

1982

Earl Michaelson and Mabel Michaelson v. Lyman Larson and Katie Larson : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

EARL MICHAELSON and MABEL)
MICHAELSON, his wife,)

Plaintiffs-Respondents,)

vs.)

Case No. 18175

LYMAN LARSON and KATIE)
LARSON, his wife,)

Defendants-Appellants.)

BRIEF OF APPELLANTS

Appeal from the Judgment of the District Court of Sanpete County, the Honorable Don V. Tibbs, District Judge presiding.

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QUESTION PRESENTED

May the court order a survey in a partition action when the description used in dividing the real property is inaccurate and uncertain and does not use ordinary landmarks?

STATEMENT OF THE FACTS

Appellants and Respondents are joint tenants and owners of certain real property in Sanpete County. Respondents instituted a partition action to divide said real property. The court appointed referees and a recommendation was submitted. Both the referees' recommendation and the court order use "legal" descriptions in describing the portion awarded to each party. A survey was never taken at either the request of the referees or the court. The descriptions used were arrived at by calculation rather than by survey. Appellants objected to said order on the grounds that the descriptions were not accurate and would not give marketable title to the parties involved. It is from the adverse judgment regarding that objection that is the basis of this appeal.

ARGUMENT

POINT I

THE RECORD COMPELS THAT THE COURT REVIEW AND DISTURB THE JUDGMENT OF THE DISTRICT COURT.

Before the court will disturb the judgment of a District Court in a Partition action there must be a compelling reason to do so, Arthur v. Chournos, 574 P.2d 723 (Ut.). This requirement has been met in this case in that the order of the District Court if left unchanged would result in unmarketable title for both parties and in uncertainty as to the boundries of their respective properties. In order to avoid these consequences a survey must be taken of the properties to provide an accurate legal description. This is discussed more completely below.

POINT II

IT IS NECESSARY THAT THE PROPERTY INVOLVED IN THIS CASE BE SURVEYED IN ORDER TO PROVIDE A FAIR AN EQUITABLE PARTITION.

Under Utah Statute, U.C.A. 78-39-13 (1953 as amended) a survey may be ordered by the court but is not necessary. As interpreted by Utah case law a survey is not necessary when the description incorporates ordinary and proper landmarks, Roper v. Bartholomew, 30 U.2d 386, 518 P.2d 683 (1974). In this case the descriptions used are legal descriptions and yet no survey was taken in order to arrive at these descriptions, but rather they were arrived at by calculation and do not accurately reflect the portions intended to be conveyed. They are vague and leave uncertainty as to exact location of the boundaries. They do not employ any ordinary landmarks upon which the parties may rely to determine their boundaries. The reasoning behind not requiring surveys in all partition actions is that by use of other means such as landmarks an accurate division may be achieved; however, in this case the purpose of the statute has been frustrated by the use of inaccurate legal description. 68 Corpus Juris Secundum supports this position "A survey of real estate to be partitioned will not ordinarily be ordered unless shown to be necessary; but, if the description of the land is loose or uncertain, the court may order a survey to be made."

CONCLUSION

The judgment of the District Court if left unchanged will result in unmarketable title, uncertainty as to boundaries, and the possibility of inequities in the partition to both parties. For these reasons it is respectfully requested that the judgment of District Court be remanded and a survey ordered.

DATED this 2nd day of ~~January~~^{February}, 1982.

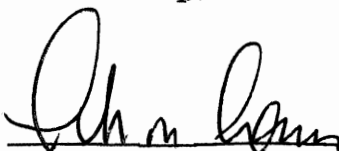
Respectfully submitted,



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CERTIFICATE OF MAILING

SERVED the foregoing Brief of Appellants by mailing two copies thereof, postage prepaid, to PAUL R. FRISCHKNECHT, attorney for Respondents, at 50 North Main Street, Manti, Utah 84642, this 2nd day of ~~January~~^{February}, 1982.



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