

1958

Hugh J. Hatch and Ardean Hatch v. Stephen
Adams, Sarah Adams and Earl Adams :
Respondents' Answer and Brief in Answer to
Petition for Rehearing

Utah Supreme Court

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Dallas H. Young; Young, Young & Sorensen; Attorneys for Respondents;

Recommended Citation

Response to Petition for Rehearing, *Hatch v. Adams*, No. 8644 (Utah Supreme Court, 1958).
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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.

FILED
UNIVERSITY, UTAH

Clerk **MAY 3 1958**

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**CASE
NO. 8644**

**Respondents' Answer and Brief In Answer To
Petition For Rehearing**

**DALLAS H. YOUNG, for
YOUNG, YOUNG & SORENSEN,
Attorneys for Respondents**

NEW CENTURY PRINTING CO., PROVO, UTAH

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In the Supreme Court of the State of Utah

HUGH J. HATCH and
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STEPHEN ADAMS, SARAH
ADAMS, and EARL ADAMS,
Defendants and Respondents.

**CASE
NO. 8644**

Respondents' Answer and Brief In Answer To Petition For Rehearing

ANSWER

As answer to the petition for rehearing herein, defendants allege:

1. That the petition for rehearing and brief in support thereof raise no questions of law or fact that were not considered by the court in the hearing upon appeal.
2. That the plaintiffs and appellants misconceive the action taken in this case by the trial court.

In support of their position, the defendants and respondents submit the brief that follows.

DALLAS H. YOUNG, for
YOUNG, YOUNG & SORENSEN,
Attorney for Defendant
227 North University
Provo, Utah

DEFENDANTS' BRIEF

STATEMENT OF POINTS

I. THE PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF RAISE NO NEW MATTERS NOT CONSIDERED BY THE SUPREME COURT IN ITS DECISION ON APPEAL.

II. PLAINTIFFS AND APPELLANTS MISCONCEIVE THE ACTION TAKEN BY THE TRIAL COURT IN STRIKING EVIDENCE.

ARGUMENT

I. THE PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF RAISE NO NEW MATTERS NOT CONSIDERED BY THE SUPREME COURT IN ITS DECISION ON APPEAL.

We understand the rule to be that this Court will not grant rehearing in order to re-consider matters it has already considered in its decision on appeal. That is, this Court must be convinced that it has failed to consider some material point in the case, or that it has erred in its conclusions, or that some matter has been discovered which was unknown at the time of original hearing. **In Re Mc-**

Knight, 4 Utah 237, 9 Pac. 299. This Court has even stated that it will not consider new points first brought to its attention on application for rehearing, where such points were available upon the original hearing. **Dahlquist v. Denver & Rio Grande R. R. Co.**, 52 Utah 438, 174 Pac. 833.

Under Point I of their brief on rehearing, plaintiffs urge that the words "appurtenant" was uncertain, and parole evidence should have been admitted to aid the trial court in determining what was intended. We do not believe plaintiffs could find a more able advocate for their position than the dissenting justices in the opinion of this Court. **Hatch vs. Adams**, _____ Utah _____, 318 P. 2nd 633, 635 ff. It would appear that this Court aired this question thoroughly.

It is urged under Point II that the trial court did not make a decision on extrinsic evidence offered as to the intention of the parties in the use of the term "appurtenant". We respectfully submit that it did, and it did so in reliance upon the rule stated by this Court. We quote from the case of **Continental Bank v. Bybee**, _____ Utah _____, 306 P. 2nd 733, cited by appellants in their brief on appeal:

"If the ambiguity can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed. (cases cited). **If the instrument on its face 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.** (cases cited.) If the intent is ambiguous still, then parole evidence may be admitted. (cases cited.)"

(emphasis added)

This very authority was submitted to this Court in the brief on appeal of the plaintiffs and appellants in argument in favor of their position that parole evidence was still necessary to show what defendants intended to convey. (Brief of appellants, p. 13-16). Surely, they cannot now urge that this argument on intent of the parties was not before this Court on original hearing. Surely appellants do not now urge that this Court did not read their brief!

Appellants urge by Point III of their brief on rehearing that the trial court did not consider the matter of the intent of the parties. We respectfully submit that it did. No case involving the meaning of a contract can be decided without considering the intent of the parties. This jurisdiction has certain rules of evidence concerning integrated contracts, succinctly stated in the case of *Continental Bank v. Bybee*, supra, which the trial court applied in this case when it employed the escrow agreement introduced by plaintiffs and appellants in aid of construction of the meaning of "appurtenant" in the principal contract. The dissenting justices urge that the trial court should have gone further. Surely it cannot be urged that the remaining justices did not read or consider the dissents!

II. PLAINTIFFS AND APPELLANTS MISCONCEIVE THE ACTION TAKEN BY THE TRIAL COURT IN STRIKING EVIDENCE.

The trial court struck no evidence running to the question whether the water represented by the shares in controversy was appurtenant. In fact, it made a finding that the water was not appurtenant.

We quote from the transcript of the trial:

"MR. YOUNG: If your Honor please, Counsel and I have discussed this matter, and also with Your Honor, and in order to avoid another trial in this matter, if Your Honor should rule with us, we have agreed to recommend to Your Honor, that is counsel and I have, reserve a ruling upon this matter, subject to all this testimony, hearsay testimony, and testimony which is included under our objection, be later stricken.

"MR. BUSHNELL: Subject to your right to move to strike, which will raise the same issue.

"MR. YOUNG: I want to forget (re-state) my position. I want the record to show that motion is made to strike at the end of the case.

"THE COURT: The Record may show that your objection goes to all the testimony **which tends to vary the written instruments in this case.**

"MR. YOUNG: That is right, Your Honor.

"MR. BUSHNELL: We have no objection to the procedure outlined." (emphasis added) (Tr. 5-6)

and again at the end of plaintiffs' case:

"MR. YOUNG: At this time, the Defendants move to strike the testimony of any and all witnesses which had to do with what Mr. Adams has purported — Mrs. Adams purported to have told any of them respecting the number of shares of water stock, or respect to the price. In other words, we move to strike anything offered by any of these evidences, **except that testimony which has to go — has to do with the question of what was appurtenant to the land,** such as the testimony of Mr. Day, and one other witness. We move to strike all other testimony.

"THE COURT: The Court will take the motion under advisement."

(emphasis added)

It was this motion which was granted. No evidence tending to show appurtenancy was stricken; no motion to strike such evidence was made. The trial court made a finding on appurtenancy.

The principal dissent cites eleven matters of evidence it asserts was stricken. Insofar as this evidence (which was disputed and apparently not believed by the trier of the fact) bore upon the question of appurtenancy, it was not, we respectfully submit, stricken.

We respectfully submit that there was never a question in this case but that appurtenant water went with the land. The undisputed evidence is that in addition to appurtenant water other water, as evidenced by the escrow agreement, introduced by plaintiffs and appellants, was transferred. The trial court found that the shares in dispute did not in fact qualify as appurtenant water. This Court stated, page 634 of 318 P. 2nd:

“There was substantial conflict in the evidence as to the extent of the use of the water on the land. The statute declares that such water shall not be deemed appurtenant.”

How, then, can it be urged that this Court did not consider this evidence?

CONCLUSION

We respectfully submit that the petition for rehearing and brief in support thereof raise no new matters that were not considered by this Court originally and aired extensively through one opinion and two dissents. They merely re-hash arguments that were presented to the trial court and to this Court in the first instance. The trier of the fact found against appellants on the question of appurtenancy

after considering all evidence offered thereon, including, incidentally, one of plaintiffs' own declarations (Defendants' Exhibit 2), and this Court has found that there was substantial evidence to support this finding.

W respectfully submit that there is nothing new to support the motion for rehearing, and it should be denied.

DALLAS H. YOUNG, for
YOUNG, YOUNG & SORESENSEN,
Attorneys for Respondents