

1957

Marinus Johnson and Arlin Davidson v. Duke Page, Joseph Koyle and Joe Syrett : Brief of Appellant

Utah Supreme Court

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Paul J. Merrill; Jackson B. Howard; Attorneys for Appellant;

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**In the Supreme Court of the
State of Utah**

FILED
MAY 15 1957

Clerk, Supreme Court, Utah

**MARINUS JOHNSON and
ARLIN DAVIDSON,**

vs.

**DUKE PAGE, JOSEPH KOYLE
and JOE SYRETT,**

Defendants.

RE-APPEAL

CASE

NO. 8657

Brief of Appellant, Duke Page

**PAUL J. MERRILL
JACKSON B. HOWARD
Attorneys for Appellant**

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In the Supreme Court of the State of Utah

MARINUS JOHNSON and
ARLIN DAVIDSON,

vs.

DUKE PAGE, JOSEPH KOYLE
and JOE SYRETT,
Defendants.

CASE

NO. _____

Brief of Appellant, Duke Page

STATEMENT OF FACTS

This case was previously appealed to the Utah Supreme Court by the appellant from a decision of the District Court of Juab County. From the appeal the Supreme Court reversed the District Court and among other things stated that the joint venture did exist, was not terminated, and that a division of the property of the joint venture must follow the contract upon termination of the venture. The Supreme Court stated "Therefore Page and Johnson each own one-half interest in the property, Page to be reimbursed one-half of all his expenditures in the acquiring and pre-

serving of the property, which would include the cost of buying and moving the house upon the land to complete the patent to Mrs. Pratt, taxes and filing fees. Since the joint venture continued until terminated by the trial court's decree, Page is not entitled to interest upon the investment and variation of the contract which provides for such advances. Reversed and remanded for findings and conclusions not inconsistent with this opinion."

STATEMENT OF POINTS

POINT 1

THE COURT ERRED IN NOT FURNISHING THE DEFENDANT, DUKE PAGE, WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE ABOVE CASE.

POINT 2

THE COURT ERRED IN TERMINATING AND DIS-
SOLVING THE RIGHTS OF THE PARTIES, EXCEPT
AS FIXED BY THE TERMS OF ITS DECREE.

POINT 3

THAT THE COURT ERRED IN NOT GRANTING
THE DEFENDANT, PAGE, COSTS ON APPEAL IN
THE AMOUNT OF \$187.53.

POINT 4

THAT THE COURT ERRED IN CALCULATING
THE AMOUNT OF EXPENDITURES MADE BY THE
DEFENDANT, PAGE, IN ACQUIRING AND PRESERV-
ING THE PROPERTY, FOR WHICH AMOUNT HE
SHOULD HAVE JUDGMENT.

ARGUMENT**POINT 1**

THE COURT ERRED IN NOT FURNISHING THE DEFENDANT, DUKE PAGE, WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE ABOVE CASE.

Rule 52 of Utah Rules of Civil Procedure require the court to find the facts specifically and state separately its conclusion of law. The court in this case merely served a copy of the judgment upon the defendant, Page. I might add that it would appear that the judgment was prepared by the court and not by either of the parties. The court rejected two different sets of findings submitted by the defendant, Page.

POINT 2

THE COURT ERRED IN TERMINATING AND DISSOLVING THE RIGHTS OF THE PARTIES, EXCEPT AS FIXED BY THE TERMS OF ITS DECREE.

The court has no right to terminate the relative rights of the parties under the contract of May 1, 1940. If Johnson has the right to benefit equally from the joint venture agreement and if it existed until the time it was terminated by action of the court then, *ergo*, the defendant Page had an equal right to share in the profits that the plaintiff, Johnson, has received from his dealing with property covered by the contract of May 1, 1940.

The fact is that the record discloses that the defendant, Johnson, sold a portion of the property to the defendant, Davidson. The defendant, Johnson, merely had a joint right

to the property but did not own an undivided one-half interest which he could sell as a tenant in common.

The defendant, Page, has sued the plaintiffs, Johnson and Davidson, for an accounting of the profits made by Johnson from land acquired subject to the joint venture agreement and the court should not enter a judgment couched in such terms as would preclude the action of Page or be res adjudica to the pursuit of his rights thereunder. The plaintiffs in this action have in their defense to that action pleaded this judgment for that purpose.

It is the contention of the appellant that neither party proceeded in the trial court under the theory that the other had any rights under the original contract. The suit now pending between the parties is based upon the decision of this Court and its interpretation of the respective rights of the parties.

The claim of the appellant against the plaintiffs is brought under a claim independent of that originally sued upon in this suit. He should not be barred from asserting such a claim by over-inclusive language of the court. At the most the Court should restrict itself to terminating the joint venture and adjudicating the rights under the issues joined by the pleadings, but it has no right in stating "the rights of the parties thereunder are terminated except to the extent fixed by the terms of this decree." This is one of those instances where neither party by their original theories intended a counterclaim by the other, each claiming an exclusive right to the 400 acres which was the subject of this law suit.

We believe that the right the appellant is now asserting is one of those rights that is optional or permissive for the appellant to claim at the time. In the alternative it cer-

tainly is one of those rights that justice should require not be foreclosed.

It would appear that the court has gone far beyond the instruction of the Supreme Court to the trial court upon the first hearing of this cause, and certainly exceeds requirements of the decree.

Why should the appellant be precluded from bringing an action for an accounting on property obtained by appellees which rights the appellant was unaware of at the original trial?

Actually, the appellant's claim against the appellees involves property foreign to that sued upon by the plaintiffs. It is a new claim that might properly have been asserted as a permissive counterclaim had the appellant thought the original contract had not been rescinded. When the Court determined that a joint venture did exist then his rights became apparent, however, the language of the lower court would tend to bar them.

It also has the effect of placing upon the appellant the duty of having this Court rule upon the right to bring a suit upon a subject matter related but not arising out of the transaction which was the subject of the instant case. This point, of course, is the most important point in the appellant's case and is of vital concern to the appellant.

The appellant has not submitted authority on the question of res judicata for reason that to do so the appellant would have had to show to the Court the facts of an entirely new case which was not in evidence in the case below.

The question here would seem to be one of equity and justice and by context of Rule 13-B, Utah Rules of Civil Procedure and the annotations thereunder it would appear

that the Legislature and the courts do not desire to foreclose a counter-right except in those cases wherein the counterclaim is a necessary element of the same suit and can be proved or disproved by the same fact situation.

In any event how, and why, should the trial court attempt to pre-judge or bar any other rights, the nature of which are unknown to him. The court's language is much broader than that necessary to decide the issues of the case.

POINT 3

THAT THE COURT ERRED IN NOT GRANTING THE DEFENDANT, PAGE, COSTS ON APPEAL IN THE AMOUNT OF \$187.53.

The appellant filed a cost bill within the time allotted after the remittitur was returned, but by oversight failed to include the cost of the transcript in the amount of \$91.75. Subsequently, the appellant filed an amended cost bill showing appellant's actual cost in the amount of \$187.53; however, the court awarded the appellant only \$55.28 costs but awarded the plaintiffs \$10.00 cost of trial. Naturally the appellant is aggrieved.

If the cost bill has been filed within the proper time, the court certainly should allow the filing of a supplemental amended cost bill. See Dignan vs. Nelson, 26 Utah, 186, 72 P. 936.

POINT 4

THAT THE COURT ERRED IN CALCULATING THE AMOUNT OF EXPENDITURES MADE BY THE DEFENDANT, PAGE, IN ACQUIRING AND PRESERVING THE PROPERTY, FOR WHICH AMOUNT HE SHOULD HAVE JUDGMENT.

The appellant asked the court to determine that the appellant, Page, was entitled to be reimbursed for one-half the following expenditures which are shown in the transcript:

- a. Mrs. William Pratt, \$440.00. ✓
 - b. Eli Taylor, \$65.00. ✓
 - c. Recording fees incident to patent, \$3.10. ✓
 - d. Entry on States selection, \$10.00. ✓
 - e. Survey and engineering costs on entire property, \$120.00.
 - f. Taxes for years 1944 to 1954, inclusive, \$165.02.
 - g. Costs of houses and building placed on property, \$400.00. 350.00 ✓
 - h. Eli Taylor for legal fees in connection with the property, \$176.00.
 - i. LeRoy Hill, wages for moving houses, \$180.00.
 - j. Eldon Otteson for groceries on project, \$40.00.
 - k. Advance to Marinus Johnson, \$170.00.
 - l. Utah County Implement cost for dead horse, \$150.00.
 - m. Advance to Marinus Johnson, \$22.87.
 - n. J. W. Jones for survey on entire property, \$225.00.
 - o. Killpack Service Company for gas and oil in moving house, \$15.40.
 - p. Advance to Marinus Johnson, \$22.87.
 - q. Central Market for groceries on project, \$80.34.
 - r. Advance to Marinus Johnson, \$35.45.
 - s. Chase Lumber Company for lumber for house, \$85.00.
 - t. LeRoy Hill bonus on moving house, \$30.00."
- Total: \$2,436.05.

The expenditures shown are substantiated by testimony and evidence shown in the transcript, and should have been allowed. It is contended that the Court has refused to follow the instruction of the Court in that he has failed to make a finding of such costs as were made by appellant.

CONCLUSION

The issues in this appeal are merely questions of interpretation of facts requiring no legal authority. It is respectfully submitted that the trial court has misinterpreted the instruction of this Court, and has not entered judgment accordingly.

Respectfully submitted,

PAUL J. MERRILL

JACKSON B. HOWARD

Attorneys for Appellant