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Lee M. Stephens and Gwen Stephens v. Myrtle Burton, Jack E. Burton, Duke C. Jones, John E. Burton and Lewis Dillree : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

LEE M. STEPHENS and GWEN STEPHENS,	:	
Plaintiffs and Respondents,	)	
vs.	:	Case No. 14,066
MYRTLE BURTON, JACK E. BURTON, DUKE C. JONES, JOHN E. BURTON and LEWIS DILLREE,	)	
Defendants and Appellants.	:	

BRIEF OF DEFENDANTS-APPELLANTS

APPEAL FROM THE JUDGMENT OF THE SECOND
JUDICIAL DISTRICT COURT, IN AND FOR
MORGAN COUNTY, STATE OF UTAH
HONORABLE CALVIN GOULD, JUDGE

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NATURE OF THE CASE

This is an appeal arising from an action to determine ownership to rights in water flowing from the Broudth spring in Morgan County, Utah, and also an action for injunctory relief and for damages caused by the severance of a pipe stopping water flowing to a home.

DISPOSITION IN LOWER COURT

The matter was tried on June 20 and 21, 1974, before the Honorable Calvin Gould, sitting without a jury. The only issues tried at that time related to ownership of the water rights. All issues as to injunctive relief and damages from cutting the water pipe were reserved for trial at a later date.

The Court found as to ownership of water rights that after certain conveyances by the Stephens, the maximum water rights obtained by appellant, John E. Burton, was an irrigation right for 0.34 acres of land and for the domestic requirements of five per-

sons; that the maximum water rights obtained by appellants, Myrtle Burton and Jack E. Burton, were a stock watering right of 0.139 gallons per minute for the stock watering requirements of six cows and two horses; and that the respondents, Lee M. Stephens and Gwen Stephens, retained an irrigation right for 0.502 acres, a domestic right for four persons and also retained a stock watering right for the equivalent of 22 cattle.

In summary, the Court found, as to water ownership rights to the Broudth spring, after the two parcels of land were conveyed from Stephens to Burtons, that the Stephens still retained ownership of 56.6% of the one-half interest in right No. 342 of the "Weber River Decree" and the appellants Burtons collectively are the owners of only 43.4% of the onehalf interest in right No. 342. It is from this finding as to water ownership rights that the appellants appeal.

RELIEF SOUGHT ON APPEAL

The appellants seek reversal of the Court's ruling as to the ownership of the disputed water rights after the two conveyances contending that the respondents completely divested themselves, by warranty deed, of whatever remaining water rights they had in the Broudth spring.

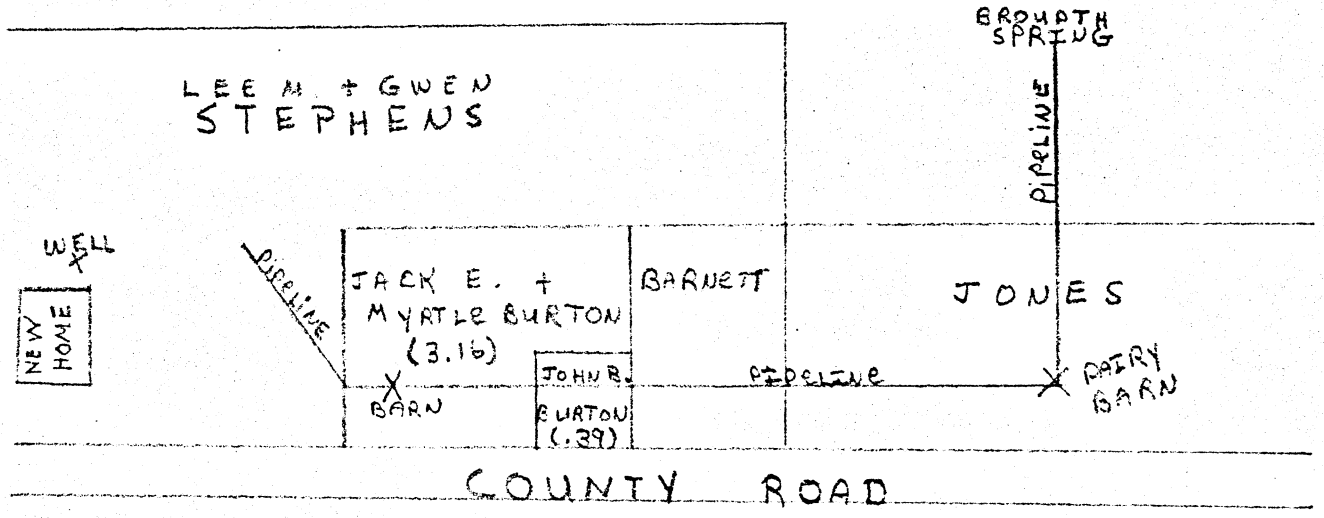
STATEMENT OF FACTS

This dispute involves the ownership rights of the use of waters from a spring in Morgan County known as Broudth spring. The water rights in question are evidenced by No. 342, confirmed by the "Weber River Decree" dated June 2, 1937.

This dispute arose as a consequence of the Stephens' selling two parcels of property. On one parcel was the Stephens' old home.

This parcel, containing .39 acres, was conveyed to John E. and Sheryn Burton, for which a warranty deed was given on June 15, 1971, without a reservation of any water rights to the Stephens as grantors. (R.23) Contemporaneously with selling their home to the Burtons, the Stephens also sold some acreage to the south of their old home to the Barnetts without a reservation of any water rights. (Tr. 84) The third parcel, containing 3.16 acres, was conveyed to Myrtle and Jack E. Burton by warranty deed on August 20, 1972. (R. 24) This deed expressly "included in the sale is a stockwater right in the present pipeline crossing the property." The Stephens, as in the other deeds, failed to reserve any water rights. Stephens testified he orally intended to reserve water rights. (Tr. 72, 73) Mr. Stephens owned a total of 17.85 acres prior to the above two conveyances and he later built a new house just south of the Burtons on part of this original acreage and in December, 1971, moved into his new home. (Tr. 57, 65) The Stephens had drilled a well in connection with building this new house in order to provide domestic water. (Tr. 66)

A rough schematic drawing of the Bradt spring and the single pipeline which served the above properties follows:



As the drawing indicates, a single pipeline about four feet below the surface (Tr. 4) runs from the Broudth spring to the Stephens' new home. In August, 1972, the Stephens permanently hooked themselves up to this pipeline. (Tr. 67)

On May 27, 1973, Louis Dillree, acting under the direction of another, severed the pipeline where it crossed the Burton property, thereby depriving the Stephens' new home of water from the Broudth spring. The Stephens then unsuccessfully sought the issuance of an injunction compelling the defendants to replace the severed pipeline.

The Burtons and defendant Jones justified the severance of the pipeline by alleging they are the owners of all water rising in the single pipeline from the Broudth spring across their property. The Burtons contend they have complete ownership of all water rights because on June 15, 1971, the Stephens deeded to the appellant, John E. Burton, all the Stephens' interest in culinary water from the Broudth spring and also on August 20, 1972, the Stephens deeded all of their remaining water rights to the appellants, Myrtle Burton and Jack E. Burton.

On the contrary, respondents Stephens contend they still own a portion of the water rights in Broudth spring even after the above two conveyances to John Burton on June 15, 1971, and to Myrtle and Jack E. Burton on August 20, 1972. The trial court held that the Stephens, after the above conveyances, owned a portion of the water rights to Broudth spring. The trial court held the two conveyances had not completely divested the Stephens of all water rights in the Broudth spring. The appellants contend such a finding is reversible error.

POINT I

THE BENEFICIAL USE OF WATER AT THE TIME LAND IS CONVEYED IS THE CORRECT MEASURE OF WATER RIGHTS.

This appeal involves a question of the ownership of water rights after certain conveyances of .39 and 3.16 acres of land from the Stephens to the Burtons. The correct measure of these water rights prior to the above two conveyances is the beneficial use of water at the time of the conveyances. As statutory authority for such an assertion, appellants cite Utah Code Annotated, 1953 as amended, §73-1-3, which states:

> Beneficial use basis of right to use.--Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.

This theme of essential, beneficial use has been reiterated over and over again in the many water rights decisions of the Utah Supreme Court. In Richfield Cottonwood Irr. Co. v. City of Richfield, 84 Utah 107, 34 P.2d 945 (1934), the court stated:

> We have a statute which provides that "beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." Rev. St. Utah 1933, 100-1-3. Such has been the law in this jurisdiction ever since the territory of Utah was organized. This court has in numerous cases had occasion to apply that law. Among such cases are Sowards v. Meagher, 37 Utah 212, 108 P. 1112; Salt Lake City v. Gardner, 39 Utah 30, 114 P. 147; Big Cottonwood Tanner Ditch Co. v. Shurtliff, 49 Utah 569, 164 P. 856; Cleary v. Daniels, 50 Utah 494, 167 P. 820; Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 P. 852; Mt Olivet Cemetery Ass'n v. Salt Lake City, 65 Utah 193, 235 P. 876; and Big Cottonwood Lower Canal Co. v. Cook, 73 Utah 383, 274 P. 454. Id. at 949.

Also see Big Cottonwood Lower Canal Co. v. Cook, 73 Utah 383, 274

P. 454 (1929), in which the the Utah Supreme Court said:

> "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." Laws Utah 1919, chapter 67, §3.
>
> This is a cardinal principle of the law of water rights. Id. at 456.

The water from Broudth spring, prior to the conveyances by the Stephens, was used on the 3.16 acres in the following manner as Jack Burton testified (Tr. 220):

> A. Well, this looked like it was originally a hay barn typical ranch in this area, and had been modified to include a cattle shelter and numerous corrals, five, I think. And it was used as a feedlot. I counted the cattle on several occasions, and there were in the neighborhood of thirty-five or forty.
>
> Q. All on this piece of property that you purchased?
>
> A. Yes, sir.
>
> Q. And the size of the mangers and the shelter, did you formulate an opinion as to how many cattle this area would accommodate?
>
> A. I would quess fifty; and it is our intention, of course, to build a herd of this size.
>
> Q. How long prior to when you purchased the property did you see thrity-five to forty head of cattle on it?
>
> A. Oh, whenever I happened to be visiting my boy why I would step out and just peruse, take a look at the area and see how many were there to see if it looked like it would accommodate what we wanted.
>
> Q. And was that the number of cattle that the area would accommodate, was that one of the prime factors in your determining to buy the property?
>
> A. It is strictly a feed yard. I don't think it would sustain a goat otherwise, in an area like this, you have to buy land when it is available. We bought the house when it was available We bought some property, or John

bought some property, or Woodrow Barnett bought property south of the house when it was available. We bought the barn when it was available, and we are still looking for property.

Q. When you purchased the property and received the deed, it specifically has provision for water, does it not?

A. Yes, sir.

Q. How much water did you intend that you would receive with that deed?

A. Whatever had been used prior to that time.

Q. What was the prior use?

A. It has been stated that there was between sixty and seventy head of cattle or animals kept in that place.

Q. And you intended to acquire water enough to take care of that many animals?

A. Yes.

Q. That's what you thought the deed provided?

A. Yes, sir.

Appellants object to the Court's Finding No. 5 (R. 62). Since there was no evidence to support the finding concerning the extent of the appurtenancy prior to deeding the 3.16 acres that related to 6 cows and 2 horses. The evidence before the Court was that 60 head of cattle had been watered on this property conveyed to Myrtle and Jack Burton. (Tr. 220, 96, 83)

There could only be two houses hooked on the waterline flowing from Broudth spring. Rex Larsen from the State Engineer's office testified (Tr. 181, 183) that a flow of .03 second feet is sufficient for only two families.

Q. All right. Is there anything in that Brown Decree or anything else that you

> use as a guide that you refer to that flow is merely to one home or to two homes, the total right?
>
> . . .
>
> A. The maps show two homes, and the proposed determination shows eighteen persons, which would be in balance. And there was large families in those days.
>
> . . .
>
> A. The only basis we have to go on is the maps and, of course, the Brown Book; the maps show two homes and the Brown Book shows eighteen persons.

Eighteen persons would be the equivalent of two families.

Among those who used the waters flowing from Broudth spring, it was commonly understood that only two homes could be hooked on to the line. Stephens so testified: (Tr. 115)

> A. I investigated the water for probably two years before I did anything. I simply didn't hook the water on to the house because I was told over and over again that there could be only two houses hooked on to the, or two houses hooked on to the water line, I am sorry, so I didn't do anything to change the system that I had run up to the house.

John Burton testified (Tr. 206) Stephens told him the line "to the best of his knowledge was for two houses." Mr. Waldron indicated there could only be two houses on the line. (Tr. 95, 113) Mr. Jones also understood there could be only two houses hooked on. Mr. Stephens testified (Tr. 76):

> Q. Now, Mr. Stephens, when was the first time that any problems developed between you and any of the Burtons or the Joneses with respect to your use of the water from this pipeline?
>
> A. Generally the -- I was told by the Joneses time and time again that there could only be two houses hooked on to the line, whether or not this was the problem or trouble that you are outlining, maybe it simply preceeded it. But I was told that that was the case. And I agreed.

Stephens also testified (Tr. 77) there was the problem of this "two-house thing."

Only two homes, for culinary water, could be hooked onto this line is evidence that when Stephens sold their home on the .39 acre parcel that the intent was to convey all remaining culinary water rights from Broudth spring without any reservation. Such an intent of the parties is also supported by Stephens' drilling a well to supply his new home with water and the lack of any reservation of culinary water rights in the warranty deed conveying the property.

The only parcels irrigated with water from the Broudth spring were the parcel conveyed by Stephens to Barnett; the .39 acre conveyed by Stephens to John Burton; and the acres conveyed to Jack and Myrtle Burton. The irrigation rights appurtenant to the Barnett property were all conveyed. The only remaining irrigation rights were appurtenant to the .39 acres and it was the intent of Stephens to convey these irrigation rights. (Tr. 73)

> Q. Did you intend to convey any of your irrigation right under the conveyance marked Exhibit D?
>
> A. I knew there was a small garden area back of the home where a little garden was kept, and I intend -- I would have to say honestly that I intended to convey whatever water went to serve that too.

If there were any irrigation rights remaining, they were conveyed in the deed to Jack and Myrtle Burton. Thus, whatever irrigation rights remained in Broudth spring were conveyed by the Stephens.

After the water pipe was severed, stopping the flow to respondents, respondents made a motion for a temporary injunction.

A hearing was held July 5, 1974, before Judge John F. Wahlquist. In order to determine whether an injunction should issue, it was necessary to determine the status of the water rights after the conveyances by Stephens. Judge Wahlquist found (Tr. of Preliminary Injunction 83,84):

> I find as follows:
>
> That the plaintiffs' predecessors in interest owned the water right which has been referred to as .03 second feet of flow, and that this was to water on .17 (1.7) acres of land to be used for domestic purposes; that there is no evidence before me on which I can make a determination of which of the original Waldron landowners would receive water shares. So for the purpose of this proceeding alone I presume that each was to receive one half which would be .015 in flow. This would I find on the testimony of the State Engineer's representative that this would be the approximate amount of water necessary to support a home with an ordinary family size such as Barns and gardens and no other waters above this figure.
>
> Number two, that the plaintiff sold the house in question to the one defendant and at the time he sold the water clearly hooked up to this water system, and it would be implied in law a transfer of the water right necessary for this home; that further the earnest money contract evidence an intention to sell water necessary for this home.
>
> I also find there was a discussion involving the sale or exchange of water and necessity for water and also water necessity in the finishing of the home, and that plaintiff orally promised to make a quit claim deed to the purchaser of the home for $17,000.00, to the water; that so far as I am able to determine the vast majority of the .015 water right was sold in this transaction; that then I find that there had been a further sale of water right to this particular defendant's father when the barn was sold, when it was transferred. I believe that this would wipe out the water right. That there has also been other sales of water coming off this which would further diminish the water right.

> At this time I see no convincing evidence at all in this case that this plaintiff owned any water in this spring. I also find that there is no evidence of irreparable damage if the water is not turned on and that he had adequate temporary water supply. (emphasis added)

In the later decision appealed from, Judge Calvin Gould did not base his decision on the water usage at the time of the conveyances, but rather his decision was based on the usage after the two conveyances. For example, in his Findings of Fact No. 5 (R. 62), Judge Gould finds:

> 5. The maximum water rights conveyed by plaintiffs to defendants Myrtle Burton and Jack E. Burton under the Warranty Deed dated August 20, 1972 was a stockwatering right of 0.139 gallons per minute for the stockwatering requirements of 6 cows and 2 horses.

Such a finding was based on John Burton's testimony (Tr. 37) as to his usage after the conveyances.

> Q. Can you tell us, Mr. Burton, the maximum number of stock that your father, Jack E. Burton, has had on this 3.16 acres since he owned it?
>
> A. Well, my dad hasn't actually owned the stock, I have managed that property for him.
>
> Q. Have you had any stock on the 3.16 acres?
>
> A. Yes.
>
> Q. Of your own?
>
> A. Yes.
>
> Q. What have been the maximum number of head of stock, livestock, that have been on the 3.16 acres since your father owned it, and since you have been managing it?
>
> A. Total, or at one time?

Q. At one time.

A. Six head of cattle and three horses.

Q. Six head of cattle. Would they be different or the same as the six head of cattle that you told us about as being on your .39?

A. They would be the same cattle.

Beneficial use, not the total acreage, is the correct measure of the extent of water rights. Water rights are not prorated to the total acreage but rather such rights are only appurtenant to land actually watered. The only part of the total acreage owned by the Stephens to which the water had been used beneficially was the Woodrow Barnett property and the two parcels purchased by the Burtons. See John Burton's testimony. (Tr. 217, 218)

Q. Mr. Burton, did you, at the time you were negotiating for purchase of the Woodrow Barnett property, that which you purchased and that which Jack Burton purchased, did you ever see any of this water put to any beneficial use whatsoever other than on those three tracts of property?

A. No, I didn't.

The balance of the property not conveyed by the Stephens was so steep and sagebrush-covered that it had never been watered. (Tr. 85) Mr. Stephens testified the balance of the dry hillside had never been watered. (Tr. 91)(Inj. Tr. 25, 13) Stephens also testified (Tr. 100) that the only land conducive to irrigation was land at the base of the hill. The land was so steep Stephens had to make a cut in the hill in order to construct his new house. (Tr. 102)

The Stephens retained certain land upon which they built a new house after the above conveyances. The correct measure of

Stephens' water rights are not the acres retained after the conveyances, but rather the correct measure is the beneficial use of the water on the .39 and 3.16 parcels of land at the time of the conveyances to the Burtons.

The water rights were not inseparably attached to the whole piece of property owned by the Stephens, but rather water rights are restricted to only the portions to which water had actually been put to beneficial use. The Stephens thus retained no water rights in the steep sagebrush acreage which they retained at the time of the conveyances.

In the instant case, the question is simply how the water was used prior to the conveyances. The only possible measure of the extent of the water right was the clear use to which respondents had put the water prior to the conveyances to the Burtons. At the time the conveyances were made, it was clear and visible to all the parties which land was being benefited. The water, prior to the conveyances, was used exclusively on that portion of respondents' land which was conveyed to the Burtons. Up to 60 head of cattle were watered on the land that was ultimately conveyed to Myrtle and Jack Burton. It was with the expectation that Myrtle and Jack Burton would be able to use the land to, at least, the same extent as respondents had (Tr. 220) that they purchased the land from respondents. Beneficial use prior to the conveyances determines the water rights. Such prior use was established by testimony at trial.

POINT II

THE WATER RIGHTS WHICH WERE BENEFICIALLY USED UPON THE LAND CONVEYED BY STEPHENS WERE APPURTENANT TO THE LAND.

It is a general principle, well settled in Utah, that water rights which are appurtenant to the land shall pass with the land unless expressly reserved. It must be determined, therefore, whether the water rights used on the .39 and 3.16 acres were appurtenant to these particular parcels conveyed. Appurtenance is defined as "a thing belonging to another thing as principal and which passes as incident to the principal thing." St. Louis-New Orleans Nav. Co. v. Hynicka, 36 Ohio App. 94, 172 N.E. 287.

Whether water rights are appurtenant depends on whether the rights are an incident necessary to the enjoyment of the land and whether the rights were used specifically for the benefit of the land in question.

The Utah Supreme Court in Cortella v. Salt Lake City, 93 Utah 236, 72 P.2d 630 (1937), stated that whether a water right is appurtenant depends upon usage.

> Before Cortella can rely on owhership of a water right as an appurtenance to his land, he must first show that such right was an appurtenance, one essential of which is that water right was in fact used upon said land. Whether a water right is an appurtenance involves a question of fact and depends upon the circumstances surrounding each particular case. Id. at 640 and 641. (emphasis added)

The Nevada Supreme Court, in Zolezzi v. Jackson, 297 P.2d 1081 (Nev. 1956), discussed the question of whether water was appurtenant to land upon which it was used thus:

> "[T]he very right itself, relating as it does to the land upon which it is applied, although in a sense incorporeal, nevertheless, by reason of its application, becomes an integral part of the freehold. The water and the land to which it is applied become so interrelated and dependent on each other in order to constitute a valid appropriation that the former

> becomes by reason of necessity appurtenant to the latter." [Emphasis supplied.] Such would appear to be the universally recognized law of waters in the arid western states. Id. at 1082. (emphasis added)

Also see Big Goose and Beaver Ditch Co. v. Wallop, 382 P.2d 388 (Wyo. 1963), in which the Wyoming Supreme Court stated:

> In January of 1894, the supreme court in the case of Frank v. Hicks, 4 Wyo. 502, 35 P. 475, 1025, made a significant decision wherein it was said at 35 P 484:
>
> "* * *a water right becomes appurtenant to the land upon which the water is used* * * Under our system there is no such thing as a water right in gross. The application of the water to some beneficial purpose is absolutely requisite. And a water right for purposes of irrigation can no more exist, where there is no land to be irrigated, than can an easement for the passage of light to ancient windows exist where there never were any windows. And this would seem to be of the very essence of appurtenances. Where one thing depends upon another for its existence, it would seem entirely proper to call it appurtenant to that thing upon which it so depends." Id. at 392

Also see Salt River Valley Water Users' Ass'n v. Kovacovich, 3 Ariz.App. 28, 411 P.2d 201 (1966), in which the Arizona Court stated:

> Sloser v. Salt River Valley Canal Co. [7 Ariz. 376, 65 P. 332], supra; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 P. 598; Brockman v. Grand Canal Co., 8 Ariz. 451, 76 P. 602; Tattersfield v. Putnam, 45 Ariz. 156, 41 P.2d 228; Olsen v. Union Canal & Irr. Co., 58 Ariz. 306, 119 P.2d 569. The holding in all of these cases is to the effect that a water right is attached to the land on which it is beneficially used and becomes appurtenant thereto, and that the right is not in any individual or owner of the land. It is in no sence a floating right, nor can the right, once having attached to a particular piece of land, be

> made to do duty to any other land, with certain exceptions, e.g., where the land is washed away. Id. at 203.

In Thompson v. McKinney, 91 Utah 89, 63 P.2d 1056 (1937), the Utah Supreme Court defines appurtenant rights by quoting its own previous decisions thus:

> This court gave the following definition in Holley Milling Co. v. Salt Lake & Jordan M. & E. Co., 58 Utah 149, 197 P. 731, 736:
>
> "Again, the legal import of the phrase 'appurtenances, rights and privileges, thereto belonging,' as is well understood, includes all those appurtenances, etc., which are used in direct connection with the real estate conveyed. In some instances more, and in some others less, is thereby conveyed, depending entirely upon what easements, rights, and privileges are used in connection with the real estate conveyed." (emphasis added) Id. at 1060.

The two tracts purchased by the Burtons were of little value unless water from Broudth spring was utilized on these tracts of land. The two parcels purchased were both arid and unproductive without water rights. The reason the Burtons purchased the property was to secure the water. (Tr. 210) These two tracts of land were entirely dependent upon the water being beneficially used upon them and the water was beneficially used upon only these two tracts, therefore, the water rights were appurtenant to these particular tracts of land. Under the evidence before the trier of fact, the water rights in dispute were appurtenant to the land conveyed.

POINT III

WATER RIGHTS WHICH ARE APPURTENANT TO LAND PASS WHENEVER THE LAND IS CONVEYED UNLESS THE WATER RIGHTS ARE EXPRESSLY RESERVED.

Water rights have been classified generally as real estate.

The water right itself is treated as an incorporeal hereditament and is real property. See Cortella v. Salt Lake City, supra. The water rights disputed in the case were appurtenant to the land. Water rights which are appurtenant as a general principle pass under a deed of conveyance unless expressly reserved. See 78 Am.Jur. 2d, Waters, §242.

> It is a general principle that water rights which are appurtenant to land pass under a deed of conveyance of such land, unless expressly reserved. Thus, in the absence of anything indicating an intention to sever the right to use the water from the land, a conveyance of land will pass a water right which is plainly attached to the land and visibly in use at the time of the conveyance. The water rights which pass on a conveyance of land as appurtenant thereto are not limited to those absolutely necessary to the enjoyment of the property conveyed; it is sufficient if full enjoyment of the property cannot be had without them. The incidents which pass as appurtenant must, however, be "open and visible," from which fact the knowledge of their existence by the grantor is a natural inference.

The Utah water rights statute, Utah Code Annotated, 1953 as amended, §73-1-11, codifies this principle by providing that an appurtenant water right passes to the grantee of the land to which it was appurtenant; but that the water right, or any part thereof, may be reserved by the grantor in express terms in the conveyance or it may be separately conveyed. See Utah Code Annotated, 1953 as amended, §73-1-11:

> Appurtenant waters--Use as passing under conveyance.--A right to the use of water appurtenant to land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any con-

> veyance thereof; subject, however, in all cases to payment by the grantee in any such conveyance of all amounts unpaid on any assessment then due upon any such right; provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance, or it may be seaprately conveyed.

It is well settled case law in Utah that water rights that are appurtenant shall pass with the land unless expressly reserved. In Cortella, supra, the Utah Supreme Court stated:

> Under our statute, section 100-1-11, R.S. Utah 1933, a conveyance of land passes an appurtenant water right unless the same is expressly reserved. This has been the statutory rule at least as far back as 1888. See Snyder v. Murdock, 20 Utah 419, 59 P. 91; Comp. Laws Utah 1888, §2783; R.S. Utah 1898, §1281. Id. at 635.

A deed in statutory form is effective to transfer all appurtenant water rights unless water rights are expressly reserved in the deed. Anderson v. Hamson, 50 Utah 149, 167 P. 254 (1917); also see Petrofesa v. Denver & Rio Grande Western RR Co., 110 Utah 109, 169 P.2d 808 (1946), in which the Utah Supreme Court stated:

> A warranty deed conveys the fee simple title "together with all the appurtenances, rights and privileges thereunto belonging," by force of Sec. 78-1-11, U.C.A. 1943, unless some rights are reserved by the terms of the conveyance. Id. at 810.

In Thompson, supra, the mortgagor showed that in several previous transactions relating to a given tract of land, he had expressly mentioned the water whenever it was contended that both the land and the water were included. He urged that this, plus the failure to mention water in the mortgage, evidenced an intention to reserve water rights from the effect of the particular

mortgage. The court said that the evidence of such other transactions, all expressly including water, did not constitute sufficient evidence of an intention to reserve the water from the land mortgaged. In the instant case, there is absolutely no evidence the Stephens reserved any water rights.

The measure of an appurtenant water right is thus the use to which it was put. It is clear from both case law and statutory law that the measure of a right which is appurtenant is the amount and type of use employed by the grantor at the time of conveyance. Which land a water right is appurtenant to is determined by the property the water was beneficially used upon prior to the conveyance. The question in the instant case, therefore, is how were the two parcels conveyed by the Stephens to the Burtons used prior to being conveyed. Stephens testified as to usage (Tr. 96) that:

> Q. I think you have testified earlier that in connection with that operation you had between sixty and seventy animals on that area, at least the area of the barn which Jack Burton has now at least sometime during that period, isn't that correct?
>
> A. Well, yes, on that and other land. Of course, they weren't confined.
>
> Q. But in fact the barn and feeding area is where in fact they fed for the most part, isn't that true?
>
> A. Yes, where the feed was supplemented for them, yes.
>
> Q. Yes. And so you were aware that that's what that area was used for, is that correct?
>
> A. Yes.

The intention of the parties also determines whether a water

right is appurtenant to the land. The question of intention is to be drawn from the deed or if the deeds are silent, as in this case, to be drawn from the surrounding circumstances, and the acts of the parties. The testimony and acts of the parties in the instant case all indicate an intent to convey all water rights appurtenant to both parcels. John Burton testified (Tr. 53, 231, 234) that Stephens said, "He knew he had no claim to the water, but that he was not going to disconnect that line." John Burton also testified (Tr. 206) that Stephens:

> . . .indicated that he was going to drill a well. And I--he went on, he expounded, he said because he couldn't legally hook onto the spring, that's to the best of his knowledge, it was for two houses. And that he would have to drill a well for his use.

John Burton also testified (Tr. 211) as follows:

> Q. Now, Mr. Burton, after you had acquired your home and Mr. Barnett had acquired the approximately three acres to the south, and after your father and grandmother had acquired the approximately three acres on the north, what water -- what was your intention as to what Stephens water you had acquired?
>
> A. It was my understanding that we had acquired substantially all of the water.
>
> Q. Was it your understanding that he had any water left after those transactions?
>
> A. No, I didn't think he had any water left after those transactions.

John Burton testified (Tr. 54) that the reason Stephens drilled a well was "that he didn't have any right to water for his new home and that is why he was drilling an 8-inch well." Measured by both the intention of the parties and the beneficial use of the water at the time of the conveyances, the water rights were appurtenant to both parcels conveyed by the Stephens.

It is the general principal that water rights which are appurtenant to land pass under a deed of covneyance of such land unless expressly reserved. See Black v. Johanson, 81 Utah 410, 18 P.2d 901 (1933), in which the Utah Supreme Court stated:

> The law is well settled in this jurisdiction that a deed to land in statutory form without reservation of the water conveys whatever right the grantor has to the water appurtenant to the land. Anderson v. Harrison, 50 Utah 151, 167 P. 254. Id. at 902.

The respondents, to determine the water rights, look first to the decree (Tr. 76), however, the Weber River Decree Right No. 342 does not determine the water rights between appellants and respondents. On the contrary, the documents, determinative of their respective water rights, are the deed delivered to the grantee, John Burton, on June 15, 1971, and the other deed of conveyance delivered to grantees, Myrtle and Jack Burton, on August 29, 1972. As to determining water rights, Utah Code Annotated, 1953 as amended, §73-1-11, is controlling not a water decree.

The appellant, John E. Burton's, title to water rights is derivative and is derived solely from the warranty deed from the Stephens dated June 15, 1971. The appellant's Myrtle and Jack E. Burton's, water rights is likewise derivative, being derived solely from the warranty deed from the Stephens which was dated August 20, 1972. It is clear from the case and statutory law cited by appellants that the measure of appurtenant water rights is the amount of beneficial use at the time of the conveyance. It is also clear that when the deed is silent as to the reservation of any water rights, it is presumed that the grantor has conveyed all water rights which were appurtenant to the land convey-

ed. Stephens testified he reserved no water rights. (Tr. 117) The deed to John and Sheryl Burton as grantees contained no reservation of water rights. (Tr. 86) There was never any oral discussion of the reservation of any water rights by the Stephens. (Tr. 91) As to reversation of water rights, Stephens testified (Tr. 116) thus:

> Q. Let me ask you this, you didn't specficially, in writing, reserve any water rights, did you?
>
> A. No, sir.

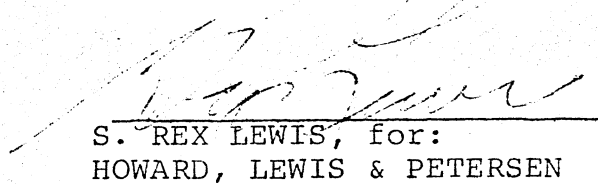
The respondents attempted to obtain an implied reservation without dealing with the clear and unambiguous language of the warranty deeds which are fatally lacking in any reservation language.

The warranty deeds clearly conveyed whatever rights the Stephens had to water appurtenant to the land unless those rights were expressly reserved. Stephens failed to reserve any water rights, therefore, in accordance with both statutory and case law, all the water rights were coveyed by Stephens to the Burtons.

CONCLUSION

The appellants respectfully submit that the judgment should be reserved and the respondents completely divested of any water rights.

Respectfully submitted,



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MAILING CERTIFICATE

I, S. Rex Lewis, hereby certify that I mailed two (2) copies of the foregoing Brief of Defendants-Appellants to Joseph Novak, Attorney for Plaintiffs-Respondents, 520 Continental Bank Bldg., Salt Lake City, Utah 84101, and LaVar E. Stark, Attorney for Plaintiffs-Respondents, 2651 Washington Boulevard, Suite #10, Ogden, Utah 84401, this 7th day of August, 1975.

S. REX LEWIS