1957

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARINUS JOHNSON and
ARLIN DAVIDSON,
Plaintiffs and Respondents,

— vs. —

JOSEPH KOYLE, DUKE PAGE,
and JOHN DOE SYRETT,
Defendants,

DUKE PAGE,
Defendant and Appellant.

RE-APPEAL

Case
No. ~~8404~~ 8657

Brief of Plaintiffs and Respondents

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STATEMENT OF FACTS

As stated by the defendant and appellant Duke Page in his brief on re-appeal, this case was previously appealed to the Utah Supreme Court by said appellant. The facts of the case in so far as they are here pertinent are set forth in the opinion of the Court in that appeal. In substance the facts are as follows:

The plaintiff Johnson in 1940 was the owner of a water filing and likewise held the contract to purchase 440 acres of land from one Pratt. Pratt at that time was homesteading the acreage and in the contract which Johnson held, Pratt promised to convey title to said land to Johnson upon Pratt's acquisition of the title. Johnson was without funds to develop the water filing and therefore entered into a written agreement with defendant-appellant Page which provided generally as follows:

1. That Johnson would convey a one-half interest in the water filing which Johnson owned, together with a one-half interest in the levies, and canals that had already been constructed, to the appellant Duke Page.

2. Page would provide all the supplies, equipment and labor necessary to complete the levies and canals.

3. Page would furnish all the costs required to complete the appropriation of water and put it to beneficial use.

4. Each party was to pay one-half the purchase price of land to be acquired in the future and each was to have one-half interest in property so acquired.

After Johnson and Page had entered into this contract Pratt died without having received title to the 440 acres which he was supposed to convey to Johnson. Page and Johnson then aided Pratt's widow in perfecting the homestead by moving a house and other buildings on to the property. She received a patent to the 440 acres and

conveyed the land to Page for a consideration of $440.00 in 1943.

The Supreme Court in the former appeal held that Page and Johnson each own a one-half interest in this 440 acres and in so holding the opinion stated as follows:

> "Page is to be reimbursed one-half of all his expenditures in acquiring and preserving 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."

STATEMENT OF POINTS

POINT I

APPELLANT DUKE PAGE WAS NOT PREJUDICED BECAUSE HE WAS NOT FURNISHED WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THIS CASE.

POINT II

APPELLANT CAN NOT NOW COMPLAIN THAT THE COURT ERRED IN TERMINATING THE RIGHTS OF THE PARTIES EXCEPT AS FIXED BY THE TERMS OF ITS DECREE AS THIS PROVISION APPEARED IN THE ORIGINAL DECREE ENTERED BY THE TRIAL COURT AND WAS NOT APPEALED FROM BY THE APPELLANT IN APPELLANT'S FIRST APPEAL.

POINT III

THE COURT DID NOT ERR IN CALCULATING THE AMOUNT OF EXPENDITURES MADE BY THE DEFENDANT PAGE IN ACQUIRING AND PRESERVING THE PROPERTY ACQUIRED FROM MRS. PRATT.

ARGUMENT

POINT I

APPELLANT DUKE PAGE WAS NOT PREJUDICED BECAUSE HE WAS NOT FURNISHED WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THIS CASE.

Rule 52 of Utah Rules of Civil Procedure requires the trial court to find the facts specifically and state separately its conclusions of law. On the 26th day of November, 1956, the trial court entered its Findings of Fact and Conclusions of Law consistent with the opinion of this honorable court as determined by the aforementioned opinion of the court (R. 23). The Findings of Fact and Conclusions of Law were on file to be inspected by appellant at his leisure. Appellant was not prejudiced in any particular because a copy of the Findings of Fact and Conclusions of Law were not served upon him. He subsequently was served with a copy of the Decree and has brought this appeal from the Decree. Thus, any argument as to whether or not he should be served with a copy of the Findings of Fact and Conclusions of Law is here superfluous.

POINT II

APPELLANT CAN NOT NOW COMPLAIN THAT THE COURT ERRED IN TERMINATING THE RIGHTS OF THE PARTIES EXCEPT AS FIXED BY THE TERMS OF ITS DECREE AS THIS PROVISION APPEARED IN THE ORIGINAL DECREE ENTERED BY THE TRIAL COURT AND WAS NOT APPEALED FROM BY THE APPELLANT IN APPELLANT'S FIRST APPEAL.

The within case was originally tried before the trial court on plaintiffs' second amended complaint which for some reason has not been included with the present record. Paragraph 4 of the prayer for relief in said complaint states as follows:

> "4. That the Decree of the Court terminate the above-mentione dagreement between Marinus Johnson and Duke Page and decree that Duke Page has no rights or interests thereunder."

In its original decree from which appellant brought his first appeal, the Court stated as follows:

> "4. That the agreement made and entered into by and between the plaintiff Marinus Johnson as first party and the defendant Duke Page as second party dated the 21st day of May, 1940, and referred to in the plaintiffs' second amended complaint herein is hereby dissolved and the rights of the parties thereto terminated except to the extent fixed by the terms of this decree." (R. 15)

In the appellant's brief in the original appeal of this cause, appellant listed four points none of which complain about the court's order terminating the agreement between Johnson and Page except to the extent fixed by the decree. Appellant can not at this late date complain about that provision.

Furthermore, under Rule 13(a) of the Utah Rules of Civil Procedure, it is stated as follows:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is

the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court can not acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced, the claim was the subject of another pending action.''

The within action was brought to determine the rights of the parties under the contract between Johnson and Page. As heretofore stated one of the prayers of plaintiffs' second amended complaint asks the court to terminate that contract and decree that Duke Page had no rights or interests thereunder. Any claims which Page had under that contract were necessarily mandatory counterclaims in this action and Page can not now be heard to complain that he is not to be allowed to bring further actions arising out of that contract, which actions had matured at the time of this action.

POINT III

THE COURT DID NOT ERR IN CALCULATING THE AMOUNT OF EXPENDITURES MADE BY THE DEFENDANT PAGE IN ACQUIRING AND PRESERVING THE PROPERTY ACQUIRED FROM MRS. PRATT.

The essence of the contract between Johnson and Page as found by this court in its opinion in the original appeal herein was that Johnson was to give Page certain rights in a water application which he owned and in certain canals and levies constructed in order to put that water to beneficial use. Page was to furnish all the costs necessary to put the water to a beneficial use,

to complete the construction of the canals and levies already partially constructed, and to construct further canals and levies (R. 20). Johnson was only required to expend money in the event that new land was purchased. In this event, he was to pay one-half of the purchase price. In Paragraph 7 of its Findings of Fact and Conclusions of Law dated 14th day of June, 1955, the court makes its findings as to the amounts expended by Page to acquire the 440 acres hereunder dispute. In that respect the court found that Page paid the sum of $350.00 to purchase a house and move it onto the Pratt land, that Page paid Pratt's widow the sum of $440.00 for the land and paid Ely F. Taylor the sum of $75.00 for his services in connection with obtaining title to the land together with $3.10 for recording fees (R. 10). In Paragraph 7 of its Findings of Fact and Conclusions of Law dated the 26th day of November, 1956, which were entered pursuant to the order of the Supreme Court in the original appeal, the court found that Page had spent the identical sums to acquire the land as set forth in the previous Findings of Fact and Conclusions of Law (R. 25). It is axiomatic that the Findings of Fact of a court will not be disturbed on appeal unless found to be without basis of fact on the record. The appellant in his brief attempts to include amounts which Page had contracted to provide in receipt for one-half of Johnson's water right and levies and canals. For instance, appellant asks to have this court order that he be reimbursed for a $10.00 fee which was paid in connection with a state selection. He seeks to recover $120.00 for surveying and engineering cost on the entire property. He seeks to

recover the sum of $400.00 for the cost of the house and buildings placed on the property, the sum of $180.00 for wages paid to Hill for moving the house, the sum of $40.00 for groceries paid to one Ottesen on the entire project, an advance to Marinus Johnson, $175.00; another advance to Marinus Johnson for $22.80, a $150.00 for a dead horse, still another advance to Johnson in the amount of $34.45, bonus to one LeRoy Hill, $30.00; a bill to Central Market for groceries for $80.34, a bill for gas and oil for $15.40, a second bill for a survey on the entire property in the amount of $225.40, two legal bills, one in the sum of $65.00 and one in the sum of $176.00; all these costs purportedly were expended according to appellant in obtaining one 440 acre tract the original cost of which was $440.00 and in moving a house onto that tract.

In its Findings of Fact and Conclusions of Law the court found as a fact that Page paid the sum of $350.00 total for the purchase and expense of moving the house onto the property. Appellant in his brief states only as follows:

> "The expenditures shown are substantiated by testimony and evidence shown in the transcript, and should be allowed."

Appellant does not indicate where these expenditures are substantiated or by what evidence they are substantiated, nor does appellant indicate in what way the court erred in making its Findings of Fact where herein set forth.

It is respectfully submitted that the court's Findings of Fact and Conclusions of Law an Decree satisfactorily enunciate the provisions and orders of this honorable court in its decision handed down in its original opinion and that appellant has shown nothing to the contrary.

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