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Brigham B. Harvey and Ruth M. Harvey v. Haights Bench Irrigation Co. : Appellant's Reply Brief

Utah Supreme Court

Gustin, Richards & Mattsson; Attorneys for Defendant and Appellant;

Case No. 8631

IN THE SUPREME COURT of the STATE OF UTAH

BRIGHAM B. HARVEY and RUTH M. HARVEY,
Plaintiffs and Respondents,

—vs.—

HAIGHTS BENCH IRRIGATION COMPANY, a Utah corporation,
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

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STATEMENT

Appellant in its Reply Brief questions two factual statements made by respondents in their brief and answers respondents' cross-appeal.

FACTUAL STATEMENT

On Page 5 of respondents' brief the following statement is made: "* * * and left him no crossing across the canal." This fact was due entirely to Mr. Harvey's own action. Appellant offered, during the construction of the concrete ditch and immediately after it was finished, to construct a bridge across the ditch and asked Mr. Harvey where he wanted it constructed. Mr. Harvey said

he did not know (R. 173-179). On Page 7 of respondents' brief it is stated: "It never used any part of the east bank." The evidence clearly shows that the east bank was used to a certain extent (R. 165).

CROSS-APPEAL

The question the court must determine in this case is whether the admitted fact that appellant intends to place water from new sources in the ditch, and to place it in the ditch when it normally would have been dry, supports the contention that this is such an increase of the burden on the servient estate that they are justified in asking damages therefor or requiring condemnation proceedings, or whether such facts support the contention of appellant that it is merely using an existing easement and obtaining all of the benefits possible from said easement. The latter is not considered as increasing the burden to such an extent that either damages may be awarded therefor or condemnation proceedings required.

Respondents in their brief make the following statement:

> "If I had a water right for one cubic foot of water and would burden your land by taking one foot across it, there just isn't any authority under which I can enlarge it to two feet or ten feet."

By this statement we take it that respondents do not mean that the ditch over which the one cubic foot of water would be carried would have to be enlarged in

order to carry additional water, but merely that the easement would not permit them to carry water through the existing ditch from which they have in the past been bringing one cubic foot of water. In other words, they could not increase the flow or use their easement for a longer period of time in order to carry the additional water even though it might be safely conveyed through the same ditch without damage to the servient estate by overflowing etc.

If respondents' contention were true, it would mean that if a married couple without children had an easement for a right of way, either as a foot path or automobile travel, that in the future when their family increased the additional members of the family could not use the easement. This is not a correct statement of the law as will appear from the Oregon case hereinafter cited which discusses several of such type of cases. It is our contention that the cases cited by respondents do not support and in fact, do not apply to the question involved on the cross-appeal.

The cases cited by respondents are analyzed as follows:

The case of *Nash vs. Clark,* 27 Utah 158, 75 P. 371 involved the question of condemning a right of way in a ditch owned by the defendants and to enlarge the ditch in order to carry the water appropriated to plaintiff's use. Plaintiff was successful in his condemnation proceedings.

In the case of *Smith vs. Rock Creek Water Corporation,* (Calif.) 208 P. 2d 705, there was no question of taking additional water by plaintiffs in an existing easement of their own. The defendants cut down shade trees, destroyed bridges, left debris upon the land of plaintiff, even close to his dwelling, and constructed sluiceways across an open ditch. The court held that the defendant was liable for damages, and in that connection said:

> "The secondary easement is no more than the right to make repairs and to do such things as are necessary to the exercise of the right and to do them only when necessary and in such reasonable manner as not to increase the burden needlessly on the servient estate or to enlarge it by alteration in the mode of operation."

In the present case there is no evidence to show that the work appellant did in improving the ditch was not necessary and was not done in a reasonable manner, with the exception of leaving some of the debris on respondents' land, which appellant concedes should have been removed and which point should have no effect upon the question involved in the cross-appeal.

The case of *Nielsen vs. Sandberg,* 105 Utah 93, 141 P. 2d 696, is a case involving the right to change the use of an easement by changing the use to which the water was to be put. Originally it was for power purposes. Afterwards an attempt was made to use it for swimming pool purposes and to impose upon the servient estate the duty of not contaminating the water by permitting turkeys to feed and run upon his own land.

The case of *Stephens Ranch vs. Union Pacific Railroad Co.,* 48 Utah 528, 161 P. 459, is a case involving the question of permitting the Railroad to enlarge certain dams and thereby causing much larger quantities of flood water to be cast upon plaintiff's land. The court held that they may have had an easement for casting upon plaintiff's land a certain amount of flood waters, but they did not have the right to enlarge their dams and thereby increase the flood waters causing plaintiff damage.

Robin vs. Roberts, 80 Utah 409, 15 P. 2d 340. This case held that where they had an easement for flooding an area of plaintiff's land defendant could construct a larger dam on his own property, providing he did not flood plaintiff's land to any greater extent than his easement allowed. Again, the principle involved was entirely different than in the present case.

The following cases set forth the true and correct rule governing easements.

Bernards et ux vs. Link et al (Ore.) 248 P. 2d 341. In this case there was an easement granted for building a logging railroad which was used for such purpose for several years. Later the company became insolvent and the easement right was sold to plaintiff who owned large tracts of timber land surrounding the easement. The railroad was removed and a logging road constructed. The court made the following comments:

> "From the earliest of times the courts, in their construction of instruments which granted easements, have sought to discern and give effect in a practical manner to the purposes of the grant, with the result that the grantee in his enjoyment of the easement has never been restricted to the exact conditions which existed when the grant was made. The leading authority is Luttrel's Case, 4 Rep. 86, which was decided in 1601. * * *."

> "Although the owner of a right of way over land of another is limited in his use of the right to the terms of the grant, yet it is settled that the grantee may avail himself of modern improvements which will enable him to enjoy more fully the rights which were granted. In other words, in determining the meaning of the grant, it will be inferred, in the absence of express language to the contrary, that the grantee is not restricted to the methods of use which were current at the time of the grant. We shall now take notice of a few of the decisions upon this phase of the controversy."

A Virginia Court in the case of *Virginia Hot Springs vs. Lowman* (Va.) 101 S.E. 326, held in a case involving a turnpike road as follows:

> "But if the new use is in all respects of the same nature and character as the old, and the difference is in degree only, and no additional burden is put upon the servient estate, then the new use is within the prescriptive use. Baldwin vs. Boston & M. R. Co. 181 Mass. 166, 63 N.E. 428."

Henkle et al vs. Goldenson et al (Mich.) 248 N.W. 574.

In this case the defendants' predecessors in interest owned a large tract of land and had an easement over a private road. Part of this tract of land was then sold to five individuals, defendants in the case, together with the easement. The plaintiffs claimed that by cutting up the lot into smaller parcels it would cast an additional burden upon the private road not contemplated by the original grantor thereof, and that consequently the five defendants, who acquired title to the northerly half of the lot, acquired from the grantor no right to use said private road. The question was: Is this an unlawful additional burden imposed on the land of the servient estate? The Court held:

> "The application of the rule against unreasonable and unlawful increase of burden upon the servient estate is largely a question of fact. 9 R. C. L. 790. Harvey vs. Crane, 85 Mich. 316, 48 N.W. 582, 12 L.R.A. 601. Generally, a mere increase in the number of persons using an unlimited right of way to which the land is subject is not an unlawful additional burden. 9 R.C.L. 791. Note 95 Am. St. Rep. 326. But it is recognized that in some cases the increase may be such in fact as to amount to an unreasonable burden. The trial court here held that the grant to five persons in fee did not in fact create an unlawful additional burden. In this he is clearly right. The case of Bang vs. Forman, 244 Mich. 571, 222 N.W. 96, is not authority for the extreme position of plaintiffs. In that case, in addition to easement, there was also a building restriction. No other matter demands discussion."

See also:

Unverzagt vs. Miller, (Mich.) 10 N.W. 2d 849.

From the above authorities it is apparent that merely bringing water from a source different than Farmington Canyon and having the water conveyed over the easement for two or three months longer period of time would not unreasonably or unnecessarily increase the burden on the servient estate so as to give rise to damages or force condemnation. In fact, to so hold or to modify or change the decision of the Moyle case would prevent the taking of a forward or progressive step, so recognized by the general public, when not in itself injurious or destructive.

The case of *Anderson vs. Knoxville Power & Light Co.* 16 Tenn. App. 259, 64 S.W. 2d 204, holds:

> "'Appellants complaint of the added noise, vibration, and pedestrian and automobile travel as an additional burden which the defendants as original owners never agreed to permit and should not now, as abutting owners, be compelled to endure when such was not contemplated when the deeds were executed. Eliminating the matter of additional travel, for which neither party is wholly responsible, the additional noise and vibration found by the court is not such an element as should wholly hinder and prevent the taking of a forward or progressive step, so recognized by the general public, when not in itself injurious or destructive.'"

In fact, to require the owner of an easement to condemn for further rights every time there is a development of a new source of water or an increase in the flow which could be transmitted through the existing

easement without material damage to the servient estate would unduly burden everyone interested in irrigation and work a great detriment to the advancement of irrigation.

CONCLUSION

We respectfully submit that respondents' cross-appeal should be denied and that appellant should be granted the relief asked for in its original brief.

Respectfully submitted,

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Attorneys for Defendant and Appellant.