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

Utah Supreme Court

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In the Supreme Court of the
State of Utah

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SEP 4 - 1957

HUGH J. HATCH and
ARDEAN HATCH,
Plaintiffs and Appellants,

vs.

STEPHEN ADAMS, SARAH
ADAMS, and EARL ADAMS,
Defendants and Respondents.

Clerk, Supreme Court, Utah

CASE
NO. 8644

BRIEF OF RESPONDENTS

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In the Supreme Court of the State of Utah

HUGH J. HATCH and
ARDEAN HATCH,
Plaintiffs and Appellants,

vs.

STEPHEN ADAMS, SARAH
ADAMS, and EARL ADAMS,
Defendants and Respondents.

**CASE
NO. 8644**

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

This case was tried without pretrial, upon issues raised in the pleadings. We deem it therefore beneficial to review briefly the pleadings and outline the issue of the case before setting forth our statement of facts.

The complaint, couched in three counts, was brought to compel the transfer of a stock certificate representing 7½ shares of stock in the Provo Reservoir Water Users Company, on the theory that the water represented by such

shares was appurtenant to the land sold by contract, a farm in Alpine, Utah, and that title to such water therefore passed without specific mention of the certificate in the contract. The complaint contains additional general allegations seeking to quiet title to the certificate in the plaintiffs, and to recover damages for the wrongful withholding of such certificate from the plaintiffs.

The answer, by admissions and denials, merely puts in issue the question whether the water represented by this particular stock certificate is appurtenant to the land sold under the contract.

It should be remembered that the case went to trial on this one issue only. This is not a case brought to reform a contract. Nor is it a case brought upon a theory of fraud or mistake in reducing the agreement to writing. Indeed, under the provisions of Rule 9 (b), URCP, such issue could not be raised upon the trial.

In the spring of 1951 defendants had listed for sale a house and farm at Alpine, Utah. Plaintiffs called at the office of Mr. D. D. Bushnell, realtor, at Provo, and were shown the property by his son (Tr. 4). The next day, accompanied by Mr. Bushnell, they went over the property with two of the defendants (Tr. 4).

An agreement was reached that the plaintiffs purchase the properties, and an earnest money agreement was entered into March 29, 1951 (Exhibit 1 "B") (Tr. 90). This agreement was reduced to a uniform real estate contract, abrogating the earnest money receipt, which was executed April 2, 1951 (Exhibit 1 "D") (Tr. 90), and the parties, except Ardean Hatch, later met at the Bank of Pleasant Grove, Pleasant Grove, Utah, where they executed an escrow agreement with the bank, whereby they escrowed

certain papers and documents (Exhibit 1 "E") (Tr. 10-11).

The earnest money agreement and the uniform real estate contract, after describing the farm land, stated 'Also all water rights appertaining thereto.' The escrow agreement contained the same language originally, but when the parties went to the bank to close the transaction, at the suggestion of Mr. West, the bank official, the following was added thereto: "Lehi Irr. Co. Certs. Nos: 439D, 7 sh; 440 D, 7 sh.; Alpine Irr. Co. Cert. No. 610, 36 sh." (Tr. 46). It is undisputed that the water represented by these shares was sold under the contract. It is also undisputed that the water represented by forty shares in the Highland Conservancy District, commonly called Deer Creek water, is appurtenant, and was therefore also sold under the contract.

At the time of this transaction the defendants also owned water rights in Provo Reservoir Water Users Company to the extent of $7\frac{1}{2}$ shares, represented by stock certificate number 1773. Nowhere in the earnest money agreement, uniform real estate contract, or escrow agreement was this water right or stock certificate mentioned. It is the ownership of this certificate which is in dispute.

Over defendants' objections because it violated the "parole evidence" rule, and because it went beyond the issues raised by the pleadings, the court admitted voluminous testimony as to the preliminary negotiations of the parties prior to their execution of the real estate contract, with the understanding that it would entertain a motion to strike at the end of the case. The testimony thus presented, as it refers to the shares of stock in dispute, is in complete and sharp conflict. We add that for the most part plaintiffs' statement of facts in their brief consists of such tes-

timony that is most favorable to their theory of the case.

Plaintiffs continued to use the water under this certificate until the autumn of 1953, or spring of 1954, paying the assessments during that time (Tr. 12-13; 107). Their payments on these particular assessments were frequently delinquent (Tr. 55-56). Plaintiffs contend they were buying it; it is defendants' position they were renting it temporarily, paying assessments as rental. Plaintiffs' contention, which we do not believe to be material anyway, is completely answered by the letter mailed December 29, 1953, by the plaintiff Ardean Hatch to the defendant Stephen Adams. We deem it worthy of quote: "Dear Mr. Adams; We have been waiting before sending this water slip [notice of assessment] so we could see Mr. Day [the watermaster] and see how many hours we got for the seven shares, but my husband was on days for quite a while and he's been ill with the flu since before Christmas, so I thought I had better mail it to you and let you pay it. Then **if we find it would pay us to keep it and you still have it**, we can pay you. Hope you had a happy Christmas and that you have a Happy New Year. /s/ Mrs. Hugh Hatch" (Emphasis added). (Exhibit Def.—2)

The only testimony offered which could have any bearing on the issue whether the water right in issue is appurtenant to the land sold is that of Mr. Orval Cox Day, watermaster.

He testified that according to his knowledge the water in dispute was for the first time put on the farm sold to plaintiffs by Mr. Delos Boyer, then owner of the farm. In 1916 or 1917 Mr. Boyer traded Lehi Irrigation Company water to a Mr. George Myers for ten shares of Provo Reservoir Company water which Mr. Myers had owned for two

or three years (Tr. 68). After testifying that he was not too familiar with all the sources of water for the farm, he stated that in his opinion, without the water in controversy, the farm had a fair water right, and with the shares it had a good, but not a very good, water right (Tr. 70-71). He stated that such shares in his district were bought and sold every year (Tr. 75). That is the sum and substance of his testimony which would bear on the issue of this case.

As a matter of fact, that is all the testimony presented in the entire trial bearing upon this issue. As stated earlier, considerable time was taken on the trial presenting testimony on the preliminary negotiations leading to the contract of sale, all of which was material under the issue only on the question of what shares of water the parties intended to be transferred, and all of which is in sharp conflict.

After the trial, the court found that the contract was not ambiguous, granted the motion of defendants to strike testimony bearing upon negotiations prior to execution of the contract offered to show what shares were intended to be transferred, and granted defendants judgment of no cause of action.

STATEMENT OF POINTS

1. NOT ONLY IS THERE NO EVIDENCE WHATSOEVER THAT THE WATER IN DISPUTE WAS EVER APPURTENANT TO THE LAND SOLD, BUT WHAT EVIDENCE THERE IS ON THIS ISSUE IS TO THE CONTRARY.

II. PAROLE TESTIMONY ON NEGOTIATIONS PRELIMINARY TO EXECUTION OF THE CONTRACT WAS PROPERLY STRICKEN BY THE TRIAL COURT,

BECAUSE IF BELIEVED IT WOULD AT MOST VARY THE TERMS OF THE WRITTEN AGREEMENT, AND HAD NO PROBATIVE VALUE ON THE QUESTION WHETHER THE WATER INVOLVED WAS OR WAS NOT APPURTENANT TO THE LAND SOLD.

ARGUMENT

1. NOT ONLY IS THERE NO EVIDENCE WHATSOEVER THAT THE WATER IN DISPUTE WAS EVER APPURTENANT TO THE LAND SOLD, BUT WHAT EVIDENCE THERE IS ON THIS ISSUE IS TO THE CONTRARY.

The governing statute in this case is Section 73-1-10, U. C. A. 1953 (as amended by Chapter 134, L. U. '45), which provides:

“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 . . .”

This Court, in the case of *Brimm v. Cache Valley Banking Co.*, (1954) 2 Utah 2d 93, 269 P2d 859, construed the effect of this statute. We quote therefrom:

“We think the effect of the 1943 amendment to section 100-1-10, U. C. A. 1943 (now 73-1-10, U. C. A. 1953) which added the phrase ‘in which case water shall not be deemed to be appurtenant to the land’ 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."

It will be noted that there are two requirements and that they are in the conjunctive: first, that the water right was in fact appurtenant, and second, that the grantor intended to transfer the same. Evidence intended to meet the first requirement must be clear and convincing. We find NO evidence in the record meeting this first requirement.

We take it that a water right represented by a share or shares of stock is personal property, transferred by transfer of the stock certificate as any other personal property thus represented is transferred, unless the person asserting otherwise can show by clear and convincing evidence that the water in fact belongs to the particular land as a matter of right—that it was appropriated to that land and has not been severed therefrom.

As set forth in the statement of facts, the water master, Orval Cox Day, testified that the water in dispute here was used on this land to his knowledge for the first time in 1916 or 1917, when the then owner traded Lehi Irrigation Company water for ten shares of Provo Reservoir Company (now Provo Reservoir Water Users Company) stock (Tr. 68).

The record shows on the plaintiff Hugh J. Hatch's testimony that at one time there were fifteen shares of water used on the land (Tr. 49), and that at another time a previous owner had transferred $7\frac{1}{2}$ shares of that water to

other land in exchange for Lehi Irrigation Company water, the certificate for which was transferred to the plaintiffs on the sale to them by defendants, and plaintiffs knew this (Tr. 50). The record is devoid of evidence that this water right was initiated as appurtenant water. One wonders exactly when it could have become such.

Plaintiffs rely upon **Brimm v. Cache Valley Banking Co.**, supra, in support of their position. We respectfully submit that that case is not in point. In that case the water right was initiated as an appurtenance of the land and only after many years was it conveyed to an irrigation company in exchange for stock. Thereafter it was used for many years on the same land, and only there, without change, although title to the land was the subject of transfers without express mention of the water rights. The land was practically valueless without the water, and the appraisers for the probate court arrived at their valuation of the land by considering that the water was a part of it. The record title to the shares still rested in the person who had owned the water right as an appurtenance and had conveyed it to the company in exchange for such shares of stock. The land had never been irrigated with other water, and the water had never been used elsewhere. This Court stated that such evidence was sufficiently clear and convincing that the presumption created by Section 73-1-10, U. C. A. 1953, could be considered by the trial court as having been rebutted.

None of the facts of that case measure up with the one presently before the Court. In truth, the facts of the case at bar more closely resemble those of **George v. Robison, et al**, 23 Utah 79, 63 Pac. 819, wherein the court stated that "From an examination of the evidence the conclusion

is irresistible that the water rights in question were treated by the owners as personal property, constituted no part of the realty, and, not being expressly mentioned or referred to in the deed, were not conveyed with the land, and ~~that~~ there is no proof that warranted the court in finding that the water was appurtenant to the land, or that the water rights were included in the warranty."

Certainly the trial court here was warranted in finding that the statutory presumption was NOT overcome.

II. PAROLE TESTIMONY ON NEGOTIATIONS PRELIMINARY TO EXECUTION OF THE CONTRACT WAS PROPERLY STRICKEN BY THE TRIAL COURT, BECAUSE IF BELIEVED IT WOULD AT MOST VARY THE TERMS OF THE WRITTEN AGREEMENT, AND HAD NO PROBATIVE VALUE ON THE QUESTION WHETHER THE WATER INVOLVED WAS OR WAS NOT APPURTENANT TO THE LAND SOLD.

Much of the trial time was consumed in presenting testimony on negotiations preliminary to the execution of the contract of sale bearing on conversations and discussions concerning the water rights in issue. This was apparently offered in an attempt to meet the second requirement set forth in the **Brimm** case, *supra*, in order to overcome the statutory presumption—that is, to show that the grantor intended to convey the shares in question. None of it bore upon the question of appurtenant water; all of it was disputed. The trial court, we respectfully submit, properly ordered it stricken. Much of the statement of fact in the plaintiffs' brief on appeal (pages 4-6) is devoted to such evidence.

The trial court found no ambiguity in the contract. Plaintiffs, it would appear, agree (plaintiffs' brief on appeal, page 16). We do not deem it necessary to belabor the parole evidence rule. Absent the question whether this water is appurtenant, all evidence offered to show that the parties intended that the certificate for this water was to be conveyed was properly stricken, as calculated to vary the terms of the written agreement.

It will be recalled that this Court has said the grantee must "show by clear and convincing evidence that said water was in fact appurtenant and that the grantor intended to transfer the water right with the land." **Brimm v. Cache Valley Banking Co.**, *supra*. In 1 Weil, **Water Rights in the Western States**, 3d Ed., sec. 550, the rule is stated thus:

" . . . 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." (emphasis added)

As stated earlier, the plaintiffs failed in their burden to show that the water was in fact appurtenant. Rather, all evidence rebuts such position. How, then, can one say that parole evidence to vary the terms of the contract should be admissible?

Were this parole testimony admissible, then we submit that it would preponderate against plaintiffs' position, and their's was the burden of proof.

First, the assertion that the water right or the certificate representing the right which is in litigation was discussed or even mentioned at any stage of the negotiations is vigorously denied by defendants.

Second, after they had taken possession of the farm, and for the period plaintiffs were using the water in controversy, they paid promptly all assessments on the Alpine Irrigation Company and Lehi Irrigation Company stock, but allowed the Provo Reservoir Water Users Company stock to go delinquent and be sold for assessments (Tr. 55-56).

Third, upon executing the earnest money agreement at the bank, great care was made to identify the stock certificates for the water in the Lehi Irrigation Company and the Alpine Irrigation Company, but the Provo Reservoir Water Users Company stock was not even mentioned therein (Exhibit 1 "E") (Tr. 46-47), though plaintiffs would have us believe it was almost the sole subject of discussion during negotiations to purchase the farm!

Fourth, any doubt that the plaintiffs knew all the time that such water was not sold to them is dispelled by the letter of December 29, 1953, from the plaintiff Ardean Hatch to the defendant Stephen Adams (Exhibit Def.—2).

Of course, it is our position that all this is immaterial anyway, but giving it credence, the result is contrary to plaintiffs' position.

We re-assert that this is not a case bottomed on fraud or mistake, nor is it an action to reform the contract.

CONCLUSION

In their brief on appeal (p. 17), plaintiffs state that "the defendant has not satisfied his burden of proving the water was not transferred with the land." We respectfully submit that the burden is the plaintiffs' to show that it was, and that by clear and convincing evidence.

Far from supporting plaintiffs' theory, the record shows that the water involved was not appurtenant, but was always treated as personal property, freely transferable by endorsement of the stock certificates, and that this was known to plaintiffs. The parties all agree that the forty shares of Deer Creek water passed as an appurtenance. Care was exercised to see that the Lehi Irrigation Compay and Alpine Irrigation Company water, represented by stock certificates, were included in the escrow agreement. The parties knew they were dealing with both appurtenant water and water rights that were personal property. They made no mention in the contract of the stock certificate now sought by plaintiffs. They are now endeavoring to re-write a plain and unambiguous contract by means of parole evidence.

We respectfully submit that the trial court properly found that the statutory presumption created by section 73-1-10, U. C. A. 1953, was not rebutted by the evidence.

Respectfully submitted,

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