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Warren M. O'Gara v. Archie Findlay : Brief of Respondent

Utah Supreme Court

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MAY 1958

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

DEC 10 1957

WARREN M. O'GARA, Executor of
the Estate of NANCY E. HIRI-
GARAY, Deceased,

Appellant,

—vs.—

ARCHIE FINDLAY,

Respondent.

Clerk, Supreme Court, Utah

Case No. 8711

RESPONDENT'S BRIEF

REX W. HARDY

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IN THE SUPREME COURT of the STATE OF UTAH

WARREN M. O'GARA, Executor of
the Estate of NANCY E. HIRI-
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Appellant,

—vs.—

ARCHIE FINDLAY,

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Case No. 8711

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The facts of this case as set forth in the appellant's brief are vigorously disputed by the respondent. The words, "including 12 shares of water in the Davis & Weber Counties Canal Co." were included in the final decree for a specific purpose, but it was not done for

the purpose of misleading either the court or the appellant, or to "slip something past" anyone, as the appellant has indicated.

It would appear for the appellant's brief that the only place in the entire case where the water stock is mentioned is in the final decree of the lower court. This is not true. In the respondent's answer to the complaint we find as a separate defense to the allegations of the complaint the following language:

"2. That said water rights were explained by said Nancy E. Hirigaray to include appropriation for watering livestock and domestic use, drainage water appropriated for irrigation purposes, *and twelve shares of stock in the Davis and Weber Counties Canal Company.*"

Then in the prayer of the answer it is stated:

"Wherefore, the defendant demands that the plaintiff take nothing by his complaint, and that the title to said property, *together with all water rights*, be quieted in the defendant, and that the plaintiff or any other persons be forever precluded from asserting any interest therein adverse to the defendant."

Also, in the Findings of Fact and Conclusions of Law the words, "including 12 shares of water in the Davis & Weber Counties Canal Company," were included in the description found in the Findings, and the Conclusions state in part "That on or about April 26, 1949, the decedent, Nancy E. Hirigaray, was the owner in fee simple of the real property described above, to-

gether with the water rights, improvements and appurtenances thereunto belonging . . .”

There was no other water owned by the deceased and the water in question has always been used to irrigate the farm in question. This fact can not be disputed. This being farm land, the property can not be used for this purpose without water. I assumed at all times during this litigation that the water in question was that referred to in the deed, and that it would go with the land under the description in the deed, “Together with water rights,” and there is no doubt but that was what the decedent intended.

Shortly after the complaint was filed the water company made inquiry as to the status of the water and was advised by me that the title to the land and water was in dispute, but that the parties had stipulated that it would continue to be used on the property pending determination of the question of ownership. The certificate for use was then transferred to the respondent’s name, and all notices of assessments and of meetings have been sent to him and are still being so sent and paid by him.

The fact that this agreement concerning the use of the water pending determination of the controversy was entered into is proven by the lease to the farm which was drawn in 1955, long before the case was tried, leasing the farm *and the water* to Isaac Hodgson. The lease was signed by Warren M. O’Gara, the appellant, Archie

Findley, the respondent, and Isaac Hodgson, the lessee, and provided in part as follows:

“The Parties of the First Part shall furnish said land and pay all taxes and assessments in connection therewith, *and shall furnish twelve (12) shares of water from the Davis & Weber Counties Canal Company*, together with an additional eight (8) shares of water provided the same can be purchased by the Party of the Second Part for not to exceed \$14.00 per share.”

It was understood without question that the 12 shares mentioned in the lease were the same ones referred to herein because there was no provision made for the purchase of this water and it was known to be the property of the deceased and used to irrigate the farm.

There are other facts which I feel are material in order to understand why the water stock was included in the decree, and which point out that there was no element of surprise or fraud.

At the time of the death of Nancy E. Hirigaray she maintained a safety deposit box in Zion's Savings Bank & Trust in which she kept all her valuable papers. For various reasons not material to this appeal the bank requested that the box be emptied. Counsel for all parties were present at the time the box was opened and an inventory of the contents made. At this time a request was made that the abstract and water stock certificate No. 6318, which were found in the box, be de-

livered to the respondent, but it was agreed by the attorneys for the parties that they would be turned over to the Clerk of the Third District Court for Salt Lake County and delivered to the winner after the case was decided. The deposit box had previously been opened by the bank at the request of the appellant, and reportedly in the presence of appellant or his attorney, and prior to the filing of the complaint in this action, at which time the contents were also inventoried showing the stock certificate, a copy of which inventory was filed with the State Tax Commission. All of this is further proof that the appellant knew that the water right was in existence and was being used to irrigate the farm in question.

Repeatedly during the course of negotiations it was stated that the case would proceed to trial and the winner would "take all." This included the land, the water rights, the balance in the bank from the proceeds of the farming operation, and the balance in the bank received from the renting of the farm house, which was separate from the farm lease.

The reason that the water stock was specifically mentioned in the Findings of Fact and Decree is that in talking with a Mr. D. D. Harris of the water company he suggested that they be so listed specifically in order that the company would be protected in issuing a new certificate to the winner of the suit.

STATEMENT OF POINTS

POINT I.

THE QUESTION AS TO THE OWNERSHIP OF THE 12 SHARES OF WATER IN THE DAVIS & WEBER COUNTIES CANAL COMPANY, WHICH WAS USED TO IRRIGATE THE LAND IN LITIGATION WAS AN ISSUE CONTEMPLATED BY THE PARTIES AND RAISED BY THE PLEADINGS.

POINT II.

THE APPELLANT IS ESTOPPED TO OBTAIN RELIEF ON THIS APPEAL UNDER THE DOCTRINE OF RES JUDICATA.

ARGUMENT

POINT I.

THE QUESTION AS TO THE OWNERSHIP OF THE 12 SHARES OF WATER IN THE DAVIS & WEBER COUNTIES CANAL COMPANY, WHICH WAS USED TO IRRIGATE THE LAND IN LITIGATION WAS AN ISSUE CONTEMPLATED BY THE PARTIES AND RAISED BY THE PLEADINGS.

As pointed out in the Statement of Facts, the question as to the ownership of the water which was used to irrigate the farm was well understood between the parties. The deed merely stated, "together with water rights, improvements and appurtenances thereunto appertaining." It did not say "together with water rights appurtenant to the land," but only "the water rights." The deed was, therefore, uncertain as to just what was included. True there is a presumption raised by Section

73-1-10 U.C.A. 1953, that water rights evidenced by shares of stock in a water company are not appurtenant to the land, but this does not have any bearing on whether or not the water right, although personal in nature, passes under a recital in a deed.

This fact was brought out in the respondent's answer when he set out as a separate defense, "That said water rights were explained by said Nancy E. Hirigaray to include appropriation for watering livestock and domestic use, drainage water appropriated for irrigation purposes, *and twelve shares of stock in the Davis & Weber Counties Canal Company.*" These shares of stock were also mentioned in the description in the Findings of Fact of the property involved in the case, and to which title was to be quieted.

That the parties were aware of the existence of the water stock and the problem as to ownership is further born out by the provisions of the lease of the farm to Isaac Hodgson. Under this lease the parties to this action were to furnish the lessee 12 shares of water in the Davis & Weber Counties Canal Company, and the agreement between the parties that the water assessment and other costs were to be paid from the proceeds of the farm operation with the balance going to the successful party is completely inconsistent with the appellant's present contention that the water stock was never considered in connection with this litigation. Assuming that it was not involved, why was the appellant agree-

able that it be handled in this manner? If it belonged to the estate separate and apart from any dispute as to the land, some provision would have been made for the payment to the appellant of the value of the use of the water in the event the respondent won. But on the contrary, it was to be used on the farm as a part thereof.

POINT II.

THE APPELLANT IS ESTOPPED TO OBTAIN RELIEF ON THIS APPEAL UNDER THE DOCTRINE OF RES JUDICATA.

A general affirmance of a judgment on appeal makes it res judicata as to all the issues, claims or controversies involved in the action and passed on by the court below, although the appellate court did not consider or decide on all of the issues specifically. This was so held in the California case of *Bank of America vs. McLaughlin Land & L. Co.*, 105 P. 2nd 607. The decree here involved is the same in all respects as it was at the time its correctness was challenged before this court in Case 8527. The appellant has had his day in court and should not be allowed to again challenge the correctness of the decree. To do so would mean that there is no end to litigation and would allow the same decree to come before this honorable court time and time again on the same wording but on a different point of law.

SUMMARY

From the time this controversy first arose until the present time there has been repeated reference made

between the parties hereto and their attorneys to the water used to irrigate the property in dispute. In the lease to the premises pending determination of ownership of the land, 12 shares of stock were listed as to be furnished by the parties to this action clearly indicating that the title to the water was also in dispute. Otherwise it would have been mentioned that the water was to be furnished by the appellant. The respondent's answer refers to the water as "12 shares of water in the Davis & Weber Counties Canal Company," as do the Findings and Decree. The appellant never challenged the position of the respondent that the 12 shares were included under the deed which provided for the conveyance of all "water rights," and the validity of the same decree was before this court in case No. 8527.

The order denying the appellant's motion for modification of decree should be sustained, with costs to the respondent.

Respectfully submitted,

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