

1989

Larry Little v. Greene & Weed Investments, Leon S. Lippincott, caroline Lippincott, and Dee c. Hansen, State Engineer of the State of Utah : Reply Brief in Support of Appellants Petition for Writ of Certiorari

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

Supreme Court of Utah
Case No. 900451

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LARRY LITTLE,)	
)	
Plaintiff and Appellant,)	Utah Court of Appeals
)	Case No. 890177-CA
vs.)	
)	
GREENE & WEED INVESTMENTS,)	
LEON S. LIPPINCOTT, CAROLINE)	
LIPPINCOTT, and DEE C. HANSEN,)	Supreme Court of Utah
STATE ENGINEER OF THE STATE OF)	Case No. 900451
UTAH,)	
)	
Defendants and Respondents.))	
)	
)	

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REPLY

THE WATER WAS NOT SEVERED FROM THE LAND ON NOVEMBER 30, 1969.

1. Respondents cannot avoid the legal effect of Section 73-1-11 U.C.A. by claiming the water was severed from the land November 17, 1969. The reason for this is simple - no severance occurred on November 17, 1969. On November 17, 1969 title to the land upon which said water was being placed to use was, if anything, unified, not severed. It is undisputed that the land upon which the water was being placed to use originally belonged to Lorna and Clara's parents. On January 16, 1968 said land was conveyed to Lorna, Clara, and their three brothers and sisters (Pl. Ex. No. 6). If the water did not pass as an appurtenance to this transfer of land, then the severance Respondents allege occurred here. Lorna and Clara's parents would then have retained the water - which they thereafter transferred to Lorna and Clara by Quit Claim Deeds on November 17, 1969. Thus, on November 17, 1969 Lorna and Clara's parents unified, not severed, the title because they reunited title to the water with the owners of the land upon which said water was being placed to use, Lorna and Clara. Thus, whether the water passed to Lorna and Clara as an appurtenance to the land on January 16, 1968 or by quit claim deeds on November 17, 1969 is somewhat irrelevant. The fact is, under either theory they unquestionably owned the water and the land upon which that water was being used as of November 17, 1969. Title was thus unified. Then, one month later, when Lorna and Clara conveyed said land, with all

appurtenances, said water passed to the grantees of those conveyances under statutory authority of Section 73-1-11 U.C.A.

Each of the following facts is undisputed. Each confirms that title to the land and water was unified as of November 17, 1969 - under anyone's theory of title - and that the water was then unquestionably appurtenant to the land and passed as an appurtenance to land conveyances of December 30 and 31, 1969. The undisputed facts are:

a. On January 16, 1968 Lorna and Clara received by warranty deed the land upon which the subject water was being placed to use. (Pl. Ex. No. 6). This transfer included all appurtenances and is the root title by which appellant claims the water and is the root title found in the title abstract maintained by the Utah State Engineer (Pl. Ex. No.6). But, the Trial Court held and the Court of Appeals agreed that the water could not pass as an appurtenance to this land transfer because water does not become appurtenant to the land until the State Engineer issues his certificate of appropriation on the water so used. (See attached Opinion pp. 4 and 5). Under this theory there would have been a severance between the land and water titles on January 16, 1968 because the conveyance did not include appurtenant water.

b. The State Engineer issued the Certificate of Appropriation on the contested water right October 21, 1969.

Because of a descriptive error said Certificate was amended and re-issued November 25, 1969. (PTO 111(d), FF14).

c. Under Respondents theory of title and that accepted by the Trial Court and the Court of Appeals, Lorna and Clara received the contested water right November 17, 1969 by virtue of two Quit Claim Deeds. (FF 15; Opinion p.5) Neither deed is found anywhere within the State Engineers files maintained for the contested water right (PTO V (2)). Neither is found in the State Engineers Title Abstract on the contested water right and they were not filed with the Kane County Recorder as required by 73-1-10 U.C.A. (PTO V (2)). Thus, for Respondents to suggest - as they do on page 12 of their brief - that the State Engineer and respondent derived their chain of title in the same manner because they arrived at the same conclusion is blatantly misleading and dead wrong. It is the same as saying Highway I-15 and I-80 are the same highway because they both pass through Salt Lake City. The State Engineer's title abstract does not contain Respondents root title documents and it is here that the highway divides between Respondents chain of title and the chains of Appellants and the State Engineer. The State Engineer's title abstract and that of Appellant are virtually identical. The only reason they differ is that the State Engineer did not have all the deeds further down the chain. Otherwise, the conclusions of Appellant and the State Engineer would unquestionably be the same.

d. If the land and the water titles were severed by the January 16, 1868 land conveyance, they were unquestionably unified November 17, 1968 because Lorna and Clara, the owners of land be virtue of the warranty deed of January 16, 1968, received the water being used on that land by quit claim deeds of November 17, 1969. (FF 15; Opinion p.5).

e. The water was actually being placed to use on the land held by Lorna and Clara throughout the 1969 irrigation season. (Tr. 42; 4. Order Amend, FF.).

f. On December 30 and 31, 1969 Lorna and Clara joined their two brothers and one sister in dividing the land upon which the water was being used between themselves. The warranty deeds conveying the land included all appurtenances and did not reserve the water. This family distribution - on December 30 and 31, 1969 - constitutes the basis of Appellant's argument that even if water did not pass as an appurtenance to the land until the State Engineer's certificate of appropriation issued, the water nevertheless passed as an appurtenance to the land on December 30 and 31, 1969 because it was at that time unquestionably appurtenant to the land and the land was conveyed with all appurtenances. (Pls. Ex. D-3, D-4, and D-5). These deeds are conveniently omitted in Respondent's chain of title.

g. The only testimony of Lorna and Clara was that the deed of December 31, 1969 was how they thought they received their water and that they only received a portion of the water right (Tr. 127, 136), not all of it as suggested by Respondent and not by the quit claim deeds relied upon by Respondent. The remainder went to their two brothers by warranty deeds dated December 30, 1969. (Pls. Ex. D-3, D-4; Tr. 97, 100 127, 136, 161) - one of which is Appellant. Every party to the December 30 and 31 conveyances traced their claim to water through these conveyances.

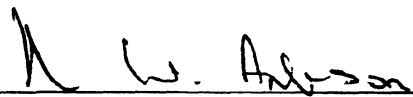
The deeds of conveyance dated December 30 and 31 are clear and without ambiguity. In fact, no ambiguity has ever been claimed. Thus, the water had to have passed under statutory authority 73-1-11 as an appurtenance to the land because there is absolutely no testimony to the contrary.

CONCLUSION

For the reasons set forth herein and in Appellants Petition for Writ of Certiorari this Court should grant the petition.

Respectfully submitted this 28th day of November, 1990.

PRUITT, GUSHEE & BACHTTELL



John W. Anderson
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the foregoing REPLY BRIEF IN SUPPORT OF APPELLANTS PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS to be mailed, postage prepaid, to each of the following this 29th day of November, 1990.



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ADDENDUM A

FILED

IN THE UTAH COURT OF APPEALS

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AUG 15 1990

Mary Homan
Mary Homan
Clerk of the Court
Utah Court of Appeals

Larry Little,)
) OPINION
) (For Publication)
 Plaintiff and Appellant,)
)
 v.) Case No. 890177-CA
)
 Greene & Weed Investments,)
)
 Leon S. Lippincott, Caroline)
 Lippincott, and Dee C. Hansen,)
 State Engineer of the State of)
 Utah,)
)
 Defendants and Appellees.)

Sixth District, Kane County
The Honorable Don V. Tibbs

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E. J. Skeen, Salt Lake City, for Appellees Leon S.
Lippincott and Caroline Lippincott
Keith S. Christensen, Salt Lake City, for Appellee
Greene & Weed Investments

Before Judges Davidson, Bench, and Garff.

DAVIDSON, Judge:

Appellant appeals the trial court's decision awarding water rights to the appellees.¹ We affirm.

On January 16, 1968, Lester F. Little and Madge Little, husband and wife, conveyed to their five children by warranty deed 80.1 acres of land located in the Johnson Canyon area in

1. This is an appeal from an interlocutory decree which the lower court certified as a final judgment pursuant to Utah R. Civ. P. 54(b). The lower court action was brought on two counts: (1) a challenge to the state engineer's decision; and (2) an action to quiet title to a water right. The issues below were bifurcated. The quiet title action was tried first since determination of the water right ownership will likely determine the challenge to the state engineer's decision. The present appeal concerns only the quiet title action.

Kanab, Utah. The deed conveyed to each an undivided one-fifth interest "[t]ogether with all improvements and appurtenances appertaining thereto." At the time of the conveyance the water right later associated with the land had not yet been certificated by the state engineer. This water right was carved out of a larger water right application originally filed by Lester on April 12, 1955 and approved by the state engineer on October 15, 1958. On November 30, 1967, Lester filed the application to segregate the water right in question. The new application requested permission to appropriate .92 cubic feet per second (cfs) out of the 10 cfs in the original application for use on 83.3 acres. The state engineer opened a new file upon receiving the segregated application.

Lester constructed diversion facilities and irrigated the 83.3 acres beginning in the early part of 1967. On December 19, 1967, Lester filed proof of appropriation with the state engineer demonstrating that the diversion facilities were complete and that the water had been placed to beneficial use. Approximately one month after filing the proof of appropriation, but prior to certification, Lester conveyed 80.1 of the 83.3 acres to his five children.

The five children made several conveyances further dividing the land. Appellant contends that the initial warranty deed from Lester and Madge to the five children transferred the water right as an appurtenance to the land. Therefore, the subsequent warranty deeds issued by the children also passed the water rights, and the quitclaim deeds and other documents relied upon by appellees are irrelevant to the court's determination of title to the water.

Appellees argue that the water rights were not conveyed in the warranty deeds issued by Lester and Madge. Rather, they argue that on November 17, 1969, Lester conveyed the entire water right to Lorna and Clara, two of the five children, by quitclaim deeds. They argue that water rights cannot be appurtenant to land until after the state engineer issues a certificate of appropriation. The trial court agreed and held that "[t]he water right involved . . . did not pass as an appurtenance to land conveyed before it was perfected by the issuance of a certificate of appropriation by the State Engineer."

STANDARD OF REVIEW

Our review of the trial court's ruling is a question of law which we review for correctness. Asay v. Watkins, 751 P.2d 1135, 1136 (Utah 1988); see Gonzales v. Morris, 610 P.2d 1285, 1286

(Utah 1980) ("[Q]uestions of legislative intent and statutory application are matters of law, not of fact.")

Appellant argues here that the water right becomes appurtenant upon the filing of the proof of appropriation.² He therefore contends that the water right automatically transferred in the warranty deed. He relies specifically on Utah Code Ann. § 73-1-11 (1989) which states that "[a] right to the use of water appurtenant to land shall pass to the grantee of such land" unless expressly reserved by the grantor. He also relies on Utah Code Ann. § 73-1-10 (1989), which states that final water rights may be transferred by deed in substantially the same manner as real estate, and upon Utah Code Ann. § 73-3-18 (1989), which states that rights claimed under water right applications may be transferred by instruments in writing prior to issuance of a certificate of appropriation.

To determine if the water right here was appurtenant to the land at the time of the initial conveyance, we must look to the nature of the right created by statute. See Bonham v. Morgan, 788 P.2d 497, 500 (Utah 1989), reh'g denied (1990); Mosby Irrigation Co. v. Criddle, 11 Utah 2d 41, 46, 354 P.2d 848, 852 (1960). In determining the nature of this right we rely upon the plain language of the statutes in question and prior case law. Bonham, 788 P.2d at 500. In this analysis, we note that the right to use and appropriate water is created by statute. See Criddle, 11 Utah 2d at 46, 354 P.2d at 852; Utah Code Ann. §§ 73-3-1 to -29 (1989). The statutory procedure "prescribes the exclusive manner in which such a right can be initiated, the conditions upon which such right can be acquired, and the procedural requirements which must be complied with." Criddle, 11 Utah 2d at 46, 354 P.2d at 852.

Section 73-1-11 provides that "water appurtenant to land shall pass to the grantee of such land" The term "appurtenant" is not defined by statute. The Utah Supreme Court has stated, however, that "[a] water right, acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, is an appurtenance thereto, and as such passes with the conveyance of the land, unless expressly reserved from the grant." Thompson v. McKinney, 91 Utah 89, 98, 63 P.2d 1056, 1061 (1937) (emphasis added)

2. A proof of appropriation is the next to last step in the statutory water appropriation process. Before a certificate of appropriation is issued the applicant must first file the proof of appropriation demonstrating that diversion facilities are complete and that a stated quantity of water has been applied to a beneficial use. Utah Code Ann. § 73-3-16 (1989).

(quoting Lensing v. Day & Hansen Sec. Co., 67 Mont. 382, 215 P. 999, 1000 (1923)).

Two steps must be completed before water becomes appurtenant to land. First, the water must be beneficially applied to a specific tract of land. Thompson, 91 Utah at 97-98, 63 P.2d at 1061. Second, all the statutory steps for appropriation must be completed. See Utah Code Ann. § 73-3-1 (1989) (no water rights may be appropriated without first following statutory requirements); Criddle, 11 Utah 2d at 46, 354 P.2d at 852; Thompson, 91 Utah at 98, 63 P.2d at 1061 (appropriation plus beneficial use equals appurtenant right); see also Eardley v. Terry, 94 Utah 367, 375, 77 P.2d 362, 365 (1938). The first step is completed when the proof of appropriation is filed. The second step, however, can only be satisfied when the entire statutory process is complete. Prior to completion of the entire appropriation process, the applicant only has an inchoate³ right to the use of the water. See Criddle, 11 Utah 2d at 46, 354 P.2d at 852.

When Lester transferred the 80.1 acres to his five children on January 16, 1968, the final statutory requirement in the appropriative process, the issuance of a certificate, had not been accomplished. Even though Lester had previously completed the diversion facilities, applied the water to beneficial use, and filed the proof of appropriation, the water right could not be appurtenant to the land. The appropriation process is complete only after the certificate of appropriation is issued and that certificate then becomes "prima facie evidence" of the owner's water right. Utah Code Ann. § 73-3-17 (1989);⁴

3. The term "inchoate" means "[i]mperfect; partial; unfinished; begun, but not completed" Black's Law Dictionary 686 (5th ed. 1979).

4. Utah Code Ann. § 73-3-17 (1989) provides, in pertinent part, as follows:

Upon it being made to appear to the satisfaction of the state engineer that an appropriation . . . has been perfected in accordance with the application therefor, and that the water appropriated . . . has been put to a beneficial use, as required by Section 73-3-16, he shall issue a certificate The certificate so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.

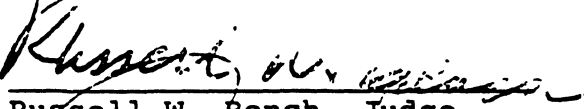
Eardley, 94 Utah at 375, 77 P.2d at 365 ("[N]o final rights are acquired until the proof . . . is made and a certificate has been issued by the state engineer."); Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 81, 166 P. 309, 311 (1917) (certificate is appropriator's deed of title good against the state and against everyone else who cannot show a superior right).

We therefore conclude that the January 16, 1968 warranty deed did not transfer the water as an appurtenance to the land. The trial court properly found that the November 19, 1969 quitclaim deed did transfer the water right at a time when that right was fully vested.⁵

The decision of the trial court is affirmed.


Richard C. Davidson, Judge

WE CONCUR:


Russell W. Bench, Judge


Regnal W. Garff, Judge

5. In its findings of fact, the trial court concluded that Lester and Madge intended to transfer the entire water right in the November 17, 1969 quitclaim deed, even though that deed contained an incorrect property description. The trial court's decision was based in part on a subsequent undated quitclaim deed and on other documents which revealed the grantors' intent. We find no error in the trial court's ruling.