

1971

Mary Harding v. Frank Bohman : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY HARDING,
Plaintiff and Appellant,

vs.

FRANK BOHMAN,
Defendant and Respondent.

Case No.
12475

APPELLANT'S BRIEF

Appeal from a Judgment of the Second Judicial District
Court in and for Morgan County, Utah
Honorable Ronald O. Hyde, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MARY HARDING,
Plaintiff and Appellant,

vs.

FRANK BOHMAN,
Defendant and Respondent.

Case No.
12475

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the plaintiff claiming a right-of-way through the land of the defendant, which claim is based on a public dedication by use or a private right-of-way acquired by prescriptive use and pursuant to the laws of the State of Utah. The Second Judicial District Court in and for Morgan County in a hearing which took place on the 14th day of December, 1970, the Honorable Ronald O. Hyde, Judge, presiding, in a memorandum decision and judgment ruled that the plaintiff had failed to establish that the road in question had been dedicated by public use and the Court ignored

and failed to rule on the other questions raised and alleged by the plaintiff-appellant.

RELIEF SOUGHT ON APPEAL

The plaintiff-appellant seeks a reversal of the trial court's decision as to the one issue decided by the Court and that in any event the case be remanded to the lower court with instructions to grant the relief prayed for in the complaint on any one of the grounds alleged in said complaint.

STATEMENT OF FACTS

Dry Hollow Road is located in Morgan County, Utah. It runs in a general easterly direction through property owned by defendant-respondent (hereinafter designated as "respondent"), and thereafter through property belonging to plaintiff-appellant (hereinafter designated as "appellant"). (T: 4.5, Exhs. A. B. 17). Among other things, it has been used to maintain a spring in the East Half of the Southwest Quarter of Section 33, Township 5 North, Range 2 East of the Salt Lake Meridian, and for access for use of irrigation waters arising in what is known as Dry Creek. The water right of appellant's predecessor in interest to use the waters of Dry Creek, as well as the excess water of the aforementioned spring, dates back to the year 1866. (T: 25, 35, Exh. C (page 28, rt. #189)).

Mr. John L. Young, now 75 years of age, remembers Dry Hollow Road as being in existence since the

time he was 10 years old, or a period of 65 years. He considered it a public road in use by deer hunters "and that" made it such. "There was always travel up that way." (Sheepmen and deer hunters.) There was no restriction on this activity "until later years." For a period of 50 or 60 years "there was nobody stopped them from going there." (T: 75, 76, 77, 78).

On the 9th day of February, 1917, respondent's predecessors in interest entered into a "Water Deed and Agreement" with the "Board of Education of Morgan County, Utah," under the terms of which respondent's predecessors in interest conveyed and warranted to the School Board "all their right, title and interest in and to the water" of the above mentioned spring. In addition to the grant of water, the "Water Deed and Agreement" recites as follows:

"also a perpetual right-of-way and easement one rod in width over and across the lands owned by said parties of the second part hereinbefore mentioned, for the purpose of laying a pipe line and maintaining the same to convey the waters of said spring, and for ingress and egress to the said party of the first part, agents, employees, and contractors for the purpose of laying said pipe line and making repairs, inspection, maintenance, and improvement of the same, the said use to be at as little damage as possible to the said parties of the second part, the said right of way and easement to be in a westerly direction from said spring and along the course of stakes heretofore staked and laid out by Bostaph and Roach, engineers, one half of said right of way and easement to be on each side of said pipelines

as finally laid, and the parties of the second part agree to execute a Deed for same containing a particular description thereof to be as furnished by the said Bosteph and Roach."

In consideration of said conveyance, the Board of Education granted the respondent's predecessors in interest two connections to the pipe line. (Exh. 1).

In the year 1920, the School Board constructed a roadway along the right-of-way conveyed to it by respondent's predecessors in interest. (T: 8). In 1937, the School Board, by warranty deed, conveyed its water rights in the above mentioned spring, and all appurtenances, to the Peterson Corporation of the Church of Jesus Christ of Latter-Day Saints. This warranty deed contains the following language:

"To be transferred under the following conditions: that the property described herein be permanently maintained intact and used for public benefit and to remain nontransferrable in part or whole to private enterprise and that a reasonable effort be made by the grantee to maintain and use the property for the best interest of the community." (T: 11, 12, Exh. 2).

Dry Hollow Road has been used by deer hunters, tree cutters, irrigators, fence builders, farmers, neckers, sheepmen, and the general public from before 1900 until 1964 without restriction. (T: 25, 34, 35, 39, 40, 54, 57, 61, 63, 67, 69, 76, 77, 78, 79, 97, 99, 101, 102, 103, 113). In 1961, at the time the freeway was under construction, the State of Utah fenced off the property line where Dry

Hollow Road begins and proceeds across respondent's land. The gates in this fence were installed by the State Highway Department. (T: 6).

Until 1953, there was no lock on Dry Hollow Road entrance to respondent's land from the public road. In 1953, respondent put a lock on the gate leading into appellant's land, and the lock was there for 4 years. However, appellant's predecessors in interest had a key to the lock. (T: 123, 128, 129).

One person paid respondent's predecessor in interest \$20.00 for taking his sheep up the roadway, but this was for damage the sheep did to the surrounding pasture, and not for the use of the road. (T: 91, 93).

In July of 1964, respondent paid the School Board the sum of \$10.00 for a Quit Claim Deed to the property the School Board had previously conveyed by warranty deed (in 1937) to the Peterson Corporation of the Church of Jesus Christ of Latter-Day Saints, and which contained the above cited recitations. Thereafter, respondent refused to permit appellant and appellant's predecessors in interest to use the Dry Hollow Road. (T: 115, Exh. 3).

STATEMENT OF ISSUES

The Legislature reenacted Section 27-1-2, now Section 27-12-89, UTAH CODE ANNOTATED, 1953, as amended, which states as follows:

"Public use constituting dedication — A highway shall be deemed to have been dedicated and

abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

One of the basic issues before the Court in this case is the application of this statute to the facts as shown in the record and as this statute has been interpreted by this Court in other cases heretofore decided involving an interpretation of this statute.

There is evidence in the record that there was, in fact, a public dedication of the highway in question and that the provisions of Section 27-1-3, UTAH CODE ANNOTATED, 1953, as amended, should have been considered and applied by the lower court.

The court below made no decision as to whether or not the plaintiff-appellant had acquired a prescriptive right to the use of the defendant-respondent's thoroughfare in question.

The court below made no reference or mention to the provisions of Section 73-1-15, UTAH CODE ANNOTATED, as amended, which allows the plaintiff-respondent a right-of-way through the land of the defendant-respondent to maintain her water right, which right is clearly shown in the record.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING THAT DRY HOLLOW ROAD IS NOT A PUBLIC ROAD BECAUSE THE EVIDENCE CLEARLY ESTABLISHES (A) THAT DRY HOLLOW ROAD HAS BEEN USED BY THE PUBLIC FOR OVER SIXTY YEARS WITH THE KNOWLEDGE AND IMPLIED ACQUIESCENCE OF THE OWNERS OF THE FEE TITLE OF THE LAND OVER WHICH IT PASSES, AND (B) DRY HOLLOW ROAD WAS DEDICATED TO PUBLIC USE BY A RECORDED PUBLIC DOCUMENT EXECUTED BY THE SCHOOL BOARD OF MORGAN COUNTY, UTAH.

The record in this case clearly indicates that for over sixty years Dry Hollow Road was used at will by hunters, sheep herders, fence builders, farmers and the general public. This use was with the knowledge of the owners of the land over which it passed and without objection on their part (see Statement of Facts).

(A) Section 27-12-89, UTAH CODE ANNOTATED, 1953, as amended states as follows:

"A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

The Utah Supreme Court has had many occasions to construe the above cited statute or its predecessors which were worded identically. In an early Utah case reported in 16 UTAH 240; 51 P. 980, Whitaker vs. Ferguson, the Court defined a "thoroughfare" and the conditions under which it became public. The Court said:

"... A thoroughfare is a place or way through which there is passing or travel. It becomes a 'public thoroughfare' when the public has a general right of passage. Under this statute the highway, even though it be over privately owned ground, will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of ten years ..."

In the case of Clark vs. Erikson, 9 UTAH 2nd 212; 341 P. 2nd 424, (July, 1959) the Court stated:

"There was testimony by witnesses, some of whom could remember back to 1890, that Erikson Lane had been used by the general public, either walking or riding in wagons and later in automobiles. The road was being constantly used by people either to go to church or to fish in Little Cottonwood Creek through which the lane passed, or as a short cut north between 59th South and Vine Street. There was no evidence that permission was sought or given by anyone to use this short cut. . . . This evidence is sufficient to establish a dedication of the road by user under the provisions of Section 27-1-2, UTAH CODE ANNOTATED, 1953, the evidence being uncontradicted that Erikson Lane was being used as a highway by the public generally for more than ten years."

In another early case, Schettler vs. Lynch, 23 UTAH 305; 64 P. 955, the Court held that "land having been once dedicated by the owners of the soil as a highway, and having been accepted by the public, all subsequent grantees of the abutting lands are bound by such dedication, and have no right to obstruct any portion of the street."

(B) On February 9, 1917, (after Dry Hollow Road had been used by the public for over twenty years) respondent's predecessors in interest conveyed Dry Hollow Road to the Board of Education of Morgan County, Utah. (See exh. 1). In the year 1920 the Board of Education, which is a body politic of the State of Utah, constructed a road over the Dry Hollow Thoroughfare. (T:) In 1937, some twenty years after its purchase of the Dry Hollow Road and some seventeen years after the construction work done on the road, the Board of Education deeded the road to the Peterson Corporation of the Church of Jesus Christ of Latter-Day Saints. We repeat part of the wording in this deed for the convenience of the Court: ". . . to be transferred under the following conditions: That the property described herein be permanently maintained intact and used for public benefit and to remain non-transferable in part or whole to private enterprise and that a reasonable effort be made by the grantee to maintain and use the property for the best interest of the community." (Exh. 2, 11, 12).

After the dedication contained in this deed, Dry Hollow Road was used for various purposes by the general public without objection on the part of the owners of the fee (see Statement of Facts). In July of 1964 (some 27 years after the dedication to public use above cited), respondent paid the school board the sum of \$10 for a quit-claim deed, in favor of respondent, quit-claiming, among other things, the right-of-way represented by Dry Hollow Road. Section 27-12-90 (formerly 27-1-3) UTAH CODE ANNOTATED, 1953, as amended, states as follows:

"All highways, once established, must continue to be highways until abandoned by order of the Board of County Commissioners of the county in which they are situated, or other competent authority."

Thus Dry Hollow Road by use and by acquiescence of the owners of the fee, has been dedicated to public use by implication for a period of over sixty years. Furthermore, it has specifically been dedicated to public use by a recorded deed executed by a public body for a period of some thirty years. An attempt to void this public dedication by quit-claim deed is nullity.

POINT II

THE TRIAL COURT ERRED IN FAILING TO RULE ON THE ISSUE OF PLAINTIFF-APPELLANT'S CLAIM TO A PRESCRIPTIVE EASEMENT TO THE ROAD IN QUESTION AS ALLEGED IN HER COMPLAINT AND AS SHOWN BY HER EVIDENCE IN THE RECORD.

The Court's attention is called to paragraphs 2 and 4 of the prayer of plaintiff's complaint in which the plaintiff-appellant asks the Court to declare that the plaintiff "has the right to use the aforesaid right-of-way for ingress and egress to the above described property," and "for an order of the Court enjoining and restraining the defendant from interfering with plaintiff's use of said right-of-way in obtaining ingress and egress from said real property."

The Supreme Court of the State of Utah in the case of Morris vs. Blunt, et al, 49 UTAH 243, 161 P.

1127, determined that "the right by prescription can only arise by adverse use and enjoyment under claim of right uninterrupted and continuous for a period of 20 years."

This case established the basic prescriptive period for obtaining a right-of-way by adverse use in the State of Utah and the Court goes on to say: "Under the well-established rule, the use, in order that it may ripen into a prescriptive title, must, in any case, not only be adverse and continuous, and under claim of right for a period of twenty years, but it must be uninterrupted throughout that period."

Applying the ruling of the Court to the facts in the instant case, the Court's attention is called to the fact that the record clearly discloses that the plaintiff-appellant and her predecessors in interest used the highway or thoroughfare through the property of the defendant-respondent uninterruptedly for more than twenty years under a claim of right, which was based on the facts that there had been a written public dedication of the highway or thoroughfare in question on which the plaintiff and her predecessors in interest had relied and, furthermore, the record discloses that plaintiff-appellant and her predecessors in interest all took the position that this was a public thoroughfare dedicated by reason of the general use of the public over a period of time in excess of sixty years and that in any event, plaintiff-appellant and her predecessors in interest had a right to use the road in question to maintain their water rights. Certainly, the record is clear that the claim to the use of

the roadway in question was based on the rights as heretofore set forth and shown in the record.

The record further indicates that the use by the plaintiff-appellant was uninterrupted throughout the prescriptive period of twenty years. There is evidence that a fence and a gate was erected but that the plaintiff-appellant's predecessor in interest was given a key to the lock on the gate so that at no time was the plaintiff-appellant or her predecessor in interest denied the right to the use of the road in question. The Court's attention is further called to the fact that the present fence and gate, which the defendant-respondent locked in 1964, and which precipitated this lawsuit, was not erected by the defendant-respondent but rather was placed there by the State Highway Department to protect the state highway right-of-way and prevent livestock from entering thereon from the private property adjacent to the freeway right-of-way.

On the basis of the law and the facts in the record, the plaintiff-appellant had acquired a prescriptive right to the use of the property of the defendant-respondent for the limited purpose of ingress and egress from the state highway to her property.

POINT III

THE TRIAL COURT ERRED IN NOT FINDING FROM THE FACTS IN THE RECORD THAT PLAINTIFF-APPELLANT HAD ACQUIRED A RIGHT-OF-WAY THROUGH DEFENDANT-RESPONDENT'S LAND FOR THE PURPOSE OF MAINTAINING HER WATER RIGHT, PURSUANT TO

THE PROVISIONS OF SECTION 73-1-15, UTAH CODE ANNOTATED, 1953, AS AMENDED.

The Legislature of this state many years ago realized that water and proper access to the water at its point of diversion created many feuding "Martin and McCoy" situations and therefore wisely enacted Section 73-1-15 UTAH CODE ANNOTATED, 1953, as amended, imposing criminal penalties for a violation of a person's right-of-way to maintain his rights to properly care for his water along the water course up to the point of diversion. Said section reads as follows:

"Obstructing ditches or right-of-way — Penalty. — Whenever any person has a right-of-way for any canal or other water course it shall be unlawful for any person to place or maintain in place any obstruction, by fence or otherwise, along or across such canal or water course, without providing gates sufficient for the passage of the owner of such canal or water course. Any person violating the provisions of this section is guilty of a misdemeanor."

The record, as hereofore reiterated to this Court in the Statement of Facts, clearly shows that plaintiff-appellant and her predecessors in interest had a water right in the Bohman Springs and that pursuant to this right she and her predecessors in interest had continuously, for over twenty years, used the road in question for the purpose of maintaining the water right and the water course and that at no time prior to 1964 when the defendant-respondent placed a lock on the state highway right-of-way gate was the plaintiff-appellant and her predecessors in interest ever denied a right to use the

road in question for the purpose of maintaining the water course of the water to which they were entitled to use out of the Bohman Springs.

While there is no evidence in the record that plaintiff-appellant has invoked the provisions of said Section 73-1-15, this Court can take judicial notice of the laws of the State of Utah as could the lower court and can therefore rule that plaintiff-appellant is entitled under the laws of this state to the protection of her rights as set forth in the above quoted section of our code.

CONCLUSION

While the law hesitates placing a burden upon private property, either for a public use or a private use, the law does clearly recognize both by statute and case law that such rights can be acquired. The courts of this state have indicated that where a thoroughfare has been used continuously and openly by the general public for a long period of time, sixty years or more, there arises a strong presumption that such thoroughfare has been dedicated by public use. Particularly is this true where there has been a written public dedication and acquiescence over a long period of time by the owner of the land over which the road in question runs and thereby people have relied upon such facts and have used the roadway openly, notoriously and with a claim of right over such period of time.

Furthermore, a private individual can acquire a prescriptive right through continuous, uninterrupted use

under claim of right adverse to the rights of the owner of the land over which the roadway in question runs and plaintiff-appellant respectfully submits that the record clearly shows that she and her predecessors in interest have acquired such a prescriptive right and the court below should have ruled on this issue. In any event, the plaintiff-appellant under the law has a right to maintain the water course in the water right which she has in the Bohman Springs and therefore is entitled to the relief prayed for in her complaint under the provisions of Section 73-1-15, UTAH CODE ANNOTATED, 1953, as amended.

Respectfully submitted,

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