

1981

Melvin Church v. Meadow Springs Ranch Corporation, Inc. , Estate of Thomas Tony Castagno, Albert J. And Bernice B. Castagno, Myron T. Castagno And Mrs. Myron T. Castagno, Eugene Castagno And Mrs. Eugene Castagno Individually, And Eugene Castagno, As Administrator of The Estate of Thomas Tony Castagno, Richard Castagno, John Does And Jane Does, One Through Six, As Heirs of Thomas Tony Castagno, And Federal Land Bank of Sacramento :
Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN CHURCH, :

Plaintiff and Appellant, :

vs. :

MEADOW SPRINGS RANCH CORPORATION, :

INC., ESTATE OF THOMAS TONY

CASTAGNO, ALBERT J. and BERNICE B. :

Case No. 17241

CASTAGNO, MYRON T. CASTAGNO and

MRS. MYRON T. CASTAGNO, EUGENE :

CASTAGNO and MRS. EUGENE CASTAGNO,

individually, and EUGENE CASTAGNO :

AS ADMINISTRATOR OF THE ESTATE OF

THOMAS TONY CASTAGNO, RICHARD :

CASTAGNO, JOHN DOES and JANE

DOES, ONE through SIX, AS HEIRS :

OF THOMAS TONY CASTAGNO, and

FEDERAL LAND BANK OF SACRAMENTO, :

Defendants and Respondents.:

APPELLANT'S BRIEF

Appeal From a Judgment of the Third District Court
In and for Tooele County, State of Utah
Honorable Homer F. Wilkinson, Judge

KENNETH M. HISATAKE
1825 South Seventh East
Salt Lake City, Utah 84105
Attorney for Plaintiff-Appellant

FILED

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PAUL N. COTRO-MANES
40 Judge Building
Salt Lake City, Utah 84111
Attorney for Meadow Springs Ranch

JOHN A. ROKICH
3617 South 8400 West
Magna, Utah 84044
Attorney for All Defendants except
Meadow Springs and Albert J. and
Bernice B. Castagno

DOUGLAS F. WHITE Clerk, Supreme Court, Utah
Prudential Plaza
185 North Main, Suite B-1
Tooele, Utah 84074
Attorney for Defendants Albert J.
and Bernice B. Castagno

E. J. SKEEN
536 East Fourth South
Salt Lake City, Utah 84102
Attorney for Federal Land Bank of
Sacramento

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IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN CHURCH, :
Plaintiff and Appellant, :
vs. :

MEADOW SPRINGS RANCH CORPORATION, :
INC., ESTATE OF THOMAS TONY :
CASTAGNO, ALBERT J. and BERNICE B. :
CASTAGNO, MYRON T. CASTAGNO and :
MRS. MYRON T. CASTAGNO, EUGENE :
CASTAGNO and MRS. EUGENE CASTAGNO, :
individually, and EUGENE CASTAGNO :
AS ADMINISTRATOR OF THE ESTATE OF :
THOMAS TONY CASTAGNO, RICHARD :
CASTAGNO, JOHN DOES and JANE :
DOES, ONE through SIX, AS HEIRS :
OF THOMAS TONY CASTAGNO, and :
FEDERAL LAND BANK OF SACRAMENTO, :

Case No. 17241

Defendants and Respondents.:

APPELLANT'S BRIEF

STATEMENT OF CASE

Appeal from the final Judgment of the Honorable Homer F. Wilkinson, District Judge, in and for Tooele County, State of Utah.

The First Cause of Action, Count I, is an action to quiet title to an approved water Application No. 32822 for 5 second feet of water, which Plaintiff-Appellant claimed three-fifths (3/5) interest to. Plaintiff purchased a three-fifths (3/5) interest to the approved

application from the Defendants, Albert J. Castagno and Bernice B. Castagno, two of the Defendants named herein. The other named Defendants also claim an interest to the approved application and, therefore, Plaintiff's action to quiet title.

Count II of the First Cause of Action seeks damages against Richard Castagno, President of Meadow Springs Ranch as an officer of Meadow Springs Ranch, for preventing Plaintiff from perfecting Plaintiff's interest to the approved Application No. 32822.

The Second Cause of Action, Count I, is an action for breach of an oral contract against Albert J. Castagno and Bernice B. Castagno for failing and refusing to assist in the perfecting of approved Application No. 32822.

The Second Cause of Action, Count II, involves a cause of action for breach of an oral agreement by the Defendants, Albert J. Castagno and Bernice B. Castagno, to sell to Plaintiff three-fifths (3/5) interest in and to approved Application No. 32822. Plaintiff sought damages for breach of the oral agreement.

STATEMENT OF FACTS

For convenience, all Defendants other than Albert J. Castagno and Bernice B. Castagno will be referred to collectively as Meadow Springs Ranch.

Originally Plaintiff owned sixty (60) acres, more or less, in Tooele County, State of Utah, in an area immediately East of Grantsville

City, Utah. The property was without irrigation water and Plaintiff was interested in obtaining irrigation water by way of an irrigation well so that his land could be better utilized. During the time in controversy the Tooele area was closed to new appropriation for irrigation water and Plaintiff, therefore, was compelled to seek a transferable water right or to seek an approved application which could be transferred and proved on his land.

Plaintiff learned that an approved application within the Grantsville district had been issued by the Utah State Engineer's Office under the name of Bernard and Gertrude Castagno, the parents of the Defendant Albert J. Castagno.

Plaintiff and the Defendant, Albert J. Castagno, entered into an agreement whereby the Defendant, Albert J. Castagno, would purchase approximately forty (40) acres from the Plaintiff, and an Uniform Real Estate Contract was prepared and the transaction was consummated. That particular transaction was the subject matter of a prior litigation in Castagno vs. Church, 552 P.2d 1282.

By a separate and oral agreement, Plaintiff and Defendant, Albert J. Castagno, agreed that the Defendant, Albert J. Castagno, would obtain from his mother approved Application No. 32822 which represents a right to seek and appropriate 5 second feet of water and Albert J. Castagno did, thereafter, assign to Plaintiff three-fifth (3/5) interest to the approved Application so both parties could obtain irrigation water for their respective parcels.

The prior lawsuit and subsequent appeal was based on the terms of an Uniform Real Estate Contract for the sale of the forty (40) acres and did not resolve the issue of approved Application No. 32822.

Plaintiff brought this action to seek his three-fifths (3/5) interest in and to approved Application No. 32822. There is no dispute that the Defendant, Albert J. Castagno, obtained an Assignment of Application No. 32822 from his mother and subsequently assigned a three-fifths (3/5) interest to that approved Application to the Plaintiff

When the Plaintiff applied to segregate his three-fifths (3/5) interest from approved Application No. 32822 and to seek a change in diversion point for the proposed appropriation of water, the Defendant, Meadow Springs Ranch, protested Plaintiff's application for segregation and change in diversion point, claiming that they were the rightful owners of approved Application No. 32822 and that water had already been appropriated by the Defendants, pursuant to Application No. 32822. (See Pl. Exhibit 5). A hearing was held by the State Engineer's Office on Plaintiff's application and on Defendants' protest and no decision was reached pending the litigation of this case.

The Defendants, Meadow Springs Ranch, claim that approved Application No. 32822 was a "water right" which was appurtenant to the land and, therefore, the application was conveyed with the land as an appurtenant water right when the land was first sold by Albert J.

Castagno's mother to Gledhill, Inc. The first sale of land occurred in 1965, prior to the Utah State Engineer's approval of the application, and was prior to the Assignment of the approved Application to the Plaintiff. The Defendants, Meadow Springs Ranch, acquired the property by subsequent transactions.

The following is the sequence of events on the sale of the Bernard Castagno ranch and the development of Application No. 32822:

- March 13, 1961 - Bernard Castagno applies for right to seek and appropriate additional 5 second feet of water, Application No. 32822. (Pl. Exhibit 1, p. 2).
- January 2, 1965 - Bernard Castagno died. (D. Exhibit 15).
- June 14, 1965 - Honorable Gordon R. Hall, then attorney for Gertrude M. Castagno, obtained a Decree whereby all of the assets of the Estate of Bernard Castagno was distributed to Gertrude Castagno. (Pl. Exhibit 1, p. 5).
- May 14, 1965 - Gertrude Castagno sold her property by contract to Richard C. Burke on May 14, 1965. (See page 2, Pl. Exhibit 7).
- March 15, 1967 - Burke sold property by contract to Gledhill, Inc., on March 15, 1967. (Pl. Exhibit 7, p. 2).
- September 8, 1969 - Application No. 32822 was approved by the State Engineer's Office in the name of Bernard Castagno. (Pl. Exhibit 1, p. 2, 3).
- December 29, 1969 - Gledhill sold the property to Terracor. (Pl. Exhibit 9).
- May 1, 1970 - Terracor sold property on Exchange Agreement to Thomas "Tony" Castagno. (Pl. Exhibit 1).
- May 10, 1971 - Thomas "Tony" Castagno died. (Pl. Exhibit 11, p. 2).
- August 20, 1973 - Gertrude assigned approved Application No. 32822 to her son, Albert J. Castagno. (Pl. Exhibit 1, p. 16).

September 7, 1973 - Albert J. Castagno assigned to Plaintiff, Melvin Church, three-fifths (3/5) interest to approved Application No. 32822. (Pl. Exhibit 1, p. 19).

Both assignments were recorded at the State Engineer's Office.

Meadow Springs Ranch claimed that the Plaintiff's filing of his Assignment of Interest to approved Application No. 32822 was inferior and without effect as against Meadow Springs Ranch because the Plaintiff had prior notice that others claimed an interest in approved Application No. 32822.

The Defendants, Albert J. and Bernice B. Castagno, claim that Plaintiff did not obtain any interest to approved Application No. 32822 because Plaintiff's interest to Application No. 32822 was contingent upon Plaintiff's perfecting the claim for 5 second feet of water by drilling wells and appropriating water on behalf of the Plaintiff and Defendants, Albert J. and Bernice B. Castagno, and subsequently filing Proof of Appropriation for 5 second feet of water in behalf of himself and Defendants, Albert J. and Bernice B. Castagno. The Defendants now contend that Plaintiff failed to perfect the water rights and, therefore, Plaintiff obtained nothing by the Assignment of three-fifths (3/5) interest in and to approved Application No. 32822.

Plaintiff contends that Application No. 32822 was merely an application at the time Mrs. Gertrude Castagno conveyed her property and, therefore, the application was not a "water right" appurtenant to the land and was not conveyed with the land. Plaintiff further contends that the only water appurtenant to the land which was conveyed

by Mrs. Gertrude Castagno to Burke and Burke to Gledhill was the water previously or actually used on the property at the time of the original conveyance. Plaintiff contends that the transfer or assignment of an application, approved or not approved by the State Engineer's Office, must meet the requirements of Section 73-3-18, Utah Code Annotated, 1953, as amended. Plaintiff further contends that subsequent purchasers of the Bernard Castagno ranch could obtain, through their chain of title, only such water rights as the original grantor had at the time of the conveyance or such additional water rights as the subsequent purchasers could independently prove ownership to.

Consequently, Plaintiff contends that his purchase of the three-fifths (3/5) interest to approved Application No. 32822 was a valid purchase since the conveyances in question do not refer to a conveyance of an unapproved application to appropriate water and the unapproved application at the time of the original conveyance was not a "water right" appurtenant to the land.

On the other hand, the Plaintiff contends that if the trial court correctly determined that Application No. 32822 was a right appurtenant to the land and, therefore, conveyed with the land, the Defendants, Albert J. Castagno and Bernice B. Castagno, breached their agreement to convey a three-fifths (3/5) interest to the application in breach of their oral agreement with the Plaintiff, and Plaintiff was, therefore, damaged in a sum representing three (3) second feet of

water or \$9,000.00 per second feet as the Defendants' evidence indicated. (T. 242 - 247). Finally, Plaintiff contends that if the trial court found that the application was not a "water right appurtenant to the land" and, therefore, was not conveyed with the land, the Plaintiff had a valid interest in Application No. 32822. If the acquisition of the three-fifths (3/5) interest to Application No. 32822 was contingent upon perfection of the water rights as claimed by the Defendants, Albert J. and Bernice B. Castagno, the Defendant, Meadow Springs Ranch, should be assessed damages in a sum representing 3 second feet of water because of their false Affidavit claiming title to Application No. 32822 which prevented Plaintiff from perfecting the water right.

The trial court ruled as follows:

1. In regards to the Defendants, Meadow Springs Ranch, the Court found that the application No. 32822 was appurtenant to the land and conveyed to the Defendants, Meadow Springs Ranch Corporation, Inc., because Gertrude M. Castagno, the original grantor of the land in question, did not reserve unto herself any water rights when the property was conveyed. (R. 269 - 272).

2. Consequently, the attempted Assignment of Application No. 32822 from Gertrude M. Castagno to her son and daughter-in-law, Albert J. and Bernice B. Castagno, was ineffective and without force and effect. Based upon that conclusion, the Court rendered Judgment

in favor of Meadow Springs Ranch in the quiet title action. (R. 269 -272).

As to the Defendants, Albert J. Castagno and Bernice B. Castagno, the Court found:

1. That on September 7, 1973, the Plaintiff acquired from Defendants, Albert J. and Bernice B. Castagno, husband and wife, by means of a separate and oral agreement, apart from the Uniform Real Estate Contract, a contingent interest in three-fifths (3/5) of the 5 second feet of water represented by an approved Application No. 32822. (R. 223 - 226).

2. The court found further that such oral agreement for three-fifths (3/5) interest for 5 second feet of water for the Plaintiff was conditioned upon Plaintiff perfecting the entire 5 second feet of water represented by approved Application No. 32822 for himself and for the Defendants, Albert J. and Bernice B. Castagno. (R. 223 - 226).

3. The court further found that the 5 second feet of water represented by approved Application No. 32822 was never perfected by the Plaintiff and, therefore, Plaintiff obtained no interest to approved Application No. 32822. (R. 223 - 226).

Based upon such Findings and Conclusions, the Court entered Judgment against the Plaintiff and in favor of the Defendants, Albert J. and Bernice B. Castagno, for no cause of action. The Plaintiff appeals from the Judgment quieting title to approved Application No.

The remaining Castagnos, all of whom were stockholders in Meadow Springs Ranch, are related to Albert J. Castagno, but are not brothers or sisters of Albert J. Castagno.

Although the Warranty Deed from Mrs. Gertrude Castagno to Gledhill, Inc., was dated March of 1971, the evidence is clear that Gertrude Castagno sold to Burke on May 14, 1965, and Burke sold to Gledhill on March 15, 1967. (Pl. Exhibit 7, p. 2). Furthermore, Plaintiff's Exhibit 7 shows a Customer's Service Request whereby Gledhill, Inc., requested from Utah Power and Light Company electrical service and executed an Electrical Service Agreement for the property in question on April 23, 1968. The documents relating to the request for electricity is attached to the subsequent sale from Gledhill, Inc., to Terracor. (Page 21, Plaintiff's Exhibit 7). In Paragraph 6, page 4, of that particular Agreement, Terracor agrees to pay Mrs. Gertrude M. Castagno the remaining balance of the purchase price of \$30,500.00. Obviously, Mrs. Castagno sold her property before Application No. 32822 was approved on September 8, 1969, although the Deed was not executed by Mrs. Gertrude Castagno until March of 1971.

Gledhill sold the property in question to Terracor on or before December 15, 1969. The contract is dated December 15, 1969, and appears to have been signed by Gledhill on the 29th day of December, 1969, but the date of occupancy of the contract and the pro-ration of taxes and insurance was effective as of October 1, 1969.

Thereafter, Terracor sold to Thomas "Tony" Castagno, the father of all the stockholders of Meadow Springs Ranch the property in question. The sale or Exchange Agreement was dated May 1, 1970. (Plaintiff's Exhibit 7).

Meadow Springs Ranch now contends that approved Application No. 32322 was a "water right" appurtenant to the original conveyance from Mrs. Gertrude Castagno to Burke and, therefore, was passed through the chain of title from Burke to Gledhill to Terracor and Terracor eventually to Thomas "Tony" Castagno and finally to Meadow Springs Ranch. It is important to look to the actual verbage used in the documents of conveyances starting with the transaction involving Gertrude Castagno to Gledhill and all of the subsequent conveyances. The wording on each of the Deeds are as follows:

1. Gertrude Castagno to Gledhill: (Pl. Exhibit 10).

"All water and water rights appurtenant thereto and used in connection with any of the above described properties." (Emphasis added).

2. Gledhill to Terracor: (Pl. Exhibit 8).

"Together with all water and water rights used in connection with any of the above properties." (Emphasis added).

3. Terracor to Thomas "Tony" Castagno: (Pl. Exhibit 6).

"Together with all water and water rights used in connection with any of the above properties." (Emphasis added).

It is interesting to note that each one of the conveyances used the terms "water and water rights appurtenant thereto and used in

connection with any of the above described properties." Obviously, each of the grantors in the chain of title intended that the water being used or the water rights in existence was to be transferred with the property. Since approved Application No. 32822 was merely an application, unapproved, as of the date of Burke's purchase (May 14, 1965), it was not a water right of any sort but was merely a naked application with only inchoate rights. The Application No. 32822 was not approved until September 8, 1969, more than four (4) years after Gertrude Castagno had sold her property. Therefore, Gertrude Castagno could not have possibly conveyed No. 32822 as a water right appurtenant to or used in conjunction with the land and certainly Application No. 32822 did not represent any water used in connection with the property transferred.

All of the decisions in the State of Utah pertaining to water rights confirm Plaintiff's position that water or water rights appurtenant to a land which is deemed to be conveyed with the land, unless expressly reserved, is that water which is or was beneficially used on the property before or at the time of sale. In Bauer v. Prestwich, 578 P.2d 1283, (1978), the court stated:

" . . . the use of water upon land makes it appurtenant to that land; and unless it was separately deeded away, it would pass with the land." (Emphasis added).

In Roberts v. Daniels, 584 P.2d 378, Justice Maughan states:

"In Utah a deed which conveys land to a grantee also conveys the right to use appurtenant water, unless expressly reserved.

"Appurtenant water is the amount of water beneficially used on the land before and at the time of sale." (Emphasis added).

In Stevens v. Burton, 546 P.2d 240, the court states:

"We believe and hold that the water appurtenant to the two tracts of land conveyed is the amount of water which was beneficially used thereon before and at the time of the sale." (Emphasis added).

Since Meadow Springs Ranch depends for its claim to Application No. 32822 on the original transaction between Gertrude Castagno and Burke, and Burke to Gledhill, their claim is dependent upon the wording of the documents upon which they claim title to the approved Application. The evidence is clear that they received only such water as was used on the property in 1965, the date of the original conveyance. That did not include Application No. 32822 since no one had the right to use or appropriate water under that permit until September 8, 1969. Meadow Springs Ranch cannot show any separate transaction with Mrs. Gertrude Castagno or with Albert J. Castagno because none existed. The Plaintiff, on the other hand, claims title through Albert J. Castagno from Mrs. Gertrude Castagno by way of an Assignment properly recorded after Application No. 32822 was approved on September 8, 1969.

In McGarry v. Thompson, et al., 114 U. 442, 201 P.2d 288, the court stated:

"No vested right to use of water is acquired by the mere filing of an application to appropriate water. And no such right can be acquired as a result of such filing unless such application be approved either for the State Engineer, or by the court on an appeal therefrom."

The evidence is clear that when Gertrude Castagno conveyed her property to Burke and Burke conveyed to Gledhill, only two (2) wells existed on the property and that the full 5 second feet of water had been appropriated from the two (2) wells. Both wells had been drilled pursuant to Application No. 30900. One of the wells was a 12-inch well at a depth of 240 feet and the second was the 14-inch well at a depth of 400 feet.

The statutes are clear as to the differentiation between applications, approved application, and water rights.

Under Section 73-1-3, Utah Code Annotated, 1953, as amended, a water right does not come into existence until beneficial use has been made of the water. That Section reads:

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

The Defendant, Meadow Springs Ranch insists that they obtained the right to approved Application No. 32822 because, as they claim, the approved Application was a water right appurtenant to the land. Section 73-1-11, Utah Code Annotated, 1953, as amended, defines water right appurtenant to the land. That Section states:

"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" (Emphasis added).

Again, the Defendant, Meadow Springs Ranch's, position is not defensible because Application No. 32822 was not a right to use of water at the time of the original conveyance from Mrs. Gertrude Castagno to Burke. It was merely an unapproved application.

The Defendants also contend that the Plaintiff, Melvin Church, had notice of their claim for Application No. 32822 because the Plaintiff had seen various letters and various contracts and deeds pertaining to the sale of the land by Gertrude Castagno to Burke and documents of subsequent conveyances of the land. Section 73-1-10, Utah Code Annotated, 1953, as amended, specifically states what types of water right can be and should be included in a deed for the conveyance of real estate. That Section reads:

"Water rights, whether evidenced by decrees, by certificates of appropriation, by diligence claims to the use of surface or underground water or by water users' claims filed in general determination proceedings, shall be transferred by deed in substantially the same manner as real estate . . ." (Emphasis added).

Again, at the time of the original conveyance between Mrs. Gertrude Castagno and Burke, Application No. 32822 was a naked application and not a water right as evidenced by any decrees, certificates of appropriation, diligence claims or water users' claims.

The statutes specifically prescribe the manner in which an approved application must be transferred. Section 73-3-18, Utah Code Annotated, 1953, as amended, reads:

"Prior to issuance of certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing. Such instruments, when acknowledged or proved and certified in the manner provided by law for the acknowledgment or proving of conveyances of real estate, may be filed in the office of the state engineer and shall from time of filing of same in said office impart notice to all persons of the contents thereof. Every assignment of an application which shall not be recorded as herein provided shall be void as against any subsequent assignee in good faith and for valuable consideration of the same application or any portion thereof where his own assignment shall be first duly recorded." (Emphasis added).

The Plaintiff, Melvin Church, followed the letter of the law. There is no dispute that the only Assignments filed were by the Plaintiff, Melvin Church, and that the Assignments were of Application No 32822 from Gertrude Castagno to her son, Albert J. Castagno, and his three-fifths (3/5) interest from Albert Castagno to Plaintiff, Melvin Church.

Even if the Plaintiff were to concede for the sake of the argument that the Defendant, Meadow Springs Ranch, had somehow placed a notice in the records of the State Engineer's Office claiming an interest to Application No. 32822, the facts are that the Defendant, Meadow Springs Ranch, did not obtain an assignment of the Application No. 32822; the Application was not yet an approved application at the time of the original conveyance of the land in 1965 and, therefore, was not a water right and certainly was not water appurtenant to the

property because no one had the right to use water under the application at the time of the original conveyance and, therefore, the question of notice to Plaintiff of Meadow Springs Ranch's claim to Application No 32822 is moot.

It is clear from the evidence that the Defendants, Meadow Springs Ranch, could not obtain by their acquisition of Bernard and Gertrude Castagno's farm, an interest to water greater than that which the original grantors had at the time of the first conveyance. In 1965, Gertrude Castagno did not have any water right under Application No. 32822 since the application was not approved until September 8, 1969. After the approval of the Application, the only conveyances of that permit were the Assignments of claim by Gertrude to her son, Albert J. Castagno, and from Albert to the Plaintiff, Melvin Church.

One further consideration relates to the doctrine of ejusdem generis. In all of the conveyances starting from Gertrude Castagno to Burke, Burke to Gledhill, from Gledhill to Terracor, and from Terracor to Thomas "Tony" Castagno, and from the heirs of Thomas "Tony" Castagno to the heirs of Meadow Springs Ranch, the documents and conveyances consistently refer to "water and water rights used in connection with the properties." Applying that doctrine, it is obvious that the water rights appurtenant thereto were intended to refer to the water and water rights actually used before or at the time of the original conveyance. This language is consistent with the Supreme Court rulings and with the statutory definition of water right appurtenant

to the land as defined by Section 73-1-11, Utah Code Annotated, 1953, as amended. Since Gertrude Castagno did not have a right to use any water under Application No. 32822 and since no wells had been drilled under Application No. 32822 and since Gertrude Castagno did not have any legal rights to use water under Application No. 32822 until September 8, 1969, long after her conveyance of the property to Gledhill, it is obvious that each of the grantors were referring to the actual and existing rights to the use of water, namely the two (2) wells drilled under Application No. 30900 for a cumulative total of 5 second feet of water.

Although the facts and the law clearly favor Plaintiff's position, we can also look at the intent of the original grantor in the chain of conveyances beginning from Gertrude Castagno. Obviously, Mrs. Gertrude Castagno did not believe that Application No. 32822 had been previously conveyed with the land and neither did the Defendant, Albert J. Castagno, or they would not have conveyed the three-fifth (3/5) interest to the Plaintiff.

ARGUMENT

POINT II

THE COURT ERRED IN ITS RULING THAT THE
PLAINTIFF ACQUIRED ONLY A CONTINGENT
RIGHT TO APPROVED APPLICATION NO. 32822.

Point II relates to the Causes of Action against Albert J. and Bernice B. Castagno who conveyed three-fifths (3/5) interest to approved Application No. 32822 to the Plaintiff, Melvin Church.

The Court correctly ruled that the contract relating to the Plaintiff's acquisition of the three-fifth (3/5) interest to approved Application No. 32822 was an oral and separate contract from the Uniform Real Estate Contract which was the subject matter or a prior litigation. The Court, however, further ruled that Plaintiff's acquisition of the three-fifths (3/5) interest in and to approved Application No. 32822 was contingent upon the Plaintiff perfecting the Application by obtaining authorization to change the diversion point from the old Bernard Castagno estate to the property belonging to Albert J. Castagno and the Plaintiff. Albert J. Castagno acquired approximately forty (40) acres from the Plaintiff and Plaintiff retained approximately twenty-three (23) acres. Both parcels adjoin one another.

The Court further ruled that Plaintiff failed to perfect that approved Application No. 32822 and, therefore, the Plaintiff acquired nothing. The record is devoid of any evidence to support the Court's finding. If such a contingency existed, it would have been to the effect that Plaintiff was obligated to provide 1 second feet of water to the Defendants, Albert J. and Bernice B. Castagno, in conjunction with the sale of the forty (40) acres, but that case has been fully litigated and Plaintiff, Melvin Church, was compelled to abate \$12,000.00 in the purchase price for failure to provide the 1 second feet of water.

Furthermore, Plaintiff pursued his interest in approved Application No. 32822 diligently after he acquired a three-fifths (3/5) interest to it. Plaintiff submitted a Change Application to change the diversion point in an attempt to perfect the approved Application. The State Engineer's Office scheduled several hearings, only one of which was actually conducted. The other meetings were called off for various reasons without any evidence or testimony being given. In 1976 the State Engineer's Office finally held a hearing to determine the merits of Plaintiff's Change Application, but the Defendant, Meadow Springs Ranch, by its President, Richard Castagno, filed a protest to Plaintiff's Change Application claiming that Meadow Springs Ranch had acquired the rights to Application No. 32822 and that Meadow Springs Ranch had already "appropriated" water pursuant under that permit. Because of the protest, the State Engineer's Office deferred its ruling on Plaintiff's Change Application pending the determination by the Court of the various claims in this lawsuit.

If, in fact, Plaintiff's right to the three-fifths (3/5) interest in approved Application No. 32822 was conditioned upon the perfecting of the water right to the 5 second feet permitted under the approved Application, Plaintiff was wrongfully prevented from perfecting that water right because of the Affidavit and protest of Richard Castagno, President of Meadow Springs Ranch, since the evidence is clear that Meadow Springs Ranch did not have a right to the approved Application No. 32822. Consequently, the trial Court should

have granted Judgment in favor of the Plaintiff, Melvin Church, and against Meadow Springs Ranch for the value of three-fifths (3/5) interest to Application No. 32822.

Based on the trial Courts ruling, however, that the title to the approved Application should be quieted in Meadow Springs Ranch, the Court, in effect, ruled that Albert J. Castagno did not have a valid approved Application to convey to the Plaintiff. In that event, the Defendant, Albert J. Castagno, should have had Judgment rendered against him for the value of 3 second feet of water. The evidence is clear that at the very minimum, a second foot of water had a reasonable value of at least \$9,000.00.

CONCLUSION

The initial question to be determined is whether or not Application No. 32822 was conveyed away by Gertrude Castagno to Burke, Burke to Gledhill and by Gledhill and others eventually to Meadow Springs Ranch. Although the Court ruled that the approved Application was, in fact, transferred with the conveyance of the land, the evidence and law are contrary to the Court's ruling in that approved Application No. 32822 was not a water right used in conjunction with the land in 1965 on or before the date of sale. Application No. 32822 was not approved until September 8, 1969. Therefore, any reference to water or water rights appurtenant to the land could not have included a mere unapproved application to appropriate water and the statutes

are clear that the only rights which are conveyed appurtenant to land are water rights which are evidenced by some proof of appropriation such as diligence claims, water users' claims, certificates of appropriation, or decrees. As the evidence reflects the water in use at the time of the conveyances were the two (2) wells drilled pursuant to Application No. 30900 for a cumulative total of 5 second feet. Therefore, Plaintiff should have been awarded the right to 3 second feet of water (three-fifths [3/5] interest to Application No. 32822) and should have been granted the right to pursue his Change Application to change the diversion point as provided for under the laws of the State of Utah and to perfect the water right.

If, on the other hand, the Court is correct and a naked, unapproved application is deemed to have been conveyed by Gertrude Castagno to Burke as water appurtenant to and used with the land, and by subsequent conveyances to Meadow Springs Ranch, the Court should have then ruled that the Defendants, Albert J. Castagno and Bernice C. Castagno, had nothing to convey to the Plaintiff at the time of the original Assignment of the three-fifths (3/5) interest and, therefore, the Defendants, Albert J. and Bernice B. Castagno, were obligated to the Plaintiff in a sum representing the fair market value of 3 second feet of water.

As the trial Court's ruling now stands, the Court's ruling is inconsistent and contradictory in that the Court finds on one hand that Application No. 32822 was conveyed away by Gertrude Castagno in

the original transaction in 1965. On the other hand, the Court rules that in 1973 Albert Castagno did, in fact, sell a three-fifths (3/5) interest to the Plaintiff to that same application albeit that the sale was contingent upon Plaintiff's perfecting the water right.

If, in fact, there was a valid sale in 1973 of a valid approved Application, notwithstanding the conditions pertaining to the sale, and if the Court correctly held that the Plaintiff failed in perfecting the water right, then the failure is directly attributable to the protest of Richard Castagno, President of Meadow Springs Ranch. The protest would then be a wrongful protest since Meadow Springs could not have had an interest to Application No. 32822 and certainly could never drill any wells or appropriate any water pursuant to Application No. 32822. Under those circumstances, Plaintiff would have been entitled to recover on his Cause of Action for the value of 3 second feet of water against Meadow Springs Ranch.

Plaintiff respectfully submits that the case should be remanded to the District Court for entry of Judgment in favor of the Plaintiff quieting title of three-fifths (3/5) interest to Application No. 32822 in Plaintiff, or, in the alternative, for Judgment representing the fair market value of 3 second feet of water against Meadow Springs Ranch or Albert J. and Bernice B. Castagno.

Respectfully submitted,

Kenneth M. Hisatake
1825 South Seventh East
Salt Lake City, Utah 84105
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and accurate copy of the foregoing Appellant's Brief, postage prepaid, to:

Paul N. Cotro-Manes, Esq.
Attorney for Meadow Springs Ranch Corporation, Inc.
40 Judge Building
Salt Lake City, Utah 84111

John A. Rokich, Esq.
Attorney for all Defendants except Meadow Springs Ranch
and Albert J. and Bernice B. Castagno
3617 South 8400 West
Magna, Utah 84044

Douglas F. White
Attorney for Defendants Albert J. and Bernice B. Castagno
Prudential Plaza
185 Nrth Main, Suite B-1
Tooele, Utah 84074

E. J. Skeen, Esq.
Attorney for Federal Land Bank of Sacramento
536 East 400 South
Salt Lake City, Utah 84102

this day of February, 1981.