1982

# Elaine Roundy v. Anthony Coombs and Dot Alvey Coombs : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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| ELAINE ROUNDY,<br><br>Plaintiff and Respondent,<br><br>-vs-<br><br>ANTHONY COOMBS and DOT ALVEY COOMBS, husband and wife; and LARRY COOMBS, Executor of the Estate of E. H. Coombs,<br><br>Defendants and Appellants. | ) | Case No. 18208 |

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BRIEF OF RESPONDENT

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Appeal from the Judgment of the Sixth Judicial District
Court of Garfield County, State of Utah
Honorable Don V. Tibbs, District Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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## NATURE OF THE CASE

Plaintiff brought an action to quiet title to real property purchased in the calendar year of 1964 by an Escrow Purchase Agreement and to reform a metes and bounds real property description and to have determined by Court decree the amount of irrigation water represented by shares of stock in the Boulder Irrigation Company which did pass to the Plaintiff as an appurtenance to the land upon which the water was used.

## DISPOSITION IN THE LOWER COURT

The Lower Court found there was an error in the land description and the Plaintiff actually possessed, used and purchased the family six-acre homesite and further found two

shares of Class "A" common stock of the Boulder Irrigation Company had been historically and continuously used in connection therewith and quieted title to the land and two shares of water stock and reformed the contract, Warranty Deed and Quitclaim Deed accordingly.

## RELIEF SOUGHT ON APPEAL

The Appellants do not seek to reverse that part of the decision reforming and quieting title to the property specifically acquired by the Plaintiff under purchase agreement, but challenge only the finding of the Court that two shares of capital stock of the Boulder Irrigation Company were used with and were appurtenant to the land transferred. The Respondent seeks to have the Lower Court affirmed.

## STATEMENT OF FACTS

The Plaintiff, (Respondent herein) Elaine Roundy, and the Defendant, Anthony Coombs (Appellant herein) are brother and sister. Anthony Coombs is the youngest member of the Coombs family and was residing with his father, E. H. Coombs and his mother, Dicey Coombs during the calendar year of 1962. In 1962, E. H. Coombs and Dicey Coombs sold to Anthony Coombs all of the property owned by them at Boulder, Garfield County, Utah. The sale included the six-acre homesite which is the subject of this litigation as well as farm property, water stock in the Boulder

Irrigation and Water Development Company, and grazing permits, all specifically set forth in the Escrow Agreement between those parties which, together with the Warranty Deed (Exhibit #9) was deposited with a local bank.

In the calendar year of 1964, Elaine Coombs Roundy, sister of Anthony Coombs and her husband, Urban Roundy, returned to Boulder, Utah, after an absence of several years. Anthony Coombs contacted his sister and brother-in-law to determine if they were interested in purchasing the family homesite. (Tr.58, L 9) Anthony told Elaine that the girl he was going to marry did not want to live in the family home. (Tr.58, L 19) The Plaintiff and her husband, Uvon, now deceased, entered into negotiations for the purchase of the property. E. H. Coombs negotiated a transaction whereby he would give Anthony credit on the 1962 purchase agreement for a reconveyance of the six-acre homesite. The contract was negotiated between Defendant Anthony Coombs and each of the other parties since Anthony received the same credit as the sales price on his original contract for his conveyance which released the property from his 1962 contract. (Tr.104, L25) (Deed executed by Anthony, Exhibit #5)

The sales agreement between E. H. Coombs and Dicey Coombs, as the sellers and Uvon Roundy and Elaine Roundy was prepared and executed (See Exhibit #4). A Warranty Deed from E. H. Coombs and Dicey Coombs, (Exhibit #6) together with a separate deed from Defendant Anthony Coombs conveying the property was placed in escrow and later delivered to Plaintiff and her husband and recorded.

All of the parties intended the buyers (Plaintiff and her husband) to acquire the six-acre homesite which fact was acknowledged by Anthony Coombs (Tr.102, L 18-25). The Plaintiff and her husband and their seven children moved into the family home and possessed the six-acre homesite. They cared for and irrigated the orchard, pasture land and raised a garden. The cultivating and raising of the orchard, garden and pasture required water from the Boulder Irrigation Company. Water was used upon approximately four acres of the land in the same manner as had been used since the calendar year of 1941 by the parents of the Plaintiff. (Tr.48, L 17-21; Tr. 60, L 25; Tr. 61, L 1-7; Tr. 99, L 6-15; Tr. 139, L 25; Tr. 141, L 19-25) Elaine and her husband (now deceased) maintained the property in the same fashion, grew a similar garden and continued to irrigate the orchard and pasture land.

The Defendant, Anthony Coombs, continued to reside with his sister and her family on the property for a period of some seven months and until he married. (Tr.61, L 12-19; Tr.62, L 19-22) Anthony Coombs was familiar with the irrigation practice, knew that water was used as it had been since his parents acquired the property prior to the year of 1941 and no difficulty arose until the calendar year of 1975. (Tr.64, L 17) During the calendar year of 1975 a pipeline system was developed to distribute water for an irrigation sprinkling system. (Tr.65, L 11) Thereafter, Anthony Coombs, who happened to be President of Boulder Irrigation and Water Development Company (Tr.106) refused irrigation water to the property acquired by his sister. Anthony

Coombs also advised her that she did not own the property on which the family home was situated and advised her that the property she owned was vacant ground to the north. The husband of Elaine Roundy died in 1976. Thereafter, Elaine Roundy's attempts to resolve the problem were refused by Anthony. (Tr.70, L 3-7; 15-18)

Anthony Coombs acquired from the escrow depository and recorded the Warranty Deed (Exhibit #9) executed by his father and mother in the year of 1962. The Warranty Deed to Anthony (Exhibit #9) had not been amended as intended by all of the parties, including Anthony, and it included the property sold to the Plaintiff.

Since Anthony refused water to his sister and her family and also claimed to own the property (Tr.70, L 3-7) it was necessary that this action be filed.

## ARGUMENT

### POINT I

THE STATUTE OF LIMITATIONS HAS NO APPLICATION TO THE TRANSFER OF TWO SHARES OF CAPITAL STOCK OF BOULDER IRRIGATION COMPANY FOUND TO BE APPURTENANT TO AND PART OF THE PROPERTY PURCHASED BY PLAINTIFF.

The argument of the Appellant that because the deeds transferring title to Plaintiff did not contain the word "water"

or "appurtenances" they did not carry any water rights, is not supported by Utah law.

The Plaintiff acquired title by reason of a Quitclaim Deed executed by Anthony Coombs (Plaintiff's Exhibit #5) and a Warranty Deed from E. H. Coombs and Dicey B. Coombs (Plaintiff's Exhibit #6).

Section 57-1-13, Utah Code Annotated, 1953, sets forth the general form of a Quitclaim Deed and specifies the effect of such a conveyance. Plaintiff's Exhibit #5, the Quitclaim Deed, is in statutory form. The statute provides:

> Such deed, when executed as required by law, shall have the effect of a conveyance of all right, title, interest and estate of the grantors in and to the premises therein described and all rights, privileges and appurtenances thereunto belonging, at the date of such conveyance. (Emphasis added)

Plaintiff's Exhibit #6, the Warranty Deed, also is in statutory form. Section 57-1-12, Utah Code Annotated, 1953 sets forth the statutory form of a Warranty Deed and also describes the effect of such conveyance in the following language:

> Such deed, when executed as required by law, shall have the effect of a conveyance of fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all appurtenances, rights and privileges thereunto belonging.* * * (Emphasis added)

This Court in the 1947 case of Adamson, et ux., vs. Brockbank, et al., 185 P2d 264, 112 U 52, clearly determined appurtenances were included when a statutory form is used:

At Page 270:

> [5] Appellants place reliance on the rule of law that when the language of the instrument is clear and unambiguous, the intent of the parties is determined solely by the terms of the document and cite in support thereof the case of Ruthrauff et al. v. Silver King Western Mining Company et al., 95 Utah 279, 80 P2d 338. With this general rule of law we have no dispute. However, the rule is not applicable in the present action. Section 78-1-11, UCA, 1943, provides that a deed in statutory form shall have the effect of a conveyance in fee simple to the grantee, of the premises therein named, together with the appurtenances thereunto belonging. If a deed by statute has the effect of passing all appurtenances to the property, then it is not varying the terms of a written instrument to establish what was appurtenant to the property. To hold to the contrary would render the quoted statute nugatory. (Emphasis added)
>
> This is not a suit where innocent parties have been misled by public records, by acts and conduct of the parties, or by reliance on representations made. This is a suit to determine the rights created between grantors and grantees, all of whom knew or should have known the rights not entirely reflected by recorded deeds were in existence.

This Court in the Adamson case further cited with approval Restatement of Law of Property, paragraph No. 476, page 2977, in considering particular items which would demonstrate when an appurtenance existed:

> In determining whether the circumstances under which a conveyance of land is made imply an easement, the following factors are important:
>
> * * *
>
> (g) The manner in which the land was used prior to its conveyance,

(h) The extent to which the manner of prior use was or might have been known to the parties.

In the instant case a total of five (5) witnesses were called to testify in the Court proceedings. Each of the witnesses testified that the water from Boulder Irrigation Company was used at all times to irrigate the homestead property.

The irrigation practice was commenced in about 1941 and was continued by the Plaintiff and her family after she occupied the property and while Defendant Anthony Coombs was residing with them (Tr.103, L 3, 4) and thereafter for a period of some ten years while Anthony Coombs resided on adjacent property. (Tr.129, L 15-25)

In fact, Defendant Anthony Coombs acknowledged the water use. However, he did claim that the actual land irrigated was approximately 1-1/2 acres instead of four acres. Cross-examination of Anthony Coombs concerning the irrigation practices conducted before and after Plaintiff took possession of the property begins at Tr. 130, L 7 and is as follows:

Q Now, you told us about an acre and a half was irrigated by your father on this particular property?

A Yes.

Q What part of the property did he irrigate?

A 99 feet west of the park fence is about where he irrigated, here (indicating).

Q Here?

A A little bit to the north there.

Q Into the north here?

A Yes.

Anthony Coombs concluded with an admission concerning the land which he admitted was irrigated with Boulder Irrigation water (Tr.131, L 2):

A I have no objection to irrigating any of that ground.

Q What type of crop was irrigated?

A Corn and potatoes.

The source of the water was established as water coming from the Boulder Irrigation system (Tr.108, L 2). It was also established that one share of Class "A" water stock irrigated approximately one acre of ground. (Tr.108, L 8-9; Tr.77, L 23; Tr.82, L22)

In the case of Brimm vs. Cache Valley Banking Company, (1954) 269 P2d 859, 2 U2d 93, this Court established that water represented by shares of stock in an irrigation company can be appurtenant to land and is transferred by the deed even though no description of the water was included:

> [1,2] Thus we conclude that in July, 1918, when Andrew Andersen conveyed the two-acre tract to his wife, Sophia, the trial court could find that there passed to her as an appurtenance to the land the water right which had been used on that land for many years, even though the water right was represented by shares of stock in the Irrigation Company, and even though no express mention of any water right was made in the deed to her.

In the Brimm case, this Court also analyzed the Utah statute dealing with this particular question as follows:

> [4] We think the effect of the 1943 amendment to Section 100-1-10, U.C.A. 1943 (now 73-1-10, U.C.A. 1953) which added the phrase, "in which case water shall not be deemed to be appurtenant to the land" was to establish a rebuttable presumption that a water right represented by shares of stock in a corporation did not pass to the grantee as an appurtenance to the land upon which the water right was used, but that the grantee could overcome such presumption if he could show by clear and convincing evidence that said water right was in fact appurtenant and that the grantor intended to transfer the water right with the land, even though no express mention of any water right was made in the deed.
>
> * * *
>
> But the amendment does not foreclose the water right from passing if the grantee can show such was the intention of the grantor. The amendment has the effect of placing the burden of proof on the party who alleges that despite the fact that the certificate of stock was not endorsed and delivered to the grantee, the water right represented by the certificate was as a matter of fact appurtenant to the land conveyed and that the grantor intended that it pass with the land.

At the commencement of the trial, counsel for the Plaintiff made an opening statement to apprise the Court of the claims of the Plaintiff, which included appurtenant water used on the property. Since the water right was a part of the land it was not necessary to amend pleadings in order to show the rights which were appurtenant to the land transferred.

Since the water rights passed to Elaine with the transfer of the property, Anthony did not reacquire any legal ownership claim by obstructing her water use. Therefore, the statute of limitations has no application.

## POINT II

### THE EVIDENCE IS CLEAR AND CONVINCING THAT E. H. COOMBS AND DICEY COOMBS AND ANTHONY COOMBS INTENDED TO TRANSFER APPURTENANT WATER AS PART OF THE LAND PURCHASE AGREEMENT, RECORDED WARRANTY DEED AND RECORDED QUITCLAIM DEED

Plaintiff acknowledges the burden of proving by clear and convincing evidence the two shares of Class "A" capital stock in Boulder Irrigation Company were appurtenant to the land purchased by her.

As previously discussed under Point I in Brimm vs. Cache Valley Banking Company, (supra) this Court has held that Section 73-1-10, U.C.A. 1953:

> was to establish a rebuttable presumption that a water right represented by shares of stock in a corporation did not pass to the grantee as an appurtenance to the land upon which the water right was used, but that the grantee could overcome such presumption if he could show by clear and convincing evidence that said water right was, in fact, appurtenant and that the grantor intended to transfer the water right with lands, even though no express mention of the water right was made in the deed.

There was no conflict in the evidence. Five witnesses were called, including the Appellant, Anthony Coombs. Each of the witnesses testified concerning the historic use of the water upon the property and that the property irrigated consisted of pasture land, garden and orchard, comprising of approximately four acres. The irrigation was commenced in 1941, was continued in 1964, the year Plaintiff purchased the property from her father and mother and from her brother, Appellant Anthony Coombs,

up to and including the calendar year of 1974.

All of the witnesses, with the exception of Anthony, testified that four acres of land were actually irrigated and used.[1]

Anthony testified concerning the use of the water but was of the opinion that nearer 1-1/2 acres were irrigated during the period 1941 through 1974, which included a ten-year period of use by the Plaintiff and her family before Anthony prevented further water use.

Larry Coombs, brother of both Plaintiff and of Appellant, Anthony Coombs, testified that all the property below the ditch was continuously irrigated. He lived on the property with his parents prior to the time it was purchased by the Plaintiff and was acquainted therewith. The property irrigated consisted of pasture land and an area where the family raised potatoes and corn. The area consisted of approximately three to four acres and the family always had sufficient water to mature what was grown (Tr.37; Tr.39; Tr.141).

The specific testimony of Appellant Anthony Coombs has been set forth under Point I of this Brief. However, the interesting portion of the testimony is that Anthony acknowledged the property west of the park fence was continually irrigated;

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[1]Witnesses:
Elaine Roundy (Tr.60, L 25; Tr.61 L 1-7)
Claudia Roundy (Tr.94, L 6-13)
Camille Roundy (Tr.99, L 6&15)
Larry Coombs (Tr.137, L 24; Tr.139, L 25; Tr.141, L 18-25)

however, he claims the area irrigated consisted of only one acre and a half (Tr.130) and further testified that crops of corn and potatoes were grown.

It would appear the Lower Court took into account the testimony of Anthony Coombs since the finding was made that one share of Class "A" capital stock should irrigate approximately one acre and two shares were appurtenant to the land instead of four shares as claimed by all of the other witnesses.

Anthony Coombs further made a very interesting and conclusive statement concerning the matter after he had identified certain property acknowledged to have been continually irrigated. He said: "I have no objection to irrigating any part of that ground" (Tr.131, L 2).

The use was to such an extent an ordinary observer would have seen that water naturally and necessarily belonged to the premises. The evidence offered as to the appurtenance of the water was clear and convincing.

There was no evidence before the Court that water was not historically and continuously used upon the property both before the purchase by the Plaintiff and for a period of ten years after the purchase by the Plaintiff. The only conflict in the evidence was the extent or number of acres irrigated. The District Court resolved that conflict in favor of the Appellants.

## POINT III

PLAINTIFF DID PROVIDE CLEAR AND CONVINCING EVIDENCE AS TO (1) THAT THE BOULDER IRRIGATION COMPANY WATER WAS APPURTENANT TO THE HOME GARDEN AREA; AND (2) THAT THE GRANTOR E. H. COOMBS INTENDED TO CONVEY APPURTENANT WATER OR WATER STOCK TO ROUNDYS.

The Point outlined for argument duplicates Point II and has been developed under Point I and Point II by Respondent.

Under Point I Respondent discussed in detail both the law and evidence concerning the appurtenance of the water stock to the home garden area and under Point II the clear and convincing evidence which was before the Court showing the appurtenancy as well as the fact that all of the parties intended to convey the water right to the Roundys.

In addition to the authorities heretofore cited, it should be noted this Court in the case of Hardinge Company, Inc., vs. Eimco Corporation, (1954) 266 P2d 494, 1 U2d 320 has held: "in the interpretation of contracts, the interpretation given by the parties themselves as shown by their acts will be adopted by the Court", which decision approved the rule stated in 3 Williston on Contracts, §623.

With regard to the conduct of the parties it is seen:

(1) E. H. Coombs and Dicey Coombs executed a Warranty Deed granting their entire interest in all of their property to Anthony Coombs, a single man, on the 1st day of June, 1962. The deed included all of the water stock owned by the grantors as well as the six-acre homesite. (See Exhibit #9)

(2) E. H. Coombs remained in possession of the property until it was sold to Elaine Roundy in the year of 1964. (Tr.47, L 18-20) His irrigation practices on the homesite property continued in the same historically-established manner.

(3) Elaine Roundy and her family took possession of the six-acre homesite in June of 1964 after executing a Purchase Contract and having deeds executed by Anthony and her parents. The same irrigation practices continued thereafter through the calendar year of 1974.

(4) Neither the original contract of Anthony Coombs of June 1, 1962 nor any of the original instruments placed in escrow was ever modified, amended, or changed as intended by the parties.. Anthony Coombs acquired possession of the Warranty Deed (Exhibit #9) which was recorded July 12, 1971 and the water stock was transferred into his name. Even though the title transfer was made, Elaine Roundy and her family continued to irrigate the same home garden area in the established manner.

Under the outlined circumstances and those cited throughout this brief, it is clear the interpretation of the contract given by all of the parties themselves as shown by their acts was that water stock from the Boulder Irrigation Company was appurtenant to the land sold.

## CONCLUSION

We respectfully submit that on the 15th day of June, 1964, E. H. Coombs and Dicey Coombs executed a Warranty Deed (Exhibit #6) for the conveyance of a six-acre homesite in

Boulder, Utah to Elaine Roundy and Uvon Roundy, which property included an appurtenant water right consisting of shares of capital stock of the Boulder Irrigation Company. Further that on the same day Anthony Coombs executed a Quitclaim Deed intending to convey the same six-acre homesite tract and appurtenant rights, including shares of capital stock of the Boulder Irrigation Company.

The appurtenancy of the water and intention of all of the parties was demonstrated by the manner in which the land was used prior to the execution of the conveyance. It was further demonstrated by the manner and use of the property for years following the execution of the conveyance.

The evidence of such appurtenancy and intention of the parties is clear and convincing that the water stock in question was appurtenant to the land and a part of the sales transaction.

The decision of the Trial Court should be affirmed.

Respectfully submitted,

OLSEN AND CHAMBERLAIN

By T. R. Olsen
Tex R. Olsen

ACKNOWLEDGMENT OF SERVICE

SERVED two (2) copies of the foregoing Brief of Respondent upon Defendants-Appellants' attorney, Mr. Norman H. Jackson, by delivering to his office at 151 North Main Street, Richfield, Utah, on this 25th day of June, 1982.

T. R. Olsen