

1971

Mary Harding v. Frank Bohman : Respondent's Brief

Utah Supreme Court

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

MARY HARDING,

*Plaintiff and Appellant,*

FRANK BOHMAN,

*Defendant and Respondent.*

} Case  
No.  
12475

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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**RESPONDENT'S BRIEF**

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**FILED**

JUL 16 1971

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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

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This action is an appeal from a decision of the Honorable Ronald O. Hyde from a trial occurring December 14, 1970, in Morgan County, Utah.

RELIEF SOUGHT ON APPEAL

The Defendant requests that the appeal be denied and that the judgment of the trial court be sustained.

STATEMENT OF FACTS

The Plaintiff has not stated the facts in the manner required by law, i. e., most favorable to the decision. Further, she has misinterpreted facts so that a complete statement is required.

The Defendant, who is a life-long resident of Morgan County and who has lived in the disputed area all his life (Tr. 4-5), purchased the ground in dispute in 1964 (Tr. 5). It was fenced and a gate was established at the road's edge subsequent to the completion of the Interstate highway.

The Defendant purchased the ground from Walter Carrigan (Tr. 89). Prior to that it had been in possession of Carrigan's father and brother at all times material hereto (Tr. 89).

The Plaintiff's claim of title came through Producers Livestock Corporation (Tr. 52), who acquired it from the Plaintiff's father in 1966 (Tr. 52). The Plaintiff's father acquired it in 1947 from Alma Grace Harrel (Ex. 4). The deed conveyed neither a right-of-way nor water rights to the Plaintiff's predecessor in interest.

The two parcels of ground are adjacent (Ex. A)

In 1917 (Ex. 1), the Defendant's father conveyed an interest plus an easement in Bohman Springs to the Board of Education, as did the Carrigans and the Ogdens (Ex. 1). The grant to the School Board was 7.20 acres. There was a school on it. Thereafter the School Board conveyed the ground to the Petersen Ward in 1937 (Ex. 2). The Interstate took all of the 7.20 acres (Tr. 14). There remained only the easement to the pipeline and the Petersen Ward conveyed that to the Defendant in 1964, because the ward could not use it (Tr. 104).

The so-called road was put in by the Board of Education about 1920 (Tr. 7, 94, 97). The first pipe was wooden (Tr. 97). In 1932-33, the School Board replaced

the wooden pipe with metal (Tr. 97, 108). Prior to this there was no roadway except onto the Carrigan property (Tr. 98). When the School Board started "it wasn't much of a road," they took a plow up and chopped a little brush (Tr. 98). It was later improved by a sheepman, Swan, in 1936 (Tr. 109), who agreed to fix the road in exchange for the right to go through (Tr. 90).

In the memory of the Defendant's predecessor in interest the way was used by two sheepman, George Scheberry and George Swan. When they went through the property, they always asked permission (Tr. 89). George Swan paid \$20.00 for going through, even if he didn't pasture (Tr. 93).

Deer hunters did go through the area (Tr. 91); however, there was always a fence and a wire gate (Tr. 93), as well as a gate between the Defendant's property and the property of the Plaintiff (Tr. 91), which gates were left shut (Tr. 91).

Swan remained on the ground in back until 1952 and was the only one there (Tr. 118-119).

Between 1953 and 1957, the ground of the plaintiff was used for cattle (Tr. 120) and the gates were locked (Tr. 123). Between 1957 and 1964 when the Defendant bought the ground, Ithurbode used the road for sheep but left the gate locked and a barbed gate in place (Tr. 123). The Plaintiff admitted that the gate was locked between 1953-1957, because her father admitted he had a key (Tr. 128).

The Plaintiff's own witness verified that there were always gates in place, going into the Carrigan property

(Defendant) and on the other side of the Carrigan property going to the Morgan (Plaintiff's) property (Tr. 85).

Finally, Harry Wilkinson a Morgan County Commissioner, testified that he knew of no public money being expended upon the area (Tr. 107).

ARGUMENT

POINT I

THE COURT DID NOT ERR IN HOLDING THAT THERE WAS NO PUBLIC ROAD EITHER (A) BY PUBLIC USE FOR SIXTY YEARS OR (B) BY A RECORD PUBLIC DOCUMENT.

(A) The record of the facts as heretofore set forth demonstrates conclusively that there was no area known as Dry Hollow Road, except as was invented by the ingenuity of Counsel and the Plaintiff.

Section 27-12-89 UTAH CODE ANNOTATED, 1953 states:

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

What constitutes dedication and abandonment to the use of the public has been interpreted by a number of Utah decisions.

In *Brown vs. the Oregon Shortline Railroad*, 36 Utah 257, 102 Pacific 740, the original owner of the

property in question had deeded various lots from an original piece. In addition, the grantor had deeded a right-of-way across his property to the grantees, their heirs and assigns, which was in fact, the only access to the property of the grantees. The strip used for ingress and egress was some 330 feet long and called Morris Avenue. The plaintiff grantees brought an action to have the so-called easement declared a public way. The court denied this application, saying in part as follows:

“Dedication rests primarily on the intention, expressed or implied, *Whitesides vs. Green*, 13 Utah 341, 44 Pacific 1032. There is nothing, either in the deeds or in the acts of the deceased, to show an intention, either expressed or implied upon his part to dedicate this strip to public use.” The court concluded, saying:

“The fact that anyone who has any social or business relations with either of the occupants of any of the parcels abutting upon the strip could pass over it did not make it a public--distinguished from a private--easement.”

The *Brown* decision has not been overruled and has been cited by many jurisdictions as authority for the proposition that there must be a dedication, either expressed or implied, by the property owner for a period of ten years or more before it can be declared to be a public highway.

Similarly, in *Schettler vs. Lynch*, 23 Utah 305, 64 Pacific 955, the court held that the dedication of land for highway purposes may either be express--as where

the owner manifests his purpose by a grant evidenced by writing-- or implied--where acts or conduct of the owner clearly manifest his intention to devote land to public use. The court did also find that the dedication of land as highway may be inferred by the public's long continued use of it, as such, with the knowledge of and without the objection of the owner.

Again in *Culmer vs. Salt Lake City*, 27 Utah 252, 75 Pacific 620, the court held that there was no dedication shown under this section, where it appeared that an alleyway, which had been more or less used by the public at will for a number of years, had, from time to time, been closed by abutting owners, who at all times exercised control over it.

In the case at bar it cannot be disputed that the property of the Defendant was fenced, not only on the highway but entirely surrounding his property, and that it had been so fenced for a great number of years. Further, it cannot be denied that there was a gate in place, not only on the roadway but upon the entrance to the Plaintiff's property and that for a great number of years the same gate had been locked. Certainly, this cannot be held to demonstrate a lack of control of an intent to dedicate the public highway.

The Supreme Court of the State of Utah had a somewhat different fact situation in *Morris vs. Blunt*, 49 Utah 243, 161 Pacific 1127. The plaintiff in that case was the owner of land and brought an action to restrain the defendants from traveling across it. The defendants admitted that the Plaintiffs did, in fact, own

the land but claimed a right-of-way across it and for the public, based upon the following facts:

The original owner deeded to his grantee, who was the defendant's predecessor in interest, a right-of-way. In addition, some of the people who lived west of the property traveled across the right-of-way frequently. The road or right-of-way was open without gates. There was no sign to the effect that there was no trespassing and that the roadway was a private roadway. Occupants and visitors of the occupants so deeded with the right-of-way traveled this road to and from the house. A canal ran along the right-of-way and was serviced from the right-of-way and the workers used the same to clean and maintain the canal. Subsequently, the plaintiff placed a gate across the fence and halted traffic, preventing them from using this particular road. The defendants claimed that the road had become a public highway from long and continued use. Others claimed that by reason of the right-of-way this became pertinent to the land conveyed and indeed became a public highway.

The Supreme Court denied all of the defendants' contentions, sustained the plaintiff, and held that the same was not a public right-of-way or public highway, even though used by workers cleaning the canal, by a few members of the public going to and from their homes, and by use of the homeowner to whom the right-of-way was given, saying:

"A dedication rests primarily in the intent of the owner. There must be a concession intentionally made by him which may be proved

by declaration or by acts or may be inferred from the circumstances. ***

It must, however, appear that he knew of the use by the public and intended to grant the right-of-way to the public. No mormal acceptance by any public officer is necessary, but there must be the actual use by the public."

Taking the present evidence, it is apparent that the only persons who used the right-of-way were some sheepmen who did so with permission of the owner, some people working on behalf of either the School Board or the Petersen Ward who repaired and maintained the pipeline and who had permission to do so, together with certain deer hunters and predecessors of the Plaintiff, who did so without the knowledge and/or consent of the owner, the Defendant or his predecessors, except for one period of time when the Plaintiff's father may have had a key to one of the locked gates and as a consequence he must have been held to have used it by permission.

It is difficult to determine during what ten-year period the Plaintiff contends that there were gates, but no locks and by what theory the Plaintiff contends that these acts amounted to a desire on the part of the Defendant to dedicate a public thoroughfare.

The court in *Morris vs. Blunt* further held that there was no way, that a private right-of-way can be converted into a public right-of-way, that the public as such must use the road and the use under the claim of a private right is not sufficient, stating:

“If the thoroughfare is laid out or used as a private way, its use, however long, does not make it a public way, and the mere fact that the public also makes use of it without objection from the owner of the ground will not make it a public way. Before it becomes public in character, the owner of the ground must consent to the change.”

See also *Gilmer vs. Carter*, 15 Utah 2d 280, 390 Pacific 2d, 426.

In another interesting case, somewhat related to this particular problem, is *Thimpson vs. Nelsen*, 2 Utah 2d, 340, 273 Pacific 2d, 720, wherein considering the evidence to support the contention that a road was not a public road, the court noted that the land in question sought to be declared to be a public highway led to no place of public interest. It was a dead end and was used only for the purpose of delivering merchandise and supplies to a building, not as a private road to private property.

Here, the so-called right-of-way or public road led into grounds used only for hunting or grazing of sheep.

The latest decision is that of *Petersen vs. Combe*, 20 Utah 2d, 376, 438 Pacific 2d, 545. This, again, was a case where the plaintiff sought to have a county road declared a public highway by public use for ten years pursuant to 27-12-89 U. C. A. 1953. In reversing the trial court decision, the court posed the following question:

“Was there sufficient evidence by competent testimony of witnesses who were not self-serving, to show by clear and convincing that the public

generally--not just a few having their own special and private interest in the road--had used the road continuously for ten years?" We think that there was not such quantity or quality adduced. Furthermore, we believe the testimony of plaintiff's own witness defeated the plaintiff's own cause, upon the simple principle that "the testimony of one's own witness is no stronger than its weakest link."

The above quotation fits at bar most admirably; except for family members of the Plaintiff, no witnesses in reality supported the Plaintiff. Indeed, the testimony of DeVerl Lamb and particularly John L. Young demonstrated that the ground was never a public way, that it had never been open to the public. These were the witnesses produced by the Plaintiff.

(B) The Plaintiff now contends the dedication to public use by public document. This does not conform to the facts. It is quite true that the Board of Education of Morgan County received a deed for 7.20 acres (Ex. 1). It is further true that the Board of Education conveyed that 7.20 acres to the Petersen Corporation of the Church of Jesus Christ of Latter Day Saints (Ex. 2). It is also true that Exhibits 1 and 2 included an easement for the purpose of transporting water from Bohman Springs to the 7.20 acres. Finally, it is true that the State of Utah took all of the 7.20 acres of ground for the purpose of constructing an Interstate highway. At that time all the Petersen Ward had remaining was an easement to maintain a waterline to property no longer in existence. For that reason, the right-of-way

was conveyed to the Defendant herein by quit claim deed (Ex. 3).

The trial court, in its memorandum decision, said:

“The right-of-way for the utilization of the pipeline was by grant to the School Board. The use of the road was to maintain their pipeline. The property served by the pipeline was transferred by the School Board to the Church, together with the deed that it would be used for public’s purpose. The “public’s purposes” phrase would be for the seven acres and not to any easement for the utilization of the pipeline. The School Board or their successors in title using the roadway for the maintenance of their pipeline would be in conformance with their grant and not of public use.”

An examination of the complaint of the Plaintiff does not set forth any claim predicated upon a public dedication or upon any written instrument. The Defendant posed interrogatives to the Plaintiff on May 23rd, 1969. Number two:

“State whether on not said right-of-way is based upon any public document.” Number Three: “State whether or not said right-of-way or claim thereto is based upon any written document. If so, state the time, place of execution, and parties signatory thereto.”

In July of 1969, the Plaintiff, under oath, gave the following answers: “Two: “Said right-of-way is not based upon any public document.” Three: “Said

right-of-way is not based upon any written document."

The Plaintiffs herein did not object to the memorandum decision as being in error relative to their claim of a grant predicated upon a written document. Their contention now appears for the first time before this court. It is neither timely nor correct factually. An easement to maintain a pipeline, even if valid in the public, would be only for the purpose of maintaining a non-existent, unused pipeline and would afford the Plaintiff herein neither comfort nor assistance.

Such an easement, even if present, could not be expanded, nor does the Plaintiff cite any facts or authority in support of their position.

POINT II

THE TRIAL COURT DID NOT ERR IN FAILING TO RULE UPON EACH OF THE PRESCRIPTIVE EASEMENT IN FAVOR OF THE PLAINTIFF.

It is well established throughout this country that a prescriptive right can only arise by adverse use or enjoyment under a claim of right uninterrupted and continuous for a period of 20 years. *Morris vs. Blunt* supra.

The Plaintiff did not claim and no evidence was adduced to show any adverse use or enjoyment under a claim of right prior to the time that the father of the Plaintiff, Jerry Morgan, purchased ground now held by the Plaintiff in 1947. The Defendant purchased ground owned by him in 1964 (Tr. 5). He has prevented people from using that road since that time (Tr. 6). Even if one ignored the uncontroverted testimony that in 1953, '54, '55, and '56 all of the gates between the proper-

ties were locked (Tr. 120), one would only have a period of seventeen years.

Counselor attempts to get around that by saying that the Plaintiff's predecessor in interest was given a key, and, as a result, was not denied the right or permission to go through. He failed to state how this comes within his own definition of "adverse use and enjoyment, uninterrupted and continuous."

POINT III

*THE TRIAL COURT DID NOT ERR IN DECLIN-
ING TO FIND THAT THE PLAINTIFF HAD AC-
QUIRED A RIGH-OF-WAY FOR THE PURPOSE OF
MAINTAINING A WATER RIGHT.*

The Plaintiff's predecessor in interest, Jerry Morgan, claimed to have acquired an interest in water right number 270, Exhibit C. This exhibit provides on its face that "this application has not yet been approved by the state engineer this eighth day of January 1937." No evidence was introduced tending to show that the application for water right 270 had ever been approved or that it had, in fact, been transferred to the Plaintiff or any of her predecessors in interest. The deed to the Plaintiff's father, Jerry Morgan, (Defendant's Exhibit 4, which was filed for record in Volume Q of Deeds, page 455 of the office of the Recorder of Morgan County-

Tr. 44) does not purport to grant a conveyance of any water right, either to the Plaintiff's predecessor in in-

terest, either in the Bohman Springs or any other water right. No record was introduced from the office of the state engineer showing a decreed right to the use of any water from Bohman Springs or any other source vested in the Plaintiff or in any of the Plaintiff's predecessors in interest. The Plaintiff, therefore, showed no interest in any water right predicated upon any public document.

The last sentence of 73-3-1, UTAH CODE ANNOTATED, 1953, which was adopted in 1939, and which amended 73-3-1, provides "no right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."

The Plaintiff did not contend either in pleading or by the evidence that she had acquired the right to water by adverse possession prior to 1939 and no evidence was introduced which would tend to support such a contention.

No one would deny that the Plaintiff is entitled under the laws of the state to the protection of her rights; however, she produced no evidence to show that she had any interest in any water right. She did not complain in her complaint that she had any water right or any right-of-way predicated thereon or necessary for the use thereof. She produced no evidence, documentary or otherwise, showing a water right, and there was no contention in the evidence that she had acquired a right by adverse possession. It is true that her father said he had used some water commencing with the year 1947; he could not, however, produce any deed or documenta-

tion as to his right and made no claim by adverse usage, which, of course, would have been spurious in view of the fact that he did not acquire the real property until 1947, some eight years after the enactment of the amendment to 73-3-1 UTAH CODE ANNOTATED, 1953.

CONCLUSION

The Plaintiff below appellant herein has filed her appeal based upon three grounds. It is submitted that she failed to sustain her burden of proof by clear and convincing evidence on the first ground and has produced neither fact nor law to substantiate her position on the second and third grounds. The Plaintiff's appeal should be dismissed with costs to the Defendant.

Respectfully submitted,

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