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Arliean Vickers Barrett and George C. Barrett v. Leland H. Vickers, Sterling D. Vickers and Ethelyn Vickers, and Joseph S. Barrett and Ethel v. Barrett : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

ARLIEAN VICKERS BARRETT
and GEORGE C. BARRETT,
Planitiffs and Respondents,

vs.

LELAND H. VICKERS,
Defendant and Respondent,

STERLING D. VICKERS and
ETHELYN VICKERS, his wife,
Defendants,

JOSEPH S. BARRETT and
ETHEL V. BARRETT, his wife,
Defendants and Appellants.

Case No.
11787

BRIEF OF RESPONDENTS

Appeal from a Judgment of the Fifth Judicial District Court in and for Juab County, Honorable C. Nelson Day, Judge

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NATURE OF THE CASE

This case involved an action to partition or sell certain real estate in Juab County, Utah, in which each of the parties has an interest, and for an accounting.

DISPOSITION IN LOWER COURT

The Fifth Judical District Court for Juab County Utah, ordered a partitionment and also granted money judgments in favor of the parties as their respective interests appeared.

RELIEF SOUGHT ON APPEAL

Respondents seek to affirm the judgments and order of the District Court granting partitionment of the property and thus finally terminate the dispute over the property which has existed between the parties for the past 28 years and has been pending before the Courts over that period of time.

STATEMENT OF FACTS

While Appellant portrays his version of the facts it is believed a brief chronological summary by Respondent will assist in giving the Court a truer perspective of the actual situation.

The land in question was purchased from the State of Utah pursuant to the terms of a written contract dated July 21, 1938. (Exhibit 1) Shortly thereafter a dispute arise between the parties because some of them weren't paying their proportionate share of the cost. Suit was then filed to declare that the defaulting parties had no further interest in the property and to have

them ejected therefrom. The trial court in that first suit rendered judgment in favor of the defendants. The case was appealed and on this appeal this Court ruled on September 10, 1941, in Barrett vs. Vickers, 116 P2d 772, 100 Utah 534, that in spite of the inequality in payments which the parties had made, each of the parties had an undivided one-fourth interest in and to the said property being purchased.

After the remand of that first suit, a second suit involving this very same property was commenced in 1942. This second suit was for for a partitionment or sale and division of the proceeds and for an accounting. After the trial, several subsequent hearings were had. Five years later in 1941 a written memorandum decision was made denying partitionment. However, for various and sundry reasons, no findings or judgment on that decision was made and the property was never sold.

Thereafter, and over the next thirteen years, further hearings were had. Finally, on December 21, 1960, the Court made and entered a decision in the matter saying in part:

> " x x x in the light of developments since the trial of the case it is inequitable and unfair to order a sale of the property. * * "

However, no partitionment was ordered. That decision was appealed and on June 5, 1961, this Court ruled in Barrett vs. Vickers, 362 P2d 586, 12 U2d 73, that where a co-tenancy is no longer desirable and the par-

ties cannot agree upon a solution, a co-tenant is entitled as a matter of right, to a partitionment or sale. The case was thereupon reversed and remanded for a new trial.

The re-trial or third trial which is the subject matter of this appeal was held in September, 1962. No decision was rendered, however, until almost seven years later. It was finally made and entered on June 21, 1969, and is now the subject matter of this appeal.

Although this Court ruled in 1941 that the parties had merely an undivided one-fourth interest in the property, the parties agreed among themselves upon a working arrangement for the separate use by each of them of separate and distinct portions of the residential and cultivatable portions of the property. The District Court approved this working arrangement and the parties themselves actually occupied and derived the benefit from the use of the specific portions to which they were entitled under this arrangement for more than twenty years.

ARGUMENT

In his brief Appellant sets forth twelve points of alleged error purportedly made by the Trial Court. These fall logically into three divisions. Respondents will accordingly answer Appellant's arguments by directing their arguments to these three divisions of alleged error.

POINT I

THE MONEY JUDGMENTS GRANTED THE PARTIES ARE SUPPORTED BY THE EVIDENCE.

In Point I of his brief Appellant refers to Appendix A thereof which is purportedly a recoiciliation of Exhibits A and F setting forth the payments made by the parties after April 4, 1940, toward the purchase price of the property. It does not show the taxes which were paid and by whom. Its main deficiency, however, is that it doesn't even show all the payments which were made.

It does not give these Respondents any credit for the $145.09 they paid 4-4-1940, nor for the $138.46 they paid 5-31-1939 nor for the $200.00 they paid of the $355.00 paid 7-12-1938. In other words it fails to give them any credit at all for $483.55 which they admittedly paid toward the purchase price of the property.

Then Appellant's counsel argues in Point II that these Respondents are not entitled to even the $119.89 net credit which Judge Hoyt, Judge Day and even Appellant by his own computation in his own handwriting allows them. (See Joseph S. Barrett's handwritten computation attached to E. J. Skeen's letter of 1-1-1968 to Judge Day included with the Exhibits) The reasoning of Appellant's counsel for denying these Respondents even this $119.89 net credit which was arrived at by Judge Hoyt by offsetting the debits and

credits between the parties is that it is purportedly barred from further consideration after August 15, 1948, by the provisions of 78-12-22 Utah Code Annotated 1953, as amended, since it was included in Judge Hoyt's Decree which was never renewed.

The inconsistency and fallacy of Appellant's reasoning is that if these respondents are, by the provisions of 78-12-22 Utah Code 1953, as amended, denied the net credit of $119.89 allowed them by Judge Hoyt's Decree of August 15, 1940, then Appellant and the others likewise should be denied the offsetting credits which they were allowed by the very terms of that same Decree. Respondents then should be given additional credit not only for the $119.89 net credit but for the full $483.55 which they admittedly paid toward the purchose price of the property. This would in turn reduce considerably the money judgment which Appellant was in fact granted against these Respondents.

In Point III Appellant contends the Court erred in making an allowance to Leland H. Vickers for the work and labor he performed for and on behalf of Appellant as an offset against the money judgment granted Appellant against the Estate of Leland H. Vickers.

Appellant concedes that Leland H. Vickers did perform work and labor for him. In addition the Transcript bears this out by the testimony of others. Appellant contends, however, that this work and labor was in settlement of certain other claims between those two which were previously settled between them.

An objective ananysis of the evidence in this regard demonstrates that the Trial Court acted reasonably and justifiably. In any event, even if the Trial Court did err in this respect, it does not justify a reversal but merely an adjustment in the money judgment granted as between those parties.

In Points IV, V and VI Appellant complains about the Court's accountings and particularly about the allowances the Court made for the improvements made on the property.

The fact is that the parties themselves valued the entire ranch at somewhere between $8,000 and $14,000. George C. Barrett valued it at about $8,000. (Transcript 81) Joseph S. Barrett valued it between $8,000 and $8,500. (Transcript 77, 78) And Ethelyn Vickers now Ethlyn Vickers Johnson valued it even when it was at its best at between $13,000 and $14,000. (Transcript 38) Nevertheless, the parties were making all kinds of claims for the improvements erected thereon. These so-called improvements ranged from $0.75 per hour for labor (Transcript 87), $0.50 for a cedar post (Transcript 87), $1,000 for one house (Transcript 173), $8,000 for another house (Transcript 36) and approximately $3,250 for some spruces, junipers and ash trees planted on the property (Transcript 177).

A realistic appraisal of the situation evidences that some of the so-called improvements benefit all of the property but most benefit only those portions which the individual parties had by agreement allocated unto

themselves and had occupied and used for more than 20 years. The Trial Court's allocation of the sum which it did for permanent improvements erected upon the property is certainly substantiated by the evidence.

The answer to Appellant's arguments set forth in Points I through VI of his brief is the phrase used by this Court in Casey v. Nelson Brothers Construction Co., 465 P2d, 173 Utah 2d ...., namely:

> " x x where there is a dispute in the evidence we assume that the trial court believed those aspects of the evidence, and drew the inferences which could fairly and reasonably be drawn therefrom, which tend to support the findings and judgment; and that upon our views of the record in that light, if there is a reasonable basis in the evidence to support them they will not be disturbed."

See also Winger v. Gem State Mutual of Utah, 449 P2d 982, 22 Utah 2d 132.

POINT II

THE RULING FINALLY MADE BY THE TRIAL COURT IS SUPPORTABLE AS WELL AS FAIR, JUST AND EQUITABLE AND SHOULD BE AFFIRMED.

In Point VII Appellant berates the Trial Court for waiting so long before rendering its decision. These Respondents wholeheartedly agree with Appellant in this regard. Certainly justice delayed 28 years compli-

cates the matter and almost makes a mockery of so-called justice.

Since the ruling finally made by the Trial Court is supportable and is fair, just and equitable, it should be affirmed. This Court should put an end to the 28 year court battle between the parties.

POINT III

THE PROPERTY WAS A PROPER SUBJECT FOR PARTITION AND THE PARTITIONMENT ACTUALLY MADE WAS NECESSARY AS WELL AS FAIR, JUST AND EQUITABLE.

Points VIII through XII in the Brief of Appellant all relate to the alleged error of the Trial Court in partitioning the property and in not allowing the money judgments granetd the respective parties to be express and prior liens against the partitioned portions thereof.

It is most revealing to note Appellant's changing positions about the partitionment of the property.

As previously noted herein, primarily because the parties had in fact agreed upon an acutal working partitionment of the property as far back as 1945, Judge Sevy, in his Decision of December 21, 1960, said:

> " x x in the light of developments since the trial of the case it is inequitable and unfair to order a sale of the property."

After the conclusion of the present trial which is the subject matter of this appeal, Judge Day, in his written Memorandum Decision of January 3, 1969, said

> " x x The said property is and should be partitioned as follows * * *."

These Respondents filed objections to the proposed partitionment on the grounds that it actually short-changed some of the parties in equated money values. Appellant, on February 11, 1969, filed his written response in which he said among other things that:

> " x x x the proposed allocated partitionment is fair, just and equitable under all circumstances of this case. * * * "

This written response of Appellant to the proposed partitionment was made in spite of the fact that no referees had been appointed as required by the provisions of 78-39-12 Utah Code Annotated, 1953, as amended, and which failure Appellant now argues in error in Point IX.

It was after the re-argument of the case, particularly with reference to the proposed partitionment, that Judge Day made some minor adjustments in his proposed partitionment so as to equalize as nearly as possible the equated money value for the land partitioned to the respective parties. Although the Transcript and Record do not reveal it, the fact is that at the re-argument to adjust somewhat the partitionment proposed by Judge Day, James P. McCune, now Judge McCune, appeared on behalf of some people Appellant had

agreed to sell his proposed partitioned half to. He appeared for the express purpose of ascertaining if the proposed partitionment was satisfactory to the purchasers of Appellant's portion. This is evidenced by the fact that the name of James P. McCune, who does not and did not represent any of the parties in this case, nevertheless appears on both the Findings of Fact and Conclusions of Law and the Judgment and Decree signed by Judge Day. They were sent to him at his express request.

While the Utah Code does provide that in a partitionment proceeding referees should be appointed and they were not in this case, it is respectfully submitted that this was not prejudicial. Under the circumstances of this case, even if the statutory provisions with reference to the appointment of referees were deemed mandatory rather than directory, they could certainly be construed as having been waived by the parties. Furthermore, while the testimony set forth in the Transcript is somewhat confusing, it is respectfully submitted that other than Appellant, each of the other parties testified that partitionment of the property was best. Appellant himself said in response to objections made to the initial proposed partitionment that the "proposed allocated partitionment is fair, just and equitable under all circumstances * * *." Thereafter, he even sold his partitioned portion.

In answer to the argument that the money judgments granted should have been declared express and

prior liens against the property partitioned and awarded to the parties, Respondents point out merely that there is no statutory provision which would authorize this and under the circumstances of this case it is not justifiable.

CONCLUSION

From all of the foregoing it is amply clear that the 28 year old dispute and legal battle between the parties over the property in question should be terminated once and for all. The partitionment made and the money judgments granted were as fair, just and equitable as can ever be done under the circumstances of this case; they are supported by an objective and reasonable analysis of the evidence, and, accordingly, should be affirmed.

Respectfully submitted,

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