

1953

# Hilda A. Brimm v. Cache Valley Banking Co. : Appellant's Reply Brief

Utah Supreme Court

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L. E. Nelson; Attorney for Defendant and Appellant;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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HILDA A. BRIMM,  
Plaintiff and Respondent

vs.

CACHE VALLEY BANKING CO.  
a corporation, ADMINISTRATOR  
OF THE ESTATE OF ANDREW  
ANDERSEN, AKA, ANDREW  
ANDERSON, Deceased.  
Defendant and Appellant.

Case No. 7979

APPELLANT'S  
REPLY BRIEF

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Appeal from the District Court of Cache County, Utah

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Honorable John L. Sevy, Jr., District Judge

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**FILED**

OCT 14 1953

L. E. NELSON,  
Attorney for Defendant  
and Appellant.

Clerk, Supreme Court, Utah

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APPELLANT'S  
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## ARGUMENT

Point No. 1. *The court erred in finding and holding that the water rights represented by certificate No. 24, for 112 shares of the Capital Stock of the Mendon Central Irrigation Company, a corporation, is appurtenant to the lands described in the findings and decree.*

On page 3 of respondent's brief it is contended that the stock certificate (Def's. Ex. 4) is invalid because Andrew Andersen did not own any land when the Mendon Central Irrigation Company was organized. On page 2 of the abstract of Title, (Pls. Ex. A) there is a deed from Andrew Sorensen, Mayor of Mendon City, to Andrew Andersen, conveying to him 17.63 acres; and on page 4 there appears a deed from Kelsey Bird, et. ux. conveying

to him the 2/110 acre tract. On page 7 of abstract (Ex. "A"), there appears a mortgage dated November 22, 1893, whereby Andrew and Sophia Andersen, mortgaged this property to James Quayle and Company to secure a debt of \$750. This mortgage was cancelled on September 17, 1895, and apparently a deed to this property was substituted as appears on page 8 of (Ex. A) and, when the debt was paid, the property was deeded to Sophia. And on July 23, 1918, and after the Mendon Central Irrigation Company was incorporated, and the stock certificate (Def's. Ex. 4) was issued and delivered to Andrew Andersen, he executed a second deed to her, for the 2/110 acres.

But sections 315, Compiled laws of Utah, 1907, and section 861, Compiled law of Utah 1917, did not specifically provide that an incorporator must own any particular property at time of incorporation. The statute requires (3) "The names of the incorporators and their places of residence; (7) The amount of stock each party has subscribed; and, (8) the amount of each share and the limit of capital stock agreed upon." In Article 7 of the Articles of Incorporation, the names of the incorporators are listed, with their places of residence, and the amount of stock subscribed by each, with value of each share.

In view of the fact that the Corporate stock was fully paid by a transfer of the waters of the springs, and Andrew and Sophia, joined in the execution of Def's. Ex. 1, the Deed of Water Rights, then the water which was prior thereto appurtenant to their land, was conveyed and transferred to the Corporation, in full compliance with the provisions of section 862, Compiled Law of Utah, 1917. When

this deed was delivered to the officers of the Corporation, it was their duty to issue the stock certificate to Andrew Andersen, as one of the incorporators.

But for the sake of Argument, suppose Sophia Andersen had been one of the incorporators, and the certificate was issued to her and she died leaving the stock in her name, then it would be necessary to probate her estate, and the same heirs at law would be effected. Therefore, it is difficult to perceive the materiality of Counsel's Contention on page 3 of respondent's brief.

On pages four, five and six of respondent's brief, counsel refers to the conveyances and transfers of the land described in plaintiff's complaint. It is also mentioned that said land had been irrigated, from waters represented by the stock issued to Andrew Andersen. It is difficult to perceive how that is material to any issue in this case. Even assuming that it was the same water it was merely a gratuitous use. He also emphasizes that the land is of little value without water. Assuming these facts to be true it does not justify the confiscation of private property. There are many instances where one person is permitted to use the property of another for various periods of time, but that alone does not constitute a transfer of title to the property.

On page 9 of respondent's brief, Counsel states that – "Under our decisions water is 'appurtenant', if water is used in direct connection with the real estate conveyed," – citing Thompson vs. McKinney 63 P. 2nd. 1056. From an examination of the opinion in that case it will be seen that the water was not owned by a corporation, as appears from the following excerpt from the opinion:



“There was no corporation or other organization by which shares of stock were issued. There is no question in this case respecting water rights represented by shares of stock in a corporation.”

It is contended on page 9, that the decision in *George vs. Robison* has been overruled by *In re Johnson Estate*, 228 Pac. 748. When the facts in the *Johnson* case are carefully examined it will be seen that there is a distinction between the facts in that case and the facts in *George vs. Robison*, *supra*, and in the case at bar. In the first place the water right consisting of 56½ shares, and the land upon which it had been used were both owned by Olaus Johnson, the testator.

It must also be remembered that the *Johnson* case involved the construction of a will. And the rule is well settled by statute, Sections 101-2-1, 101-2-2, U.C.A. 1943 (sections 6347, 6348), Comp. Laws of Utah, 1917 that — “*A will is to be construed according to the intention of the testator.* Where his intention can not have effect to its full extent, it must have effect as far as possible.” (Section 101-2-1). “In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator’s intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.” (Section 101-2-2).

The court in *re Johnson’s Estate* also distinguished the facts in that case from *George vs. Robison*, 63 P. 819, in the following language —

“But we think the decision itself is distinguishable, in part at least, on account of the peculiar facts in the

case and the conclusion reached. In *George vs. Robison* — ‘the water rights were not owned by the grantor in the deed, but were owned by a third person.’ ”

The same is true in the case at bar. When Catharine Gibbons and John Andersen conveyed the land to plaintiff, they did not own the water in question, but it was owned by the Estate of Andrew Andersen, deceased. It must also be observed that the decision in the case in re Johnson’s Estate, *supra*, expressly stated that the general rule stated in *George vs. Robison*, *supra*, should not be modified but only “when applied to a case like in re Johnson’s Estate.” And in a subsequent decision rendered by this Court in *Black vs. Johansen*, 18 P. 2d. 901, a further distinction was noted between the facts in the cases of *Snyder vs. Murdock* and *George vs. Robison*, and the facts in re Johnson’s Estate, 64 Utah, 114, 228 P. 748, and in making this distinction the late Mr. Justice Straup speaking for this Court said: “The cited cases of *Snyder vs. Murdock*, 20 Utah, 419, 59 P. 91; and *George vs. Robison* 23 Utah 79, 63 P. 819, are not in conflict herewith. They involve different facts.”

On page 10 of respondent’s brief the case of *Cortella vs. Salt Lake City*, 72 P. 2nd 630, is cited. It is respectfully submitted that this case does not support respondent’s judgment. The undisputed facts in that case show that the water right in question was not represented by shares of stock in a corporation. The plaintiff, Cortella, contended that the land which he acquired by mesne conveyances from the Preece heirs, had appurtenant to it a water right in Parley’s Canyon Creek. The trial court

found in favor of Cortella's claim, but on appeal, the judgment was reversed. The following statement by this Court illustrates that the question involved in that case was entirely different from the instant case. In dealing with that distinction this Court stated – "*We are not dealing with water as personal property.*" (Italics added).

Respondent's counsel attempts to discredit the opinion of the Supreme Court of Colorado in *Oppenlander vs. Left Hand Ditch Company* reported in 31 Pac. 854, because it was not cited by this Court in *George vs. Robison*, 23 Utah, 79. 63 Pac. 819. Regardless of that omission the Colorado case is nevertheless in point as an authority in support of the holding of this Court in *George vs. Robison*, *supra*.

The writer desires to call this Courts attention to another Colorado case, viz., *First National Bank vs. Hastings* 42 Pac. 691, which is cited among appellant's authorities in the opinion of this Court in *George vs. Robison*. In holding that a water right represented by shares of stock in an incorporated irrigation company is not appurtenant to the land upon which it has been used, Justice Thomson said:

"For the purpose of showing a transfer to the interveners of title to ditch stock, they introduced in evidence, against the plaintiff's objection, a deed executed to them by Dickson on May 1, 1891, conveying to them a certain tract of land, and all the water rights in any way pertaining or belonging to the land. The deed was improperly received. Water rights belonging to land and stock in a ditch corporation are two essentially different kinds of property. A real-estate

owner may have the right to water for the purpose of irrigating his land without owning any ditch stock, *and a stockholder in a ditch company may be without right to water for irrigation or without land, to irrigate..* Water rights for irrigation are regarded as real property, *and shares of stock in a corporation are personal property.* The deed conveyed all rights in water pertaining to the land described for the purpose of its irrigation, *but it no more conveyed the grantor's water stock than it conveyed his horses.*" (Italics supplied).

In a later Colorado case, *Oligarchy Ditch Company et. al. vs. Farm Inv. Company*, 88 Pac. 443, the water right was represented by shares of stock in Oligarchy Ditch Company, a corporation. It is submitted that the rule adhered to in that case, is applicable in the case at bar. Mr. Justice Bailey, speaking for the Court said:

"While there are many cases which hold that a water right or a private ditch may pass with a conveyance of land as appurtenant thereto, yet we know of no case, and counsel has called our attention to none, wherein it is held that a corporation owning a ditch, and furnishing the right to carry water to its stockholders only, must continue to carry water for land which has been conveyed to a stranger, while the stock which gave the right remained in the hands of the original owner or had been transferred to other parties."

The last clause of the foregoing quotation is certainly in point with the facts in the instant case, since the title to the lands passed from Sophia Andersen, through three parties to the plaintiff, while the ownership in the water stock remained in the estate of Andrew Andersen, deceased.

On page 11 of respondent's brief it is contended that the water used upon the land prior to the incorporation of the Mendon Central Irrigation Company, was not severed from the land. Counsel contends that although the severance deed (defendant's Ex. 1) was executed by Andrew and Sophia Andersen, and delivered to the officers of the Company, and in consideration for which the Corporation issued the stock, to Andrew Andersen, yet because water from the Canal has been used upon land, the water represented by said certificate is appurtenant to the land. This contention is contrary to the holding of this Court in *George vs. Robison* and *Snyder vs. Murdock*.

The fact that heirs of Andrew Andersen did not earlier probate his estate is immaterial — The water was used by his wife, son and daughter, and the other heirs permitted them to use the water, but at most this was a permissive use — and moreover, it being personal property, it could not be appurtenant to the land and hence could not be subject for a quiet title action.

It is a matter of common knowledge with the bench and bar that some estates, involving real and personal property, are not probated for many years after the death of the decedent.

On page 13 of respondent's brief, the case of *East River Bottom water Company vs. Boyce*, 128 P. 2d. 277 is cited. It is conceded in the opinion in that case, that a Deed of Waters Rights, similar to defendant's Ex. 1, was not executed by the incorporators and their wives. See pages 15-17 of appellant's brief for a distinction between that case and the case at bar.

It is respectfully urged that the decision rendered by this Court in *Adamson vs. Brockbank* 185 P. 2d. 264 is not in point. The facts in that case are dissimilar. In that case the irrigation ditch over plaintiff's land had been used for more than 20 years — to convey water to adjoining lands owned by plaintiffs. When defendant destroyed the ditch, plaintiffs sued for damages. It did not involve a water right, but an easement right to convey water through the ditch to plaintiff's lands, which right was held to be appurtenant to their land.

It is respectfully submitted that the holding by the Supreme Court of Montana in *Yellowtstone Valley Company vs. Associated Mortgagors Investors*, 290 P. 255, does not support plaintiff's action in the instant case. The Montana Court held that under the circumstances in that case, the water right was appurtenant to the land, but because of the foreclosure — “the plaintiff had no right, title, or interest in either the land or water stock.”

Under similar facts in the case of *Bank of Visalia vs. Smith* (Cal.) 81 Pac. 542, the Supreme Court of California held contrary to the Montana Court. The facts in the California case are very similar to the facts in *George vs. Robison*, 63 Pac. 819. The California Court held that — “Shares of stock, as such, are not presumptively appurtenant to land.”

Point No. II. *The court erred in finding and holding, that the water intended to be and represented by the said 112 shares of said capital stock, and the water so used upon said lands is one and the same identical water, and that said water was never by any owner thereof either*

*severed or intended to be severed from said lands, or used otherwise than for the irrigation of said lands described in the findings and decree.*

Respondent's counsel directs his argument to the last clause of the above point, and argues that, "the water was never by any owner thereof either severed or intended to be severed from the lands." The case of East River Bottom Water Company, 128 P. 2d. 277 is again referred to, but that case has been distinguished in this brief, and it was also distinguished at pages 15-17 of appellants brief, to which reference is hereby made.

It is contended that because the record title to the Andersen property was in Sophia Andersen, that the stock should not have been issued to Andrew Andersen, but Should have been issued to Sophia. This question has already been discussed. Suppose that the stock certificate No. 24 as it now stands was in the name of Sophia instead of Andrew. Just how that could benefit the plaintiff is difficult to perceive in view of the fact that the heirs at law of Sophia and Andrew are identical. Plaintiff has produced no evidence showing she would be in a preferable position had the stock certificate No. 24 been issued to Sophia instead of Andrew.

On page 21 of respondent's brief it is contended that—"It cannot be presumed he wanted her to have the land and not the water with it, if so he would not have conveyed the 2.50 acre tract to her. When this deed was executed to Sophia on July 23, 1918, Andrew was the owner of the 112 shares of capital stock of the Irrigation Company, which was issued to him on April 30, 1918. And

prior thereto Andrew and Sophia had jointly transferred the appurtenance rights in the water to the Irrigation Company, by their execution of the Deed of Water Rights (Def's. Ex. 1.)

Point No. III. *The court erred in finding and holding that the said water stock certificates never has been and is not now personal property separate and apart from said lands, or even so considered.*

Respondent's argument under point 3, revolves around the ownership of the stock. Mr. Sorensen, secretary of the Water Company testified, (R. 44) that the signature of Andrew Andersen, appears on stub of certificate No. 24, which acknowledges that he received the certificate, and that so far as the Corporation is concerned, Andrew Andersen's estate is the owner of the stock. (R. 45). There is no evidence offered by plaintiff to dispute this fact. The fact that the certificate has been misplaced or lost is not material. The evidence show that Andrew Andersen received it, and no other certificate has been issued in its place. Moreover, the secretary of the Corporation testified that the Company recognized Andrew Andersen's estate as the owner of the stock. Much of what is stated by Counsel on pages 23-25 of respondent's brief is answered by appellant's brief pages 17-20.

On pages 6 and 7 of respondent's brief, Counsel indulges in the assumption that Andrew Andersen must have assigned this stock to his wife, Sophia. If that actually occurred, then why didn't Sophia present the certificate No. 24, to the secretary and procure a new certificate? But just how such an assumption is material is



difficult to perceive. If Sophia did have a certificate why did she not assign the same to her son, L. M., when she conveyed the lands to him on November 26, 1922 (Ab. 14) and on January 24, 1924, (Ab. 15). A water right is not mentioned in either of these deeds. The only assumption permissible is that Andrew Andersen's wife, Sophia, and their son, L. M. knew that the water stock was issued to Andrew Andersen, and that on account of his demise the stock could not be transferred, except by probate, and so they continued to use the water, in the absence of any objection from the other children.

Point No. IV. *The court erred in finding and holding that the Mendon Central Irrigation Company, is a mutual company and that the interest in the water was conveyed with the land as an appurtenance.*

By counsel's remarks under this point on page 26 of respondent's brief, it is conceded that the water right owned by other land owners under the Mendon Central Irrigation Company were transferred by the issuance of a new certificate or certificates in lieu of the old certificate. Counsel says, that — "Nothing irregular is seen in issuing of new certificates in lieu of old ones." How does this admission square with plaintiff's failure to prove that in the instant case, there has been no transfer of the 112 shares issued to Andrew Andersen, as evidenced by the stub No. 24. Plaintiff's entire case is predicated upon the proposition that because certain water has been used to irrigate the Andersen lands, which is now owned by plaintiff, that the mere use of water from the canal, ipso facto, amounted to a transfer of the legal title to the water, represented by Certificate No. 24.

Point V. *The court erred in finding and holding that plaintiff is entitled to an order declaring her to be the owner of water right represented by the certificates of stock number 24, and that another certificate of stock be issued to plaintiff in lieu thereof for 112 shares of the capital stock of the Mendon Central Irrigation Company.*

It appears from respondent's brief, page 27, that there is a failure to answer appellant's contention on page 23 of it's brief to the effect that in view of the fact that plaintiff's pleadings and testimony attempts to show that plaintiff acquired title to the lands, and her theory was that a mere use of the water entitled plaintiff to a judgment, decreeing to her the water on the theory that it was appurtenant to the land. However, even though this was plaintiff's theory as reflected by her pleadings and evidence, it is evident that plaintiff has now concluded that in order to procure legal title to the water, she must have a certificate of stock issued to her by the Mendon Central Irrigation Company. The plaintiff's entire case rests upon the theory of ownership based upon an appurtenance right; however, under point V she is now completely changing her theory, to ownership evidenced by a certificate of stock. Manifestly, from plaintiff's complaint and her evidence, it all points to the fact that the water is appurtenant to the land and is thus considered as real property, but no doubt plaintiff realizes that she could not own water under such a right when the remaining ownership to the water under the system is evidenced by certificates of stock held by the remaining stockholders of the Corporation.

Point No. VI. *The court erred in making and enter-*

*ing its finding four (R. 11) since the action therein referred to involved different property and different issues.*

Respondent does not explain why findings No. 4 was included in the findings in as much as the court sustained appellant's objection to the introduction of the opinion rendered by this court in *Gibbons vs. Brimm*, 230 P. 2d. 983, at the time it was offered during the trial. (R. 39). It is very evident that respondent attempted in every way possible to prejudice the trial court against the defendant during the trial by attempting to enlist the court's sympathy by attempting to show that she had incurred an obligation. However, in view of the fact that the decision in this case was drawn to the attention of the court it could very likely have had a direct bearing upon the decision of the trial court in the case at bar. In view of the fact that the appellant did bring this case to the attention of the trial court, it should be kept in mind that there was included in the opinion of this court in that case another transaction involving a note for \$8000, secured by mortgage to which the plaintiff had an assignment and has since received the proceeds owing on that indebtedness, which the trial court apparently overlooked. It is difficult to understand why the respondent brought this extraneous matter before the court since it has no legal relation to the issues involved in the case at bar. The subject matter in this action is a separate and distinct property right belonging to the estate of Andrew Andersen, deceased, and it should not in any way be affected by transactions occurring between the plaintiff and Catherine Gibbons.

Point No. VII. *The court erred in rendering its judgment and decree that the water represented by the 112*

*shares of capital stock in the Mendon Central Irrigation Company, a corporation is appurtenant to the lands described in said decree, and that plaintiff is the legal and equitable owner of said water — and that the said Mendon Central Irrigation Company, be directed to issue to plaintiff a certificate for 112 shares of stock to replace the certificate issued to Andrew Andersen, deceased, in his lifetime, and the court further erred in rendering its further judgment and decree; that the Cache Valley Banking Company, administrator of the Estate of Andrew Andersen, deceased, nor any of the heirs at law of his estate have no interest, ownership or title in either the water, or Certificate of Stock covering the same, or any part thereof, and that the plaintiff's title therto is good and valid and is quieted in her, and that the administrator and heirs of the estate of Andrew Andersen, are estopped, enjoined, and restrained from asserting any right, title or interest whatsoever in said water or stock covering same.*

Respondent's counsel in his attempt to answer appellant's complaint to the court's findings, No. 7, page 27 of appellant's brief, again indicated that plaintiff's sole claim to his water is based upon an appurtant water right. This claim is made in the very face of the undisputed facts that the water right in question is represented by 112 shares of stock issued by the Mendon Central Irrigation Company, a Corporation, which is held by this court to be personal property. It is respectfully submitted that the cases cited by respondent's counsel have in this brief been distinguished from the case at bar. Counsel erroneously contends that the cases of Snyder vs Murdock, 50 Pac. 9, and George ves. Robison, 63 Pac. 819, were over-ruled by the decision in re Johnson's estate. This court held in Black vs. Johan-

sen 18. 2d. 901, that the decision in re Johnson's estate was distinguished ~~for~~ the cases of George vs. Robison and Snyder vs. Murdock, on the ground that they involved different facts.

Counsel concedes that the present action is one to quiet title. At the time when this action was brought Section 104-57-1. U.C.A. 1943, was in force and effect, and it provides that,— “An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.”

Our statute which was in force when this action was brought, Section 18-2-33, 1943, provides among other things, that, — “Stock shall be deemed personal property.”

It is next contended that the use of the water by the heirs of Andrew Anderson, deceased, since his death was not permissive. This statement is squarely contrary to the evidence. Sophia Andersen, L. M. Andersen, and Catherine Gibbons, were permitted to use water on said lands through the forbearance of the remaining heirs of Andrew Andersen, deceased.

This is simply a case where one heir is attempting to appropriate to herself property that belongs equally to herself and the remaining eight heirs of said estate.

The defendant and appellant respectfully submits to this Honorable Court that the findings, conclusions and judgment of the lower court be reversed, set aside and held for naught, and for costs on this appeal.

Respectfully submitted,

L. E. NELSON,  
Attorney for Defendant  
and Appellant.