

1957

Hugh J. Hatch and Ardean Hatch v. Stephen Adams, Sarah Adams and Earl Adams : Brief of Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Hatch v. Adams*, No. 8644 (Utah Supreme Court, 1957).
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In the Supreme Court of the State of Utah,

FILED
JUL 22 1957

HUGH J. HATCH and ARDEAN HATCH,

Appellants,

vs.

STEPHEN ADAMS, SARAH ADAMS and
EARL ADAMS,

Respondents.

Clerk, Supreme Court, Utah

Case

No. 8644

BRIEF OF APPELLANTS

RALPH & BUSHNELL

Attorneys for Plaintiffs and Appellants

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the land and thus part of the deal, was never delivered to him; and he commenced this action to recover these shares. This appeal is taken upon a ruling by the trial court excluding parol evidence which was introduced by the plaintiff to show that the water in question was appurtenant to the land.

The defendant listed his farm and home with a real estate agency, and it was placed on the multiple listing. The listing agreement stated that the price would be \$22,000 and that the water rights were "extra good, plenty water" (Exhibit 1-A). Plaintiff contacted a real estate agent and was shown the property. Upon talking with the defendant, the price was raised to \$23,500; and on March 29, 1951, an earnest money receipt was signed calling for a sale of the property with all water rights "appertaining" thereto (Exhibit 1-B). On April 7, 1951, the parties signed a Uniform Real Estate Contract calling for the sale of the same property with the same water rights, and on the same day an escrow agreement was entered into wherein there was placed in a bank the deed to the property, together with a number of shares of water stock. The water stock in question was not included in the escrow (Exhibits 1-D, 1-E).

At the trial, the following evidence was introduced to prove that the water in question was appurtenant to the land:

1. The defendant (grantor) received the water in question at the time he received a deed to the property, and to his knowledge the water had been used on the land since 1926. He personally had used it on the land in question from the time he obtained the property (1950) until he conveyed the property to the plaintiff (R. 109, 110).

2. The watermaster for the water companies testified that this water had been used on this land since about 1917 (R. 68). Furthermore, the watermaster gave his opinion that without the water in question the land had only a "fair" water right, but with this particular water it had a "good" water right (R. 71).

3. The plaintiff used the water for two years, at which time the defendant alleged it was not part of the transaction and the water was cut off. Without this water, there was not enough water to adequately grow crops on the land (R. 21-23).

4. The plaintiff used the seven and one-half shares in question and paid the assessments thereon for the years 1952 and 1953 (R. 11, 12).

5. Other water, represented by stock, which had been used on the land passed to the plaintiff pursuant to the general language of the contract (Exhibit 1-E).

The plaintiff introduced the following evidence concerning the intention of the parties, subject to the objection that such introduction violated the parol evidence rule. The objection was subsequently sustained and the evidence stricken.

1. Testimony of the plaintiff that during the discussions prior to the signing of the contract the defendant stated that the seven and one-half shares of Provo water in question were to be sold with the property (R. 6, 7).

2. A written record which the plaintiff had made at the time of these negotiations which lists the Provo water among the water shares to be transferred (R. 7 and Exhibit 1-L).

3. That the initial asking price for the property, which was \$22,000, was raised to \$23,500 because the defendant said it was worth \$1,500 more with *full water rights* (R. 8, 9 (R. 84)).

4. When the deeds and stock were placed in escrow, the defendant said he could not find the seven and one-half shares of Provo stock, but that he would bring them in. The representative of the bank, in front of all parties, said to the plaintiff "You don't need to worry—it (the additional seven and one-half shares) will be brought in—he (the defendant) is an ex bishop" (R. 11). The real estate agent affirmed that this was the conversation that took place (R. 88, 89).

5. The real estate agent had made a worksheet at the time of the transaction, showing the exact shares to be sold with the property as dictated by the defendant. The seven and one-half shares in question were listed on this worksheet (Exhibit 1-C, and R. 85, 86, 98). The real estate agent had copied the number of shares to go with the transaction, including the seven and one-half shares in question, on the back of the listing agreement during the preliminary negotiation (Exhibit 1-A and R. 97).

6. The defendant told the listing agent there was plenty of water (R. 119).

In its minute entries, the court held that (1) testimony of preliminary negotiations should be stricken because of the parol evidence rule, and (2) the real estate purchase contract is not ambiguous.

It is submitted to this court on appeal that, if the real estate

contract is not ambiguous, then it is clear that the water in question was appurtenant to the land, as was other water represented by shares of stock which passed to the plaintiff in the transaction. It is further submitted that, since the contract purported to transfer all appurtenant water, the parol evidence which was introduced as to the intent of the parties clearly establishes that the water was to be transferred with the land and that it was appurtenant. By either alternative the trial court erred in awarding the water to the defendant.

STATEMENT OF POINTS

POINT ONE: THE EVIDENCE CONCLUSIVELY SUSTAINS THE FACT THAT THE WATER IN QUESTION WAS APPURTENANT TO THE LAND CONVEYED AND THAT IT WAS IN FACT CONVEYED WITH THE LAND.

POINT TWO: PAROL EVIDENCE SHOULD HAVE BEEN RECEIVED TO DETERMINE THE INTENTIONS OF THE PARTIES AS TO APPURTENANT WATER.

ARGUMENT

POINT ONE

THE EVIDENCE CONCLUSIVELY SUSTAINS THE FACT THAT THE WATER IN QUESTION WAS APPURTENANT TO THE LAND CONVEYED AND THAT IT WAS IN FACT CONVEYED WITH THE LAND.

"It has long been the law in this state that water rights, even though appurtenant to certain land, may be separately conveyed from that land." Salt Lake City v. McFarland, et ux, Utah, 1954, 265 P. 2d 626.

The legislature of this state has attempted to further clarify this proposition with the following statute:

“Water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land . . .” 73-1-10, U.C.A., 1953.

This court, in the case of *Brimm v. Cache Valley Banking Co.*, 2 Utah 2d 93, 269 P. 2d 859, has said that the effect of this statute:

“ . . . was to establish a rebuttable presumption that a water right represented by shares of stock in a corporation did not pass to the grantee as an appurtenance to the land upon which the water right was used, but that the grantee could overcome such presumption if he could show by clear and convincing evidence that said water right was in fact appurtenant and that the grantor intended to transfer the water right with the land, even though no express mention of any water right was made in the deed . . .

“In other words, the 1943 amendment merely obviated the necessity for a grantor, who owned a water right represented by shares of stock in a corporation but who did not desire to transfer that water right to the grantee of the land upon which the water was being used, to make an express reservation of that water right in the deed. But the amendment does not foreclose the water right from passing if the grantee can show such was the intention of the grantor . . . (Italics added.)

In the *Brimm* case, *supra*, the court found (1) The water had been used to irrigate the land since 1890, (2) the land had little value without the water, and (3) the decree of distribution contained the words “together with water right

appurtenant thereto.” Based upon these findings, the court held that the grantee had paid the grantors for the land on the basis that the water went with the land.

Essentially the same facts are presented in this case as in the Brimm case. (1) The water has been used to irrigate the land since about 1917 (R. 68); (2) The land is of little value without the water (R. 21-23); and (3) The contract conveyed the land with “all water rights appurtenant thereto.” As an additional fact, the price was raised from \$22,000 to \$23,500 because of the good water rights (R. 8, 9, 84). Under these facts in this case, it should follow that the water was appurtenant to the land and it was the intention of the grantor defendant to convey these rights. In fact, this case represents a stronger case in favor of conveyance of this water. In the Brimm case there was no language in the contract which indicated that it was the intent of the parties to specifically convey all the water rights appurtenant to the land. In this case the language in the contract precisely establishes this to be the intent of the parties.

Numerous cases support this view. In the case of Dill et al v. Killip et al., Oregon, 1944, 147 P. 2d 896, the only mention of water rights in the deed was the phrasing “with the tenements, hereditaments and appurtenances.” After the transfer of the property, the dispute arose between the grantor and grantee as to whether or not certain water rights had been transferred. Quoting from Wiel’s *Water Rights in the Western States*, the court said:

“It is well settled that a water-right may pass with land as an appurtenance thereto, or as a parcel thereof,

but not necessarily so; and *whether a water right passes as an appurtenance involves two questions, viz: (a) Whether the water-right is an appurtenance, and (b) whether, being such, it was intended to pass.* Both of these are questions of fact in each case.

“The first question, whether the water-right is an appurtenance, depends on whether it is an incident, necessary to the enjoyment of the land. The water-right is not necessarily appurtenant to or parcel of any land; and whether it is an appurtenance or parcel is a question of fact resting chiefly upon whether it was used specially for the benefit of the land in question . . . A water right is incidental or appurtenant to land when by right used with the land for its benefit.” (Italics added.)

Quoting from *Bank of British North America v. Miller*, C. C., 6 F. 545, 550, the court went on to say:

“It is also clear that a sale of any real property carries with it any easement or privilege which is necessary to its enjoyment, and at the time is in use thereon and therewith, as an appurtenance in fact, although not technically so at law, and this *upon the presumption, more or less cogent according to the circumstances, that it was the intention of the parties to the agreement of sale that it should pass with the property to which it was then apparently subservient.*

“In such a case the question is simply as to the intention of the parties to be gathered from the terms of the conveyance, the subject matter, and its use and situation at the time of the sale, or as was said by Mr. Justice Story in *United States v. Appleton*, ‘*In the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties.*

In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for.' " (Italics added.)

In the case of *James v. Barker et al.*, Colo., 1937, 64 P. 2d 598, where an almost identical situation existed, a deed purported to convey some water rights with the usual "together with all and singular the privileges and appurtenances thereunto belonging" clause. Numerous water rights had been used on the land. Where the dispute concerned whether or not certain shares of water stock were part of the conveyance, the court said:

"The evidence tends to show that the land on which the deed of trust for \$15,000 was given, if only the water right from the Colorado Canal was included, would be worth from \$10 to \$125 per acre. There was over \$24,000 due on the indebtedness at the time of the foreclosure.

"Are these water rights, represented by the stock in the reservoir companies, appurtenances to the land involved in the foreclosure, and were they conveyed by the trustee's deed? The answer is the decision of this case. Plaintiff argues that they are not, that they may be conveyed independently of the land; further, that they were pledged for use only in the event of a deficiency at sale of the land and water rights described in the deed. *Defendants contend that they are appurtenances to the land covered by the deed of trust; that they are necessary to the beneficial enjoyment of the land; that the land did not have practical value for agricultural purposes without them; that the value of the land with these supplemental water rights approximated the bid at the trustee's sale, and that it may be presumed from the circumstances existing at the time the deed of trust was given, that all these rights were intended to be included in the conveyance of the property.*

“That all of the water rights involved were at all times used on the land does not seem to be questioned. That they were indispensable to give to the land the value necessary to secure the amount of the loan made is not seriously in doubt. That they were considered to be included in the transaction conveyance would logically induce the bid as made at the sale. That water rights are sometimes conveyed by a deed to land that is silent on the subject is settled law. *A water right used, as here, for the irrigation of land, will pass under the appurtenance clause in a conveyance of land, without a specific mention in the deed, if the presumptions arising from the circumstances of the transaction make it appear that it was the intention of the grantor that it should so pass.*” (Italics added.)

A very recent Nevada case illustrates the jealous nature of appurtenant water:

“The water and the land to which it is applied become so interrelated and dependent on each other in order to constitute a valid appropriation that the former becomes *by reason of necessity* appurtenant to the latter. Such would appear to be the universally recognized laws of waters in the arid western states.” *Zolezzi v. Jackson*, Nevada, 1956, 297 P. 2d 1081.

This court has also emphasized the adherence of water to land:

“Shares of stock of an irrigation company issued in place of the vested water right for lands in an irrigation district are appurtenant unless they have been transferred and put to a beneficial use upon other lands.” *Milford State Bank v. West Field Canal and Irrigation Company, et al.*, Utah, 1945, 162 P. 2d 101. *Ibid.*

For further authorities supporting the above proposition see *Gillespie Land and Irrigation Company v. Buckeye Irrigation Co., et al.*, Arizona, 1953, 257 P. 2d 393; *New River Mineral*

Co. v. Painter, Virginia, 1902, 42 S. E. 300; Shire v. Kammers State Bank, 112 Kan. 690, 213 P. 159; 70 A.L.R. 753; 93 C.J.S. page 1070.

POINT TWO

PAROL EVIDENCE SHOULD HAVE BEEN RECEIVED TO DETERMINE THE INTENTIONS OF THE PARTIES AS TO APPURTENANT WATER.

In this case the contract which the parties signed called for the conveyance of the land "together with all buildings and improvements thereon and all water rights appurtenant thereto" (Exhibit 1-D). No mention was made as to the precise shares of water that were to be conveyed.

Regarding the parol evidence rule, this court has held:

"The rule is founded upon the principle that when the parties have discussed and agreed upon their obligations to each other, and reduced those terms to writing, that such terms *if clear and unambiguous*, furnish better and more definite evidence of what was undertaken by each party than the too often fickle memory of man, for what else reduce it to writing." Garrett v. Ellison, 93 U. 184, 72 P. 2d 449. (Italics added.)

It is the general rule that where the contract is vague, uncertain or indefinite as to the identity of the property intended to be conveyed, parol evidence is admissible to give effect to the intention of the parties to the instrument. Such evidence is not to vary or contradict the language of the writing, but it is to make clear that which was uncertain so far as this is possible without aiding material terms to the writing. 68

A.L.R. 15. See also, *Joerger v. Pacific Gas and Electric*, California, 1929, 276 P. 1017, *Williamson v. Pratt*, California, 1918, 174 P. 114, and *Thompson v. McKenna*, California, 1913, 133 P. 512. As has been argued in Point One, the intention of the parties in these kinds of cases is all important. For this reason the problem presented in this case as to whether or not it was intended that certain shares of water stock should be conveyed with the land where the usual "all water rights appurtenant thereto" clause has been used, clearly illustrates this exception to the parol evidence rule.

In the case of *Brimm v. Cache Valley Banking Co.*, supra, this court held that the Utah statute regarding the passing of shares of water stock with the land (73-1-10) "was to establish a rebuttable presumption that a water right represented by shares of stock in a corporation did not pass to the grantee as an appurtenance . . . but the grantee could overcome such presumption if he could show by clear and convincing evidence that said water right was in fact appurtenant and that the grantor intended to transfer the water right with the land." There is no way that this plaintiff could rebut this presumption without introducing parol evidence to establish the intent of the parties. The trial court was in error when it refused to allow such evidence.

In the case of *Dill, et al., v. Killip, et al.*, Ore. 1944, 147 P. 2d 896, where precisely the same problem was presented, the court emphasized the importance of the intent of the parties with the following language:

"In such a case the question is simply as to the intention of the parties to be gathered from the terms of the conveyance, the subject matter, and its use and situation

at the time of the sale, or as was said by Mr. Justice Story in United States v. Appleton, 'In the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties.' (Italics added.)

In an action based on a contract which was indefinite, the Arizona court said:

"The court had the right to receive the evidence concerning the conditions existing at the time the contract was executed and *the oral evidence showing the intention of the parties. . . .* The terms of the contract are thus rendered sufficiently definite . . ." Colmenero Canal Co. v. Babers, Arizona 1956, 297 P. 2d 927. (Italics added.)

In *Brown v. Warren*, 1881, 16 Nevada 228, where a general description of "all the real estate, water rights, and property of every description, real and personal, in the State of Nevada belonging to the parties of the first" was used in a conveyance, parol evidence was held admissible to enable an identification of the property even though the deed was not ambiguous.

The Colorado court has affirmed this view in the following language:

"A water right used, as here, for the irrigation of land, will pass under the appurtenance clause in a conveyance of land, without a specific mention in the deed, *if the presumption arising from the circumstances of the transaction make it appear that it was the intention of the grantor that it should so pass.*" *James v. Barker*, 99 Colo. 551, 64 P. 2d 598. (Italics added.)

This court has outlined the parol evidence question in the following manner:

“If the ambiguity can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed. If the instrument or its fact remains ambiguous in spite of the reasonable construction, the intent may be ascertained in the light of all written instruments which were a part of the same transaction. If the intent is ambiguous still, then parol evidence may be admitted, and rules of construction may be invoked to declare the intention of the parties.”
Continental Bank v. Bybee, 1957, 306 P. 2d 773.

It was necessary to introduce parol evidence to establish just what the defendant intended to convey (R. 116). From the cases already cited, it seems that the word “appurtenant” is not ambiguous; however, the defendant himself used parol evidence to attempt to show his intention (R. 102, 107, 116). If it is believed that parol evidence is necessary in this case, it is submitted that the weight of the evidence as to the intention of the parties clearly establishes that the seven and one-half shares of water in question were to be conveyed with the property.

CONCLUSION

The parol evidence and an abundance of other evidence which was presented in this case clearly indicates that the water in question was appurtenant to the land conveyed and that it was the intention of the parties to convey this water. The courts have universally recognized the uselessness of farm land without water, and for this reason it is virtually a pre-

sumption that once water is appurtenant to the land and the land is conveyed with all its appurtenances, the water is conveyed also. These are precisely the facts of this case. In the face of such explicit protection of water rights, the defendant has not satisfied his burden of proving the water was not transferred with the land. Even where parol evidence is introduced by both sides, the facts are conclusively in favor of the plaintiff.

The Brimm case being controlling under the facts of this case, the plaintiff should have been permitted to rebut the presumption created by the statute. The trial court, having erroneously excluded such extrinsic evidence, was not in a position to make a finding that the water was not appurtenant. Rather, the evidence so excluded clearly indicates that it was appurtenant to the land and that, in fact, it was the intent of the parties that it should be conveyed to the plaintiff.

For these reasons the holding of the trial court should be reversed, with instructions to assess the damages suffered by the plaintiffs.

Respectfully submitted,

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