

1990

Lary Little v. Greene and Weed Investments, Leon
S. Lippincott, Caroline Lippincott, and Dee C.
Hansen : Brief in Opposition to Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

E. J. Skeen; Keith S. Christensen; Attorneys for Defendants.

John W. Anderson; Clyde, Pratt & Snow; Attorney for Appellant.

Recommended Citation

Legal Brief, *Little v. Greene and Weed Investments*, No. 900451.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/3208

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

90 0451

Supreme Court of Utah
Case No. 900451

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|--------------------------------|---|-----------------------|
| LARRY LITTLE, |) | |
| |) | |
| Plaintiff and Appellant, |) | |
| |) | Utah Court of Appeals |
| vs. |) | Case No. 890177-CA |
| |) | |
| GREENE & WEED INVESTMENTS, |) | |
| LEON S. LIPPINCOTT, CAROLINE |) | |
| LIPPINCOTT, and DEE C. HANSEN, |) | Supreme Court of Utah |
| State Engineer of the State of |) | Case No. 900451 |
| Utah. |) | |
| |) | |
| Defendants and Respondents.) |) | |

BRIEF IN OPPOSITION
TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

Appeal from the Judgment of the Sixth District Court
In and For Kane County
Honorable Don V. Tibbs, Judge

E. J. SKEEN
536 East 400 South
Salt Lake City, Utah 84102

Attorney for Defendants/Respondents
Leon S. and Caroline Lippincott

KEITH S. CHRISTENSEN
230 South 500 East, Suite 160
Salt Lake City, Utah 84102

Attorney for Defendant/Respondent
Greene & Weed Investments

CLYDE, PRATT & SNOW
JOHN W. ANDERSON
77 West 200 South, Suite 200
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Table of Cases and Authorities Cited | ii |
| Preliminary Statement | 1 |
| Questions Presented for Review | 2 |
| Jurisdiction of this Court | 3 |
| Determinative Statutes | 3 |
| Statement of the Facts Pertinent to the Petition for Writ of Certiorari | 4 |
| Argument | 7 |
| I. The Court of Appeals Appropriately Determined that the Water Right, Evidenced by Approved but Uncertifi- cated Application No. 26838a, was not Appurtenant to Land Conveyed by the Deed dated January 16, 1968. | 7 |
| II. The Decision of the Court of Appeals will not Invalidate any Administrative Practice of the State Engineer and will not Cloud Land Titles | 11 |
| Conclusion | 13 |

TABLE OF CASES AND AUTHORITIES CITED

CASES CITED

| | |
|---|----|
| <u>Jordan v. Utah RR</u> , 47 Utah 519, 156 P. 939 (1916) | 11 |
| <u>Mitchell v. Palmer</u> , 121 Utah 245, 240 P 2d 970 (1952) | 11 |
| <u>Tarpey v. Desert Salt Co.</u> , 5 Utah 205, 14 P. 338 (1887) | 11 |

PENDING CASES CITED

| | |
|--|----|
| <u>Proposed Determination of Water Rights in Colorado Drainage Area, Kanab and Johnson Creek Division, Code 85, Book 1, Civil No. 435, In the District Court of the Sixth Judicial District in and for Kane County</u> | 13 |
|--|----|

STATUTES AND RULES CITED

| | |
|--|--------|
| Rule 49(a)(4), Utah Rules of Appellate Procedure | 2 |
| Section 57-3-3, Utah Code Annotated | 10 |
| Section 73-1-10, Utah Code Annotated, 1953 | 3,7,9 |
| Section 73-1-11, Utah Code Annotated, 1953 | 3,8,10 |
| Section 73-3-1, Utah Code Annotated, 1953 | 8 |
| Section 73-3-18, Utah Code Annotated, 1953 | 4,12 |
| Section 78-2-2(5), Utah Code Annotated, 1989 | 3 |

IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY LITTLE,
Plaintiff and Appellant,

vs.

GREENE & WEED INVESTMENTS,
LEON S. LIPPINCOTT, CAROLINE
LIPPINCOTT, and DEE C. HANSEN,
State Engineer of the State of
Utah,

Defendants and Respondents.)

)
)
) Utah Court of Appeals
) Case No. 890177-CA
)
)
) Supreme Court of Utah
) Case No. 900451
)
)
)

BRIEF IN OPPOSITION
TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

PRELIMINARY STATEMENT

The parties will be referred to by name or by "petitioner" (Larry Little). References to the record will be (R.). The transcript, which is separately numbered, will be referred to as (Tr.) References to the petition for writ of certiorari will be referred to as (Pet.).

There is considerable duplication among the exhibits. Those marked with a blue "Exhibit" label were attached to the Pre-Trial Order (R. 112-126), and were referred to at the trial by the blue label "Exhibit" numbers. Other Exhibits were introduced in the trial and were identified in the usual way. In this brief, the documents in evidence marked by blue "Exhibit" labels will be identified as (Ex.). The exhibits which are not included in the foregoing group will be referred to as (Pl. Ex.) or (Def. Ex.).

Segregated Water Application No. 26838a (85-102) will be referred to as "Application No. 26838a".

QUESTIONS PRESENTED FOR REVIEW

The questions the petitioner presented for review on certiorari are:

"1. Is it appropriate for the Court of Appeals to decide a question of first impression and thus overturn a long standing and generally accepted Administrative Policy of the Utah State Engineer when the answer to that question is unnecessary to the determination of the case? Does not justice require that courts of law address and resolve the central and dispositive issues of the case before seeking out and resolving questions of first impression that have no real bearing on the outcome?" (Pet. 1,2)

The questions are stated in the abstract and are not expressed in "...the terms and circumstances of the case...." as required by Rule 49(a)(4) of the Utah Rules of Appellate Procedure. If so stated, they would be:

1. Was it appropriate for the Court of Appeals to decide the question as to whether the Lester F. Little approved, but uncertificated, application to appropriate water, was appurtenant to the land on which water was used when it was conveyed by a deed dated January 16, 1968, before deciding whether Larry Little obtained title to the water by deeds dated December 30, 1969, which was after the certificate was issued?

2. Should the decision regarding the appurtenancy of the water right in dispute to the land conveyed by the deed dated January 16, 1968, which decision established ownership of water at that point in time, have been made where it was unnecessary and would overturn a State Engineer's administrative policy of long standing?

JURISDICTION OF THIS COURT

Jurisdiction to hear the Petition for Certiorari is conferred by Section 78-2-2(5), Utah Code Annotated, as amended 1989.

DETERMINATIVE STATUTES

Section 73-1-10, Utah Code Annotated, 1953.

"Conveyance of water rights - Deed - Exceptions
- Filing and recordation of deed.

"Water rights, whether evidenced by decrees, by certificates of appropriation, by diligence claims to the use of surface or underground water or by water users' claims filed in general determination proceedings, shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land; and such deeds shall be recorded in books kept for that purpose in the office of the recorder of the county where the place of diversion of the water from its natural channel is situated and in the county where the water is applied. A certified copy of such deed, or other instrument, transferring such water rights shall be promptly transmitted by the county recorder to the state engineer for filing. Every deed of a water right so recorded shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice thereof."

Section 73-1-11, Utah Code Annotated, 1953.

"Appurtenant waters - Use as passing under conveyance.

"A right to the use of water appurtenant to land shall pass to the grantee of such land, and in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject, however, in all cases to payment by the grantee in any

such conveyance of all amounts unpaid on any assessment then due upon any such right; provided that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance, or it may be separately conveyed."

Section 73-3-18, Utah Code Annotated, 1953.

"Lapse of application - Notice - Reinstatement priorities - Assignment of application - Filing and recording - Constructive notice - Effect of failure to record.

Pertinent part provides:

"Prior to issuance of certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing. Such instruments, when acknowledged or proved and certified in the manner provided by law for the acknowledgment or proving of conveyances of real estate, may be filed in the office of the state engineer and shall from time of filing of same in said office impart notice to all persons of the contents thereof. Every assignment of an application which shall not be recorded as herein provided shall be void as against any subsequent assignee in good faith and for valuable consideration of the same application or any portion thereof where his own assignment shall be first duly recorded."

STATEMENT OF THE FACTS PERTINENT TO THE
PETITION FOR WRIT OF CERTIORARI

The amended complaint in this action states three causes of action (1) to review a decision of the State Engineer approving a change application filed by respondent Greene & Weed Investments; (2) to quiet title to the water in dispute against Greene & Weed Investments; and (3) to quiet title to the same water right against the respondents Lippincott (R. 19-23). The Court made an order of bifurcation, directing that the quiet title issues be tried first (R. 46,47).

The subject of the quiet title causes of action is the right to the use of 0.92 cfs of water from a well in Kane County referred to in the record as "upper well" and "well No. 1".

The determinative evidence as to the initiation, ownership, and priorities of the respective documents is largely documentary.

As indicated by the questions presented for review, Larry Little contends that the trial court and the Court of Appeals erred on questions of law based on the following undisputed facts:

1. Application No. 26838a to appropriate .92 cfs of water for irrigation of 83.3 acres of land, approved by the state engineer on May 21, 1968. (Pl. Ex. 2) (Ex. B).
2. Proof of appropriation filed December 19, 1967, on application No. 26838a. (Ex. F)
3. Deed from Lester F. Little and Madge C. Little, husband and wife, dated January 16, 1968, conveying 520 acres of land (less 32.23 sold to State Road Commission), together with all improvements and appurtenances appertaining thereto to their five sons and daughters. (Ex. A) (Pl. Ex. 9)
4. Hand written agreement among sons and daughters for division of land dated August 3, 1968. (Ex. L)
5. State Engineers certificate issued October 21, 1969, amended November 25, 1969. (Pl. Ex. 5) (Ex. Ea, Eb)
6. Water Quit Claim deed, notarized November 17, 1969, from Lester F. Little and Madge Little, husband and wife, grantors, to Lorna Cottam and Clara Bess Little Grams, conveying "water rights

to wit: Application No. 26838, File No. 85-33, well No. 1, described as being North 2465 feet and West 2640 feet from the Southeast corner of Section 25, Township 43 South, Range 5 West, Salt Lake Meridian, Utah. (Ex. L-1) Filed in State Engineer's office. (Ex. L-6-a)

7. Quit Claim Deed - Water, undated and not acknowledged, from Lester F. Little and Madge Little, husband and wife, conveying to Lorna Cottam and Clara Bess Little Grams the same water rights as those described in the Quit Claim Deed, acknowledged on November 17, 1969, except correcting the description of the well location. (Ex. L-2) Filed in the State Engineer's office. (Ex. L-6-a).

8. Warranty Deed, undated, but acknowledged at various dates between December 12 and December 23, 1969, from the five sons and daughters of Lester F. and Madge C. Little, conveying to Larry Lester Little particularly described land, "...together with all wells located thereon and also together with all improvements and appurtenances thereunto belonging." (Pl. Ex. 6)

9. Acknowledged statement of Larry L. Little, dated March 19, 1971, as follows:

"It was my understanding at the time my siblings and I divided the property we held in common, that the original well #1 of application #26838 (85-102 33) together with the existing pump, header pipe, sprinkler pipes, and engine were to go to Lorna Cottam and Clara Bess Grams." (Ex. L-6)

10. Deed, dated September 1, 1972, from Lorna Little Cottam and Clara Bess Little Grams, grantors, to A. H. Greene and

Daniel R. Weed, conveying a large acreage of land, including land on which well No. 1 (upper well) is located, "....together with any and all water rights...." (Pl. Ex. 6) (Def. Ex. 9)

The above chain of title is documented by a packet of deeds certified by the state engineer. (Pl. 6) (Ex. L-22) The Title Abstract of the State Engineer, as of 5/23/83, shows the warranty deed from Lorna Little Cottam and Clara Bess Grams, above-mentioned, conveying 0.79626 cfs, 365.96 AF. The next entry shows the East Canyon Irrigation Company conveyance to Greene & Weed of 0.12374 cfs 56.87 AF, with the remark, "Now own total right". (Title Abstract - Pl. 6, Ex. L-22).

The above-mentioned water deeds were all filed in the state engineer's office pursuant to Section 73-1-10, UCA.

By a written agreement to purchase land (Ex. L-10), Caroline Lippincott and Larry L. Little, on October 24, 1975, purchased from Greene & Weed 80 acres of land and the water right. (Ex. L-10)

ARGUMENT

I

THE COURT OF APPEALS APPROPRIATELY DETERMINED THAT THE WATER RIGHT, EVIDENCED BY APPROVED BUT UNCERTIFICATED APPLICATION NO. 26838a, WAS NOT APPURTENANT TO LAND CONVEYED BY THE DEED DATED JANUARY 16, 1968.

The petitioner argues that "....both the trial court and the Court of Appeals decided that water, as a matter of law, could not pass as an appurtenance to land until the State Engineer issues

a certificate of appropriation on the subject water right". (Pet. 7) It is then stated that both courts "...then refused to address Appellant's undisputed contention that he nevertheless received a deed transferring the land and appurtenant water after the State Engineer certificate issued (Pl. Ex. D4), thus rendering the court's decision on when water becomes appurtenant irrelevant to the determination of the case". (Pet. 7,8)

It is not argued in the petition that the Court of Claims erred in determining that the water right was not appurtenant to the land conveyed, but it is now argued that the court ignored deeds dated after the certificate was issued.

The argument is not supported by the facts, by the Court of Appeals' opinion, or by the law. We first point out that on pages 16 to 24 of the Brief of Appellant Larry Little, it is argued that:

"the Trial Court erred in determining that a water right initiated under authority of Section 73-3-1, UCA, 1953, cannot pass as an appurtenance to land under Section 73-1-11, UCA, 1953, until the Utah State Engineer issues a certificate of appropriation."

In the petition for writ of certiorari, as indicated above, it is argued that the Court of Appeals decision on when the water becomes appurtenant is irrelevant. (Pet. 7,8) The issue was important enough when the appellant's brief on appeal was filed to argue it on eight pages. In the petition for writ of certiorari it is said to be irrelevant! The reason that the appurtenancy question is now declared to be irrelevant is that the preparer of the petition has

conveniently ignored the "Quit-Claim Deeds - Water", dated in November, 1969, which the trial court held conveyed the water right in dispute to Lorna Cottam and Clara Bess Little Grams, thus severing the water from the land before the land was conveyed to Larry Little by the deed dated December 30, 1969, (Pl. Ex. D-4), his so-called root title.

The argument on page 10 of the petition that the trial court and the Court of Appeals did not address the petitioner's argument that he received title to the water rights by deeds dated December 30, 1969 (Pl. Ex. D-4), is refuted by the next to last sentence of the court of appeals opinion. (Pet. Addendum A, p.5) We quote:

"The trial court properly found that the November 19, 1969 quitclaim deed did transfer the water right at a time when that right was fully vested."

In the foot note in support of the quoted sentence it is stated:

"5. In its findings of fact, the trial court concluded that Lester and Madge intended to transfer the entire water right in the November 17, 1969 quitclaim deed, even though that deed contained an incorrect property description. The trial court's decision was based in part on a subsequent undated quitclaim deed and on other documents which revealed the grantors' intent. We find no error in the trial court's ruling."

The December 30, 1969, deeds conveyed no water rights because such rights were severed from the land by the quit claim deeds - water, Exhibits L-1 and L-2.

Section 73-1-10, UCA, 1953, provides that "water rights,

whether evidenced by decrees, by certificates of appropriation, by diligence claims to the use of surface or underground water, or by water users' claims filed in general determination proceedings, shall be transferred by deed....". Section 73-1-11, UCA, 1953, relied on by the petitioner, provides that an appurtenant water right "....shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof....". The last quoted provision has no application in this case to the Larry Little deed dated December 30, 1969, because the water right had theretofore been severed from the land. This assertion was not disputed nor argued by the petitioner and was affirmed by the decision of the Court.

It is stated in the petition, pages 12,13:

"Critically, the quit claim deeds relied upon by the Appellees for their root title are nowhere found in the State Engineer files maintained for this water right. The Utah State Engineer did not consider Appellee's root title documents as constituting any part of the title to the water right."

The quit claim deeds were filed in the State Engineer's office. Exhibit L-1, which is the signed and acknowledged "Quit Claim Deed - Water", bears the official stamp of the State Engineer, "Received May 13, 1971, Water Rights Office". This is further documented by Exhibit 11, dated November 22, 1985, to the deposition of Lorna Cottam. The fact that the deeds were not recorded in the county recorder's office has no significance. The statute, Section 57-3-3, UCA, merely makes unrecorded conveyances

of real property void as against subsequent purchasers in good faith and for a valuable consideration. There is no such purchaser in this case. See Tarpey v. Desert Salt Co., 5 Utah 205, 14 P. 338 (1887). Likewise, the fact that quit claim deed, Exhibit L-2, was not acknowledged is immaterial. Acknowledgment is not necessary to convey title. Jordan v. Utah RR, 47 Utah 519, 156 P. 939 (1916); Mitchell v. Palmer, 121 Utah 245, 240 P 2d 970 (1952).

The fact that the quit claim deeds, Exhibits L-1 and L-2, were in the State Engineer's file and were considered will be further discussed under the next heading.

II.

THE DECISION OF THE COURT OF APPEALS WILL NOT INVALIDATE ANY ADMINISTRATIVE PRACTICE OF THE STATE ENGINEER AND WILL NOT CLOUD LAND TITLES

It is stated in the petition that the rulings of the trial court and the Court of Appeals will disrupt and invalidate the administrative practice of the State Engineer which has been uniformly accepted and applied for over 25 years. (Pet. 11) The administrative practice referred to is not defined nor is there any evidence of such practice in the record. It is stated on page 12 of the petition that "...where there is a demonstrated actual and beneficial use of the water the State Engineer has consistently transferred title to the water before the certificate issues (Tr. 56)". In the first place, the State Engineer does not transfer titles to water rights! His office is merely an alternate

filing place for decreed water rights, certificates of appropriation, and other documents evidencing vested water rights. See Section 73-3-18, UCA, 1953. Water rights evidenced by pending, uncertificated water rights are transferred by assignments on forms furnished by the State Engineer, or by deeds if the water rights are specifically identified therein by number.

It is argued on page 13 of the petition that:

"Here, it is clear that the State Engineer's title abstract support Appellant's and not Appellee's chain of title - the two chains of title are mutually exclusive at this point and the deeds of January 16, 1968 and December 30 and 31, 1969, are in Appellant's and not in Appellee's chain of title. Thus, there is absolutely no way that a result such as that reached by the Trial Court and Court of Appeals will not make title abstracting an impossible proposition."

This argument has no merit, in view of the fact that the State Engineer, in a document entitled "Title Abstract" (Ex. L-22), divided the water right in dispute as follows:

"Recap 5/23/83

| | | |
|---------------|--------------|------------|
| Lippincott | (0.5175 cfs) | 237.843 AF |
| Larry Little | (0.2875 cfs) | 132.134 AF |
| Greene & Weed | (0.115 cfs) | 52.853 AF" |

The fractional equivalents of the foregoing are:

| | |
|---------------|------|
| Lippincott | 9/16 |
| Larry Little | 5/16 |
| Greene & Weed | 2/16 |

The findings of fact, conclusions of law, and judgment conform to and award the exact fractional interests to the parties in this case as noted in the State Engineer's above quoted Title Abstract. (L-22) The same division of the water right, Application No. 26838a, appears on page 152 of the State Engineer's

Proposed Determination of Water Rights in Colorado Drainage Area,
Kanab and Johnson Creek Division, Code 85, Book 1, Civil No. 435.

It is obvious that in view of the foregoing no State Engineer's practices or policies were disrupted where the division of the disputed water right by the Engineer's Title Abstract and the trial court's judgment and the Court of Appeals' opinion were exactly the same.

CONCLUSION


The petitioner's argument that a writ of certiorari should be granted because the Court of Appeals side-stepped and ignored his argument that his deeds dated after issuance of the certificate of appropriation were determinative of the case is without merit. The Court properly decided that Lester F. Little retained ownership of the water right until it was conveyed by the November 17, 1969, Quit Claim Deed, which severed the water right from the land. The petitioner's argument that the importance of his December 30, 1969, deed is ignored is refuted by the next to last sentence in the Opinion of the Court which states specifically that although the November 17, 1969, quit claim deed contained an incorrect property description, it was intended by Lester and Madge to transfer the entire water right.

Despite pages of argument that the Court of Appeals' decision would disrupt a long standing policy and practice of the State Engineer, the State Engineer's Title Abstract (Ex. L-22) shows exactly the same fractional ownership of the water right as


the court's decree.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,


E. J. SKEEN
536 East 400 South
Salt Lake City, Utah 84102

Attorney for Defendants/Respondents
Leon S. and Caroline Lippincott


KEITH S. CHRISTENSEN
230 South 500 East, Suite 160
Salt Lake City, Utah 84102


Attorney for Defendant/Respondent
Greene & Weed Investments

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the foregoing BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS to be mailed, postage prepaid, to the following this 25th day of October, 1990.

John W. Anderson, Esq.
CLYDE, PRATT & SNOW
77 West 200 South, Suite 200
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant


E. J. SKEEN