a result of the unlawful acts of the plaintiff in the sum of $5000.00." (R. 18)

The items of damages awarded numbered 1, 2 and 3 listed above relate to expenses of telephoning and traveling to prepare a defense to this suit, hearings before the state engineer and attorneys fees for services in this suit. See the quoted testimony of Keith Smith.

Even if the defendants had established ownership of the ditches in question and an exclusive right to use them (which they did not) they were not entitled to such damages and attorneys fees because they were not authorized by contract or statute. See 25 C.J.S., sec. 50, p. 777:

" 'Apart from the sums allowable and taxed as costs, which are considered in the title Costs, Sections 184-261, as a general rule, in the absence

of statutory or contractual authorization, there can be no recovery as damages of the costs and expenses of litigation, or expenditures for counsel fees, regardless of whether the successful litigant is plaintiff or defendant, even though the necessity of engaging in the litigation was caused by the wrongful act of the opposing party . . . "

See also *Dahl v. Prince,* 119 Utah 556, 230 P.2d 328; *Blake v. Blake,* 17 Utah 2d. 369, 412 P.2d 454.

In the Blake case the court said:

' . . . Appellants also contend that the court should not have granted as damages attorney's fees incurred in bringing this action because respondent did not ask for damages, and there is no contractual or statutory authority for the granting of attorney's fees. We agree. As a general rule, attorney's fees are not recoverable as damages in either actions on contract or in torts if there is no statutory or contractual authority for such fees. . . ' " (R. 100, 100A).

The remaining item 4 covers the expense of traveling to the head of the New Hickey ditch from the Smith ranch, a trip of 10 miles. Smith said he made 50 trips at $10.00 a trip. (Tr. 122) This amounts to one dollar a mile—a ridiculous figure. It is claimed the trips were necessary because of the plaintiff's " . . . forcing their way in the ditch." (Tr. 122) The court decided in its memorandum decision that, "I will not be able to find an exclusive right in either side for the use of the Madsen Ditch." (R. 33)

If we asume for the sake of argument only that

the defendants had a legal right to use the ditches there was no finding that the plaintiff was not entitled to use them and no evidence whatever that the plaintiff's use of the ditch caused any more trips than would have been necessary to obtain water from a common ditch. Smith testified that his water was shut off half the time in 1966 when the damage was claimed. (Tr. 168) There is no evidence in the record that he was entitled to more water than that and there is evidence that the water was distributed by a water commissioner. (R. 97)

We submit that the award of damages was error for the many reasons given above.

7. THE COURT FAILED TO MAKE FINDINGS OF FACT ON ALL MATERIAL ISSUES

This is a suit to quiet title to the ditches here involved and to restrain the defendants from using or interferring with them. It was stipulated in open court that the plaintiff's predecessor Joseph Hickey owned the Madsen ditch before the purchase by Larsen of the Hickey property (Tr. 29-32) and for the reasons stated above the successors were not divested of the ownership. The record shows use of the New Hickey ditch by Joe C. Hickey (Joseph Hickey) since it was constructed and the use of the Madsen ditch from 1911 to the time of the trial. Despite this showing the court completely ignored the rights of the plaintiff. *The findings and judgment are silent as to the plaintiff's rights.* The court did not quiet plaintiff's title and did not stat

that the plaintiff did not own the ditches. This defeated the entire purpose of the litigation and constituted reversible error.

It is well settled that the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. ***Piper v. Eakle,*** 78 Utah 342, 2 P.2d 909; ***Pike v. Clark,*** 95 Utah 235, 75 P.2d 1010; ***West v. Standard Fuel Co.,*** 81 Utah 300, 17 P.2d 292; ***Gaddis Inv. Co. v. Morrison,*** 3 Utah 2d. 43, 278 P.2d 284; ***Simper v. Brown,*** 74 Utah 178, 278 P. 529.

CONCLUSION

There is no evidence to support the findings, conclusions and judgment that the defendants have a right in the "New Hickey" and Madsen ditches" under any theory. The land traversed by the ditches is owned by the United States, Harry D. Buckley and Joe C. Hickey. There is no evidence that any of the landowners mentioned contracted to grant the defendants a permanent easement or had any dealings with the Smiths. The testimony regarding an easement by Larsen to permit the use of the ditch does not purport to create a permanent easement or permanent transfer of an easement, and if it did, Larsen, a contract purchaser, could not create an easement by a contract which would bind the owner of the fee. The award of attorneys fees was contrary to settled law and the award

of the other items of damage is not supported by any competent evidence.

The failure of the court to make a finding and judgment of the issue as to the plaintiff's ownership and right of use of the ditches was reversible error.

The judgment should be reversed and the trial court directed to quiet the plaintiff's title to the ditches in question and to restrain the defendants from using them.

Respectfully submitted,

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