

1949

James C. Whittaker v. Richard H. Spencer : Petition for Rehearing

Utah Supreme Court

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Elias Hansen; Attorney for Appellants and Respondents on Cross-appeal.

Unknown.

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

JAMES C. WHITTAKER,
Respondent,

RICHARD H. SPENCER, for whom
RICHARD LEO SPENCER, Admin-
istrator has been substituted,
*Respondent and
Cross-Appellant,*

JOHN EDISON SPENCER and
ELIZABETH A. TIBBS,
*Appellants and
Respondents on
cross-appeal.*

Case No. 7181

J. VORD SPENCER, IRWIN M.
PRICE, SIMON HUGENTOBLE,
for whom QUE JENSEN has been
substituted, INDIANOLA IRRIGA-
TION COMPANY and THE
STATE OF UTAH,
Respondents.

PETITION FOR REHEARING AND BRIEF
IN SUPPORT THEREOF.

Comes now John Edison Spencer, one of the appel-
lants and respondents on cross-appeal in the above
entitled cause and respectfully petitions this court for

a rehearing in said cause as to the items hereinafter mentioned and as a basis for such rehearing alleges:

1. That the court erred in concluding that Richard H. Spencer continued to treat certificate No. 73 as his own, including the pledging of such certificate to Irwin M. Price to secure an indebtedness.

2. The court erred in concluding that certificate 73 came back to Richard H. Spencer who either delivered it to Price as part of the security on the mortgage or else as security for a \$600.00 loan.

3. The court erred in concluding that "Having ruled that the water involved was not appurtenant we are not concerned with the deeds."

4. The court erred in concluding that Richard H. Spencer was the owner of any and all of the water right represented by certificate numbered 73.

5. The court erred in failing to make it clear as to what portion of the costs awarded to respondent Whittaker and Indianola Irrigation Company should be borne by appellants and what portion thereof should be borne by cross-appellants.

6. The court erred in not making it clear as to how the costs on appeal as between cross-appellant Richard Leo Spencer, as administrator, and John Edison Spencer and Elizabeth A. Tibbs, should be borne by each of them.

ELIAS HANSEN,

*Attorney for John Edison Spencer
and Elizabeth A. Tibbs.*

I, Elias Hansen, attorney for John Edison Spencer, one of the appellants and respondents on cross-appeal in the above entitled cause sincerely believes that errors were committed by this honorable court in the opinion rendered in this cause in the particulars hereinbefore enumerated in the petition for a rehearing.

ELIAS HANSEN,

*Attorney for John Edison Spencer
and Elizabeth A. Tibbs.*

ARGUMENT

Counsel is mindful that petitioners for a rehearing are not generally looked upon with favor, especially when the basis for a rehearing is a mere reargument of the questions originally presented and determined. However, the fact that rehearings are provided for by the courts it necessarily follows that in proper cases any party who feels that the court has erred in its decision is entitled to present his contention in a rehearing and doubtless if the court has erred in its decision it welcomes such a petition to the end that the final disposition of the case is in accord with the facts and the law.

There is a long record in this case and the same is somewhat confusing and doubtless the court experienced some difficulty in getting at its salient parts. We shall not in our argument in support of our petition reargue the question of the appurtenancy of the water to the land because we presented that question as best we

could in our original brief and the court having determined that question against our contention doubtless no useful purpose will be served by a reargument of that question. We shall attempt to confine ourselves to matters of fact concerning which there is no conflict in the evidence then point out the law which we believe is applicable to such facts.

The following facts are established without conflict in the evidence:

On January 3, 1922 R. E. Spencer and Annie H. Spencer, his wife, executed a mortgage to Simon Hugentobler to secure the payment of \$2,577.91 on Lot 4 of Section 5 and Lot 1 of Section 6 in Township 12 South, Range 4 East of Salt Lake Meridian. Together with 55 acres of primary water right from the waters of Thistle Creek. That mortgage was recorded on January 12, 1922 in the office of the County Recorder of Sanpete County, Utah. (Tr. 27 and 28)

¶

In case numbered 2888, the files of which were received in evidence, the mortgage to Hugentobler was foreclosed. The material part of said foreclosure reads as follows: "That the defendant and cross complainant Simon Hugentobler have judgment against the defendant Richard Leo Spencer, Grace Spencer, Richard H. Spencer and Annie Spencer for the sum of \$2,646.78 with interest thereon at the rate of eight per cent per annum from the --- day of May, 1936, also for the sum of \$250.00 attorney's fee and said cross complainant's costs herein; that said cross complainant as against

each and all of the other parties to this suit for a valid and substituting first mortgage lien upon the following described real estate and water rights to secure payment of the aforesaid judgment, to-wit: Lot 4 of Section 5 and Lot 1 of Section 6 in Township 12 South, Range 4 East, Salt Lake Meridian. Together with 55 acres of primary water right from the waters of Thistle Creek. (See paragraph 12 on page 8 of the decree in case numbered 2888.)

The decree also contains this provision: "That the defendants Richard H. Spencer, Annie H. Spencer, John Edison Spencer, Robert D. Tibbs and Elizabeth A. Tibbs be and are hereby restrained and enjoined from in any way assigning, transferring, disposing of or encumbering certificates of stock No. 72 and No. 73 issued by the Indianola Irrigation Company or the water rights represented by said certificates, or any other water rights held or claimed by said defendants in the waters of Thistle Creek, Clear Creek or Rock Creek until the further order of this court. The court hereby retains jurisdiction of this cause for further hearing upon the rights asserted by the Indianola Irrigation Company against said defendants. (See paragraph 14 of Foreclosure decree.) The decree is dated Dec. 4, 1936.

Pursuant to the decree of foreclosure an order of sale was issued and the property advertised, was sold and a certificate of sale issued, in which order of sale, advertisement and certificate of sale the property, including the water right was described in the same language as in the decree of foreclosure. (See documents

found in the files 2888 immediately following the decree of foreclosure.)

The sheriff of Sanpete County gave a deed to Simon Hugentobler in which the property was described in the same language as that contained in the mortgage. That deed is dated Nov. 13, 1937. (See Tr. 906.) Under date of October 20, 1944 Simon Hugentobler executed a statutory warranty deed to Andrew T. Hartley. In that deed the property, including the water right is described in the same language as in the mortgage to Hugentobler. (See Que Jensen's Exhibit 2.)

Under date of March 1, 1946 Andrew T. Hartley gave a quit claim deed to Que Jensen in which there is described a water right consisting of 55 acres of primary water right from the water in Thistle Creek heretofore used on Lot 4 of Section 5 and Lot 1 of Section 6 in Township 12 South, Range 4 East, Salt Lake Meridian. (See Que Jensen's Exhibit 4.) On the same day, March 1st, 1946, Andrew T. Hartley executed a warranty deed to Que Jensen to the land described in the Hugentobler mortgage to Que Jensen. "Without water right." (See Que Jensen's Exhibit 3.)

Such is the chain of title of Que Jensen, which the trial court held and this court affirmed the right of Que Jensen to 55/1728 of the flow of Thistle Creek and its tributaries.

The claim of the plaintiff James C. Whittaker to the water right claimed by him is derived in manner following:

On October 16, 1931 Henry M. Spencer, otherwise known as H. M. Spencer and Ida Spencer, his wife; Leo Harold Spencer and Fern Spencer, his wife; R. H. Spencer and Annie H. Spencer executed a mortgage to W. H. Hadlock, State Bank Commissioner of Utah to "The West half of the Northeast quarter; the Southeast quarter of the Northwest Quarter and the North Half of the South Half of Section three (3), Township 12 South, Range 4 East, Salt Lake Base and Meridian, containing 280 acres, subject to right of way of county road.

Together with all rights of every kind and nature however evidenced to the use of water, ditches and canals for the irrigation of said premises to which the mortgagors or said premises are now or may hereafter become entitled whether represented by certificates of stock or otherwise, and together with sixty (60) shares or acres of water right owned by R. H. Spencer in the waters of Indianola Creek, Thistle Creek and Rock Creeks in addition to waters now used for the irrigation of the above described lands." (Tr. 38.) That mortgage was given to secure a number of notes, none of which were signed by John Edison Spencer. That mortgage was foreclosed in the same proceeding as that in which the Hugentobler mortgage was foreclosed. In such decree of foreclosure the land and water right was described in the same language as in the mortgage. (See Decree—Case No. 2888, paragraph 1 thereof). In the order of sale the notice advertising the sale, the certificate of sale, return of sale of the foreclosure of the mortgage

to Hadlock, bank commissioner, the land and water was described in the same language as in the mortgage. (See files in case No. 2888 immediately following the decree of foreclosure and also abstract, plaintiff's exhibit "W", entries 9 and 10.)

On December 9, 1937 a sheriff's deed was issued to Rulon F. Starley, bank commissioner, in which deed the land and water was described in the same language as in the mortgage. (See abstract plaintiff's Exhibit "W".) Thereafter on May 31, 1939 the plaintiff herein purchased the assets of the North Sanpete Bank and secured a deed therefor including the land and water right described in the mortgage to Hadlock. (See abstract, plaintiff's Exhibit "W" and also Tr. 96.) In that conveyance the land and water are described in the same or substantially the same language as that contained in the mortgage to Hadlock.

Upon the foregoing facts the trial court awarded to the plaintiff 60/1728ths of the water of Thistle Creek and its tributaries and this court in the opinion written affirmed the decree of the trial court.

Under date of November 9, 1926, Richard H. Spencer and Annie H. Spencer, J. Vord Spencer and Jane Spencer, his wife, H. M. Spencer and Ida Spencer, his wife, executed a mortgage in favor of the Federal Building and Loan Association to secure the payment of a note for \$14,260.80. The land described in that mort-

gage consisted of approximately 234.00 acres of land. The mortgage also provided:

“Together with two hundred eighty-five (285) shares of capital stock of the Indianola Irrigation Company, a corporation. Also all water and water rights appertaining to or used upon or in connection with the above described real estate whether for domestic, irrigation or culinary purposes and whether the same arises upon said land or not.” (Tr. 30-33)

That mortgage was foreclosed by the Federal Building and Loan Association and a sheriff's deed was issued to the Federal Building and Loan Association under date of November 8, 1934. (See Tr. 218-223.) In that foreclosure proceeding and in the sheriff's deed the land and water was described in the same language as in the mortgage. In that action in addition to the persons who signed the mortgage the Indianola Irrigation Company and the State Bank Commissioner were made parties defendant. John Edison Spencer was not made a party notwithstanding he had a recorded warranty deed to 80 acres of land and 80 acres of water in Thistle Creek. The land to which he held title was not included in the mortgage to the Federal Building and Loan Association.

Under date of March 2, 1935 the Federal Building and Loan Association executed and delivered to the Indianola Irrigation Company a quit claim deed to the water right which it acquired by reason of the mortgage to it and the foreclosure thereof. (See Trs. 230-232.)

Upon receipt of such conveyance the Indianola Irrigation Company issued certificate 86 for 160 shares. (See John Edison Spencer's Exhibit 11) and certificate No. 84 for 125 shares, which certificate was assigned by the Federal Building and Loan Association to Richard H. Spencer under date of December 1, 1938. (See Indianola Irrigation Company's Exhibit 20a.)

Certificate No. 86 was made out to the Federal Land Bank of Berkeley as pledgee of Robert D. Tibbs. It was planned to secure a loan from the Federal Bank of Berkeley in the name of Robert D. Tibbs. The water represented by that certificate was assigned to John Edison Spencer and it represents the water right which was awarded to John Edison Spencer. For the purposes of the foregoing petition for a rehearing that certificate need not concern us.

The foregoing constitutes the chain of title to the water right which was mortgaged to the Federal Building and Loan Association.

On April 29, 1933 Richard H. Spencer and his wife executed a statutory warranty deed to John Edison Spencer conveying eighty acres of land "together with 80 acres of water in what is known as Thistle Creek." (See Tr. 51.) The description of the land in that deed was in error and on September 16, 1933 another Warranty Deed was executed and delivered to John E. Spencer. Such deed recites that for the sum of One Hundred Dollars and other good and valuable consideration the grantors, Richard H. Spencer and Annie H.

Spencer convey and warranty to John E. Spencer the following described tract of land in Sanpete County, State of Utah:

The North One Half of the Southwest Quarter of Section 5, Township 12 South, Range 4 East, Salt Lake Meridian, containing 80 acres. Together with 80 acres of water in what is known as Thistle Creek. This deed is made to correct that certain deed made and executed on the 29th day of April, 1933 and recorded June 22, 1933 in Book 86 of Deeds on page 301 in the office of the County Recorder of Sanpete County. This last deed dated September 16, 1933 was recorded in the office of the County Recorder of Sanpete County, Utah, on September 21, 1933 (See John Edison Spencer's Exhibit 12, and also Tr. 53).

We have set out at length the various chains of title to the various water rights involved in this action. If the various mortgages and conveyances which the trial court and this court held sufficient to create a lien upon or convey a water right it necessarily follows that the description of the water right contained in the deed to John Edison Spencer was sufficient to convey 80 acres of water in what is known as Thistle Creek. The description of the water right contained in the warranty deed to John Edison Spencer under date of September 16, 1933, as will be seen, is identically the same as the language used in a number of the other deeds of conveyance and mortgages which the trial court and this court has held sufficient to constitute a valid conveyance or lien. To make this fact clear we again set out the language used.

OTHER CONVEYANCES:

In mortgage to Simon Hugentobler:

“Together with 55 acres of primary water right from the waters of Thistle Creek.”

The same language was used in the conveyance from Hugentobler to Hartley (Que Jensen’s Exhibit 2), and from Hartley to Que Jensen (Que Jensen’s Exhibit 4).

In the mortgage to Hadlock, Bank Commissioner, the predecessor of plaintiff, Whittaker, the language used to describe the water right is:

“Together with sixty (60) shares or acres of water right owned by R. H. Spencer in the waters of Indianola Creek, Thistle and Rock Creek.”

The mortgage to the Federal Building and Loan Association is:

“Together with two hundred eighty-five (285) shares of capital stock in the Indianola Irrigation Company, a corporation, also all water and water rights appertaining to or used upon or in connection with the above described real estate whether for domestic, irrigation or culinary purposes and whether the same arises upon said land or not”.

CONVEYANCE TO
JOHN EDISON
SPENCER

The language used in the Warranty deed to John Edison Spencer is:

“Together with 80 acres of water in what is known as Thistle Creek.”

We have heretofore pointed out that in the various proceedings and conveyances by which the present owners deraign title is the same or substantially the same language is used as was used in the original instrument executed by R. H. Spencer.

A comparison of the language above quoted in the various mortgages and conveyances to persons other than John Edison Spencer is the same or substantially the same as the language used in the warranty deed to John Edison Spencer. Thus it would seem to necessarily follow that if the mortgages given by R. H. Spencer and the various deeds, including the deed to the Indianola Irrigation Company, are sufficient to pass title to or create a lien upon a water right then and in such case the same or substantially the same language is sufficient to pass title to John Edison Spencer of 80 shares or acres of water right in Thistle Creek and its tributaries. If not, it may be inquired why not? We have again gone over the evidence, including the exhibits offered and received in this case, but we are unable to find any evidence which shows or tends to show that R. H. Spencer during his lifetime or at all did anything to repudiate the warranty of title he made to his son John Edison to 80 shares or acres of water right in Thistle Creek under date of April 29, 1933, which was renewed in his warranty deed of September 15, 1933 when he executed the warranty deed correcting the description of the land in the former warranty deed. Nor is there any evidence which shows or tends to show that John Edison Spencer did anything to voluntarily relinquish his title to 80

acres or shares of water right in Thistle Creek or its tributaries which right was conveyed and the title warranted in the conveyances above mentioned. Let us briefly examine the evidence and exhibit to see if the foregoing statements are borne out.

The mortgage to Hugentobler in 1922 and the mortgage to Federal Building and Loan Association in 1926, and the mortgage to Hadlock, Bank Commissioner, in 1931 were all executed some years before R. H. Spencer conveyed the land and 80 acres shares of water to his son Edison (1933).

A mortgage was also executed to the State of Utah under date of November 3, 1931 (See entry No. 41 of abstract marked plaintiff's exhibit 18). The loan for which that mortgage was given was never completed and the mortgage was released of record on April 22, 1933 just seven days before R. H. Spencer gave his son Edison a deed to eighty acres of land and 80 shares of water in Thistle Creek (See plaintiff's exhibit 2 and also entry No. 42 of abstract marked plaintiff's exhibit 42).

Under date of February 27, 1932, Richard H. Spencer and Annie H. Spencer executed a mortgage in favor of Irwin M. Price to 160 acres of land, together with 160 acres of water right. (See John Edison Spencer's Exhibit 13.) That is the mortgage concerning which proceedings were had by Price to foreclose as shown by the files from Utah County No. 10,565 and marked John Edison Spencer's Exhibit 9. In that proceeding Price

claimed that R. H. Spencer and his wife owed him \$7,000.00 on a note dated February 27, 1932. It will thus be seen that all of the liens placed on the land and water right by R. H. Spencer were executed before the warranty deed was given to John Edison Spencer in 1933. John Edison Spencer was not a party to that mortgage. The fact that R. H. Spencer had placed a mortgage on the land which he conveyed by warranty deed to his son would of course not affect the validity of the covenants of warranty.

We now turn our attention to the certificates, particularly certificate numbered 73, which John Edison Spencer claims represented the water right that was conveyed to him by the deed from his father and later evidenced by the certificate.

That certificate is dated October 30, 1933 and made out to The Federal Land Bank of Berkeley as agent of Land Bank Commissioner, pledgee of John E. Spencer for eighty (80) shares of Class A. stock. It bears on the back thereof an assignment to I. M. Price. (See Indianola Irrigation Company's exhibit 4.) The evidence touching that certificate is thus stated in the opinion of this court:

“On November 25, 1931, Richard H. Spencer conveyed 160 acres of water right to the Indianola Irrigation Company and received certificate 57. In December, 1933, this certificate was surrendered to the Irrigation Company and two certificates No. 72 and 73 of 80 shares each were taken in lieu thereof. Certificate No. 72 was

issued to the Federal Land Bank as pledgee of Richard H. Spencer and certificate No. 73 was issued to that Bank as pledgee of John Edison Spencer. A deed was put in evidence showing a conveyance of land and 80 acres of water to John Edison Spencer from Richard H. Spencer. The reason for the division as testified to by John Edison Spencer was to facilitate the securing of a loan as two small loans, which they were advised would be easier than securing one large loan. This loan was not completed and as Richard and his wife had mortgaged property to one Irwin M. Price when the certificates came back to Richard H. Spencer he either delivered them to Price as part of the security on the mortgage or else as security for a \$600.00 loan. Mr. Price is a son-in-law of Richard H. Spencer. He disclaims any interest in this case, or the water or land and has filed such a disclaimer indicating any indebtedness owed him by Richard H. Spencer has long since been fully satisfied. Thus we need not concern ourselves with the reason for the transfer to Price. It was from these 160 shares of water that the court in case No. 2888 decreed that Que Jensen and Whittaker should get their water".

The evidence referred to above concerning certificate No. 57 will be found in Tr. 629. The reason for the loan not going through appears in Tr. 630.

The part of the opinion just quoted in general reflects the facts but the real facts as we find the law applicable thereto do not justify the conclusion that John Edison Spencer is not entitled to a water right for the 80 acres of water right which Richard H. Spencer con-

veyed to John Edison Spencer in the warranty deed dated April 29, 1933 and the deed given to correct the description of the land in that deed which was executed on September 16, 1933. (John Edison Spencer's Exhibit 12 and also Tr. 53.)

Some significance seems to be attached to the fact that John Edison Spencer testified that certificate No. 57 was divided into certificates 72 and 73 to facilitate the securing of a loan as two small loans which they were advised would be easier than one large loan.

It will probably be of some aid to the court in determining what John Edison Spencer meant when he said that certificate 57 was divided into 72 and 73 because they were advised that it would be easier to secure two small loans instead of one large loan.

The evidence in this case conclusively shows that Richard H. Spencer was in financial distress during the times the various transactions disclosed by the evidence were had. His financial difficulties were such that he was compelled to take advantage of debtor's relief by a proceeding in the Federal Court in an attempt to save some of his property. (Tr. 664.)

At the time of the trial your petitioner John Edison Spencer was 42 years of age. He had worked all his life, since he was able to work, for his father on the farm helping his father except 3 years while he was at school. (Tr. 597.) R. H. Spencer could not drive a car and John Edison took him where he wished to go on business. (Tr. 663.) Since the warranty deed was given to

him in 1933 by his father he had used water to irrigate the land conveyed to him and had paid the assessments on the water so used. (Tr. 667.) His father never made any claim to the stock after the same was transferred to his son. (Tr. 633.)

It will be noted that the matter of paying the assessments on the water stock was brought out without objection as to the competency of the witness on cross examination by Mr. Udell Jensen, one of the attorneys for the Indianola Irrigation Company and in any event such testimony does not fall within the so-called dead man's statute. Nor does the administrator assign the admission of such evidence as error.

As to the reason for dividing up certificate 57 into certificates 72 and 73 John Edison Spencer on cross examination further testified that he and his father were interested together in securing a loan. (Tr. 659.) That two different applications were made for a loan from the Federal Land Bank of Berkeley and when the loans failed the papers were returned separately to John Edison and his father (Tr. 664 and 669). After the loan from the Federal Land Bank of Berkeley fell through and in order to pay off a judgment in favor of the North Sanpete Bank against R. H. Spencer so that money could be borrowed from the Bank at Berkeley Mr. Price loaned R. H. Spencer \$600.00 with which to clear up the judgment. Mr. Price insisted on security for the loan and certificates 72 and 73 were assigned to Price as security. (Tr. 632.) That such was the nature of the transaction is further shown by the testimony of

John Henry Peterson. (Tr. 446-477.) (See also signature on certificate No. 73 and note also the further fact that John E. Spencer signed the certificate "as security for loan to R. H. Spencer as per mortgage". Surely the fact that John Edison Spencer was willing to aid his father in securing a loan in no way indicates that the stock belongs to the father.

In its opinion heretofore written the court mentions the deed given to John Edison Spencer by his father R. H. Spencer but does not mention the fact that such deed is a statutory warranty deed. There is a vast difference in legal effect between a quit claim deed and a warranty deed. A quit claim deed conveys only such title as the grantor has while a warranty deed warrants the title to the property conveyed.

The law with respect to a warranty deed is thus stated in 19 *Am. Jur.*, page 610, Sec. 12:

"It is one of the fundamental principles in the law of deeds that a deed may have effect of passing to the grantee a title subsequently acquired by the grantor. In other words, a grantor who executes a deed purporting to convey land to which he has no title or to which he has a defective title at the time of the conveyance will not be permitted, when he afterward acquires a good title to the land, to claim in opposition to his deed from the grantee or from any person claiming title under him. One of the principal theories upon which the foregoing and important and con-

stantly employed doctrine is based is that such deed operates on the after-acquired title by way of an estoppel. This principal of estoppel has been asserted and reiterated in a great many cases in almost every jurisdiction and is a rule of antiquity in the Anglo-American system of jurisprudence. Estoppel by deed, under the modern law in force in this country, performs the important function of operating as an actual transfer of an after-acquired estate or interest. The title acquired by the grantor vests in the grantee by operation of law. As many of the cases put it, "the interest when it accrues feeds the estoppel." Irrespective of the jurisdiction of courts of equity, it has always been possible to convey subsequently acquired interests by the operation of the principal of estoppel. The highest principles of morality, common sense, and justice forbid that one should assert an after-acquired title or interest in land which his deed purported to convey."

We have a statute *U.C.A.* 1943, 78-1-7 which adopts the common law in this state. The same rule of law and for the same reasons apply to personal property. The law in such particular is thus stated in 31 *C.J.S.*, page 206, Sec. 24:

"When personal property is sold with an express warranty of title by the seller, who at the time has no title, his subsequent acquisition of title inures to the benefit of the buyer by estoppel. Moreover, there is authority for the view that in sales of personalty, even without any express covenant of warranty, the title afterwards acquired by a vendor in property which he has sold passes to the grantee."

21 *C.J.*, page 1082, note 29:

“Nor is it necessary that a conveyance under a warranty of title that the conveyance was for a valuable consideration.”

McCullough vs. Polk, 262 S.W. 670.

21 *C.J.*, page 1077, note 82:

Scherman vs. George, 110 Ark. 486; 161 S.W. 1039.

Davis vs. Teregle, 8B Mon (Ky.) 539.

Robinson vs. Douthit, 64 Tex. 101.

Morris vs. Short (Tex. court), 151 S.W. 633.

In this case, however, we need not be concerned with the question of consideration because John Edison Spencer undertook to assist and did assist his father to pay off the liens that existed against his property.

We have directed the attention of the court to the law with respect to after acquired title to both real and personal property. However, at the time that the deed was given to John Edison in 1933 Richard H. Spencer had conveyed to the Indianola Irrigation Company only 160 acres of water right and had been given certificate No. 57 for 160 shares. While other water rights had been mortgaged the title remained in Richard H. Spencer for quite some time after that deed was given. In such case the only way that a water right could be conveyed was by deed such as was done in the deed to John Edison Spencer. U.C.A. 1943, 100-1-10 as amended by Chapter 105, Laws of Utah 1943. The fact that the water

right was mortgaged did not and could not preclude Richard H. Spencer from conveying by warranty deed the water right. Such transactions are a matter of every day occurrence. In passing it will be noted that the transactions here involved were all performed before the amendment of 1943.

We have heretofore in this brief in some detail set out the language used in various deeds and mortgages executed by Richard H. Spencer. The same or substantially the same language is used in such deeds and mortgages which in this case are held to be valid. That being so why should the warranty deed to John Edison by his father be singled out as failing to convey to him 80 shares of water right in Thistle Creek?

If Richard H. Spencer could not make good his warranty when the deed was executed under the doctrine announced in the above cited cases and our own statutory law the title to 80 shares or acres of water right immediately vested in John Edison Spencer upon his father securing a good title thereto.

In this connection the court will look in vain in this record to find any evidence which shows or tends to show that Richard H. Spencer did not intend to convey the land and water mentioned in the warranty deed executed in 1933 to John Edison Spencer. The surrounding circumstances all indicate that the father did intend to so convey and warrant the land and water right to the son. Unless Edison had some assurance that his father would reward him for helping to save

the property from all being lost by foreclosure it may well be doubted if Edison would have remained on the farm and assist in such an undertaking and it is to say the least doubtful if the father would expect the son to do so without being rewarded therefor. It is submitted that this record should be reconsidered in light of the fact that Richard H. Spencer gave a warranty deed to John Edison Spencer. By the same principles of law announced by this court holding that the language used in the other deeds and mortgages executed by Richard H. Spencer gave a valid lien or passed title then by the same principle John Edison Spencer is entitled to eighty shares or acres of water conveyed and warranted to him in the warranty deed dated in 1933. Especially is that so in light of the fact that John Edison Spencer held the record title to the land and water so conveyed, paid the assessments on the water, and it must be assumed paid the taxes upon the land from 1933 until the death of Richard H. Spencer in June, 1946, a period of about 13 years, nearly twice the period of time required to secure title by adverse possession of real estate.

It has been repeatedly held by this court that when a deed is of record it will be presumed that it has been delivered. The last case so holding is *Allen vs. Allen*, 204 Pac. (2d) 459, not yet in the Utah reports.

If the deed passed title to the land it would seem to follow as a matter of course that it passed title to the water right. If it is valid for the one purpose it is valid for the other.

Moreover, while John Edison assumed that the water right conveyed to him by the deed of 1933 was represented by certificate 73 it is to say the least improbable that he had in mind any particular water certificate at the time his right to 80 shares or acres of water right was initiated by the deed from his father. Indeed it would be of no concern to him, as well as to his father, and his legal representative, from what source the 80 shares or acres of water came; that is to say whether it came from certificates 72, 73, 84 or 86. These certificates are merely evidence of a water right. They do not constitute the right. One share is the same as every other share evidenced by such certificates.

It is, in effect, said in the opinion heretofore written that the trial court in case No. 2888 civil having held that the water right of Hugentobler, the predecessor of Que Jensen to 55 acres or shares and the water right of Hadlock, Bank Commissioner, the predecessor of Whittaker to 60 shares or acres should come out of certificates 72 and 73 the trial court and this court is powerless to review or modify such conclusion. Of course there was no controversy involved in 2888 between the rights of John Edison Spencer and his father as to any water rights. The controversy was between Hugentobler and Whittaker on the one hand and the Spencers on the other. Nor do the findings, conclusions or judgment purport to adjust any rights to any water as between the Spencers. Nor does the decree in this case confine the rights of Whittaker or Que Jensen to a water right represented by certificates 72 and 73 but awards to the

former 60/1728 and to the latter 55/1728 of the waters of Thistle Creek and its tributaries without regard to any water right represented by certificates 72 and 73. That being so certificates 72 and 73 cease to have any validity which places the rights of John Edison Spencer and the representative of Richard H. Spencer where they were when the deed to the land and the 80 shares of water was delivered to John Edison Spencer by his father. Moreover, even if the 55 and the 60 shares of stock were taken out of certificates 72 and 73 there remained 45 shares in such certificate to apply on the 80 shares conveyed to John Edison.

The law is well settled that if a conveyance contains a greater quantity than is owned by grantor or vendor at the time of the conveyance or transfer of title such conveyance or transfer is valid as to any excess remaining after deducting the amount not owned by the grantor or vendor. 26 *C.J.S.* page 382; 18 *C.J.* 291. *Rue vs. Merrill*, 42 Wyo. 511; 297 P. 379-382. So also if certificates 72 and 73 are invalid because fraud was perpetrated upon the Indianola Irrigation Company and for that reason set aside then and in such case John Edison Spencer is entitled to rely upon his warranty deed and if such certificates are held valid then and in such case John Edison Spencer is entitled to at least 45 shares of the stock represented by such certificates. In this connection no claim is made and if the same were made there is no evidence that John Edison Spencer was a party to any deed given by his father to the Indianola

Irrigation Company or that he had any knowledge of such fact.

Moreover, if Richard H. Spencer did make any misrepresentation to the Indianola Irrigation Company in securing certificates 72 and 73 such fact would not and could not excuse Richard H. Spencer or Richard Leo Spencer, the administrator of his estate, from the obligations, the warranty or the conveyance of 80 acres or shares of water right in Thistle Creek to John Edison Spencer.

In discussing the facts of this case as to some of the certificates here involved the court said that Richard H. Spencer knew what was necessary to transfer a water right. The record supports such view but as to the 80 shares or acres of water mentioned in the warranty deed and the 80 shares represented by certificate No. 73 there would seem to be nothing that Richard H. Spencer could have done that he did not do to vest title to 80 shares of water in his son John Edison Spencer not only that but for nearly 13 years prior to his death he held out John Edison Spencer as the owner of said 80 shares of water right. To now deprive John Edison Spencer of such right and render dry and unproductive the 80 acres of land upon which 80 shares of water has been used since 1933 pursuant to the deed given by the father to his son would be a grave injustice and as we have heretofore attempted to show contrary to law.

In our petition for a rehearing we have alleged error in the matter of assessing costs. We are mindful that in equity case it is the province of the court to divide the costs as it shall deem proper. We do not seek a review of the matter of costs except for the purpose of ascertaining just what the court had in mind in its opinion as to costs and more particularly as to how the costs were to be borne by John Edison Spencer, Elizabeth A. Tibbs and Richard Leo Spencer. The respondent Indianola Irrigation Company is awarded its costs against the appellants John Edison Spencer, Elizabeth A. Tibbs and Richard Leo Spencer, administrator, but we are not advised by the opinion as to what portion of the costs shall be borne by each of such parties.

Jensen, John Edison Spencer and Elizabeth A. Tibbs are awarded costs against Richard Leo Spencer on the cross appeal while Whittaker, Jensen and Richard Leo Spencer, as administrator, are awarded costs on appeal as against the appellants John Edison Spencer and Elizabeth A. Tibbs. Of course it is difficult if not impossible to ascertain with any degree of certainty what costs are incurred on appeal and on cross appeal. The briefs printed and filed as well as the transcript of the evidence of necessity deals with the questions presented on the appeal and on the cross appeal. The questions raised on the appeal and the cross appeal are so interwoven and interrelated that it is next to impossible to deal with the question involved on the appeal without also discussing the questions presented on the cross appeal and visa versa. When this case is remanded to the

court below there is a very great likelihood, if not a certainty, that there will be a controversy as to what portion of the costs of the Indianola Irrigation Company shall be paid by John Edison Spencer, by Elizabeth A. Tibbs and by Richard Leo Spencer, administrator, as well as what constitutes the costs properly chargeable to the appeal and to the cross appeal. Such controversy may or may not result in a second appeal to this court. We respectfully request the court to make certain the proportion of the costs that shall be borne by each of the Spencers and thus avoid needless further litigation with respect thereto.

In conclusion John Edison Spencer respectfully submits that the evidence and the law show that he is entitled to an additional 80 acres of water right which was conveyed to him by the warranty deed of 1933 and the assignment to him of 80 shares of water right purported to be represented by certificate No. 73.

Respectfully submitted,

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and Elizabeth A. Tibbs.*