

1960

Sterling Jacobson and Central Utah Block Co. v. Ralph Memmott et al : Brief of Appellant

Utah Supreme Court

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Olsen and Chamberlain; Attorneys for Appellant;

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In the
Supreme Court of the State of Utah

STERLING JACOBSON and CENTRAL UTAH BLOCK COMPANY,
a Corporation,
Plaintiffs and Respondents,

vs.

RALPH MEMMOTT, MERRILL G. MEMMOTT, GRACE K. MEMMOTT
and MARIE S. MEMMOTT,
Defendants and Appellants.

FILED
FEB 17 1960

Clerk, Supreme Court, Utah

Case No.
9120

BRIEF OF APPELLANT

OLSEN AND CHAMBERLAIN,
Attorneys for Appellant.

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BRIEF OF APPELLANT

STATEMENT OF FACTS

The Plaintiffs are the owners of an unpatented placer mining claim located in Millard County, Utah, which is principally valuable for volcanic cinders and the Defendants own an unpatented placer claim immediately adjacent to the claim of the Plaintiffs which is also principally valuable

for volcanic cinders. The Plaintiffs and the Defendants are both operating their respective claims and marketing cinders therefrom.

The Plaintiffs commenced the present action for the condemnation of a right-of-way across the mining claim owned by the Defendants for the purpose of transporting materials and supplies and cinders to and from their mining claim.

At the time the matter was set down for hearing on the question of damages which would accrue to the Defendants as a result of such condemnation, the Plaintiffs, with leave of Court, amended their complaint by attaching a map showing the course of the center line of a roadway across Plaintiffs' claim. The Plaintiffs' complaint was further amended in such a manner as to pray for right-of-way across Defendants' property which the Plaintiffs would move to any feasible road across Defendants' property upon receiving reasonable notice to do so and having an opportunity to construct said road when it became necessary for the Defendants to mine the cinders lying under said road or roads.

The Defendants moved that the Complaint, as amended, be dismissed on the ground that the prayer of the complaint was uncertain, and that the right-of-way could not be fixed with such certainty as to permit the Defendants to defend against it; and upon the ground that the laws of the State of Utah contemplate the taking of a right-of-way which is fixed and certain and which can be ascertained from the prayer of the Complaint and at the time of condemnation judgment.

An Order was entered denying Defendants' Motion to Dismiss and granting Plaintiffs a surface right-of-way across the Defendants' claims and upon the condition that when it became necessary for the Defendants to mine cinders under the designated right-of-way and upon reasonable notice to the Defendants, Plaintiffs would move said right-of-way to some other feasible route over the Defendants' property.

The Defendants immediately petitioned the above entitled Court for an Order permitting them to take this Intermediate Appeal which Order has been heretofore granted.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS AND IN RULING THAT A FLOATING OR VARIABLE RIGHT OF WAY MAY BE CONDEMNED.

- A. The Order of the Court denied the Defendants the opportunity of proving that the property of the Defendants is already appropriated to the same public use to which the Plaintiffs propose to put their property and that the public use to which it is applied is a more necessary public use because of the quality and quantity of the cinders underlying the proposed right-of-way.

- B. The laws of the State of Utah do not contemplate that a floating or variable right-of-way may be condemned.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS AND IN RULING THAT A FLOATING OR VARIABLE RIGHT OF WAY MAY BE CONDEMNED.

- A. The Order of the Court denied the Defendants the opportunity of proving that the property of the Defendants is already appropriated to the same public use to which the Plaintiffs propose to put their property and that the public use to which it is applied is a more necessary public use because of the quality and quantity of the cinders underlying the proposed right-of-way.

1. The property owned by the Plaintiffs is principally valuable for the volcanic cinders under the surface of the entire claim. The cinders vary in quality and in depth at different points upon said mining claim. The nature of the mining operation required for the removal and marketing of volcanic cinders requires an open pit mining method which necessarily destroys surface rights of way. Volcanic cinders are of such a nature that a surface right-of-way could not be undermined and any support left for a surface

road. For this reason the practical effect of the granting of a right-of-way across said property would prohibit the Defendants from mining the cinders thereunder. It is impossible to grant a right-of-way across the mining claim of the Defendants without interfering with their mining operation and depriving them of material which could be recovered and marketed.

Pursuant to Section 78-34-4, Utah Code Annotated 1953, certain conditions are made precedent to the taking of any property by condemnation and it is expressly provided under Sub-paragraph 3, “* * * if [the property to be condemned is] already appropriated to some public use, * * * the public use to which it is to be applied [must be] a more necessary public use.”

It is, therefore, incumbent upon Plaintiffs to prove that the recovery of material upon their properties is a higher and more necessary public use than the recovery of the same type material upon the Defendants' property. It appears that it would become mandatory for the Court to consider the amount of material under the roadway condemned by the Plaintiffs which could not be recovered by the Defendants. If the amount of material lost by the Defendants is substantial, the easement prayed for by the Plaintiffs should be denied. They should not be allowed to deprive the Defendants from mining the same type material and marketing it for the same purposes because it would be more convenient or more economical for the Plaintiffs to cross their property. If a fixed easement were required by the Order of the District Court, it would be possible for the Defendants to measure accurately the amount

of material condemned and accurately show to the Court the volume taken in order that the Court could determine whether the suppressions of mining on Defendants' claim is required in the public interest.

B. The laws of the State of Utah do not contemplate that a floating or variable right-of-way may be condemned.

1. Rights of way are commonly granted by deed or by prescription. In the present case easements may be taken involuntarily and granted by decree of Court under a condemnation proceeding. The Court by its order contemplates the granting of an easement which would be uncertain in its nature and would violate the rule that the location of an easement must be certain to the extent that it can be identified by the parties. The location of an easement once selected cannot be changed by either the land owner or the easement owner without the other's consent. (17A American Jurisprudence, Easements Section 103, Page 713; *Tripp vs. Bagley*, 74 Utah 57, 276 Pacific 912.)

The reason for this rule is that treating the location as variable would incite litigation and depreciate value of the entire property and discourage, if not make impossible, improvement of the land with which the easement is charged.

An examination of the Statutes of the State of Utah authorizing the condemnation of easements to be used incident to the mining and milling of minerals does not purport to authorize a variable or floating easement which could be placed upon the property of the Defendants and

cause continual litigation between them. Such an Order would have the effect of condemning the entire property of the Defendants and creating a situation where the question of what is "reasonable notice from the Defendants" and the question of "other feasible place for a right-of-way" is always left open. It appears that such an Order would avoid the very question which a condemnation suit seeks to settle: The exact location of the easement and the value of the property so taken. The Order granted by the District Court herein would serve only to confuse a jury and to create the illusion that no property was being taken while in fact the entire mining operation of the Defendants would be subject to continued litigation or continual negotiations and adjustments to coincide with the plans of the Plaintiffs herein.

It would be impossible for the Defendants to place upon the property improvements which might interfere with the road way later to be selected by the Plaintiffs or to mine in such a manner as to leave no other feasible route after the present selected roadway was mined.

Also, it must be kept in mind that it is possible for Defendant to acquire surface rights upon placer mining claims for purposes in addition to those incident to the mining of the material alone.

An examination of the authority extended by our statutes to condemn conclusively demonstrates a lack of authority to grant a variable or floating easement.

Section 78-34-1, Utah Code Annotated, 1953 under Subparagraph 5 designates use for which the right may be exercised and the word "road" is set out.

The word "road" indicates a fixed and certain surface easement over which the parties could travel.

2. Section 78-34-5, Utah Code Annotated 1953, entitled "Right of Entry of Survey" sets forth in detail the authority of the parties seeking to condemn to go on property sought to be condemned and to examine, survey, and map the same in order to make an exact location upon the property of an easement which would be most compatible with the greatest public good and least private injury. This Section requires an exact designation of route in order that proper notice may be given to the Defendants and that they may be allowed to defend the action.

3. Section 78-34-6, Utah Code Annotated 1953, is entitled "Complaint — Contents" and specifically requires among other things that the complaint must contain: "(4) If a right-of-way is sought, the Complaint must show its location, general route, termini, and must be accompanied by a map thereof so far as the same is involved in the action or proceedings.

"(5) The description of each piece of land sought to be taken and whether the same includes the whole or only part of the entire parcel or tract * * *".

The above section makes it an absolute requirement that the Plaintiffs set forth the exact description of the property sought to be condemned and also requires that the Complaint must be accompanied by a map thereof showing the exact route. The Order entered by the District Court in this matter is entirely inconsistent and cannot be reconciled with this Section.

4. Section 78-34-9, Utah Code Annotated 1953, authorizes occupation of the premises pending the condemnation action and allows the Plaintiffs to move the Court or Judge thereof at any time after the commencement of suit, upon notice of the Defendants, for an Order permitting the Plaintiffs to occupy the premises sought to be condemned. The section provides: “(A) That the Court, or a Judge thereof, shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which shall accrue from the condemnation.” The section also provides that if the Motion is granted, the Court shall require the Plaintiff to execute and file in Court a bond to the Defendants, with sureties to be approved by the Court, and the penal sum to be fixed by the Court, not less than double the value of the premises sought to be condemned and the damages which will ensue from condemnation, as the same may appear to the Court on hearing, and conditioned to pay the adjudged value of the premises and all damages in case the property is condemned. The Court also has the granted authority, pending the action, to restrain the Defendants from interfering or hindering the occupation of the premises by the Plaintiffs.

This Code Section requires that a Judge must have such knowledge of a fixed route as to be able to determine reasonable damages which may accrue to the land owner. The Court must also have such knowledge of a fixed route that it may enjoin the Defendants from interfering with the easement granted to the Plaintiffs. Also Section 78-30-10, Utah Code Annotated 1953, entitled “Compensation and Damages — How Assessed”, provides that a jury may

hear the question of damages and assess such damages as would cover the value of the property sought to be condemned and all improvements thereon, together with damages to other properties not directly condemned.

It would be impossible for the Defendants in this matter to present the question of damages properly to the jury for assessment. The mining claim of the Defendants is valuable principally for volcanic ash. The deposits vary in depth across the entire claim in such a manner that the ash condemned and made unavailable for mining purposes to the Defendants would not be subject to reasonable proof. The District Court would undoubtedly instruct the jury in accordance with the Order authorizing the Plaintiffs to amend their complaint and pray for a variable easement. Such an instruction by necessity would require the Court to state to the jury that no mining materials were made unavailable to the Plaintiffs and that the road could be moved from time to time while in fact the easement of the Plaintiffs would make it impossible for the Defendants to mine under or near the roadway granted.

CONCLUSION

Defendants and Appellants respectfully contend in summary and conclusion that the Order of the District Court authorizing the condemnation of a variable uncertain easement goes beyond any statutory authorization under the laws of the State of Utah. The Order appealed from herein further denies the opportunity to assert the defense that the property sought to be condemned is already put to a

public use as high or higher in stature than the use to which the land is sought to be put under these condemnation proceedings.

We respectfully contend that the order of the District Court evades the very question before it to be determined. It does not determine specific land to be condemned but creates a situation whereby the parties are continually litigating the question of the moving of an easement upon "reasonable demand" and upon other "feasible routes".

It is respectfully urged that this Court reverse the Order heretofore entered and instruct the District Court to deny Plaintiffs' motion to amend their Complaint to provide for a variable right-of-way.

Respectfully submitted,

OLSEN AND CHAMBERLAIN,
Attorneys for Appellant.