1970

Lyman Grazing Association v. George W. Smith, Eleanor N. Smith and Keith Smith : Brief of Respondent

IN THE SUPREME COURT
OF THE
STATE OF UTAH

AN GRAZING
CIATION,
poration,

Plaintiff and Appellant,

vs.

RGE W. SMITH, ELEANOR
ITH and KEITH SMITH,

Defendants and Respondents,

Case No.
11849

FILE

RESPONDENTS BRIEF

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peal from a Judgment of the Third J
District Court Summit County, U
Honorable Merrill C. Faux, Pre

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vs.
GEORGE W. SMITH, ELEANOR N. SMITH, and KEITH SMITH,
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RESPONDENTS BRIEF

STATEMENT OF FACTS

Respondents agree with the Statement of Facts as given by appellant with the following exceptions.

At page 5 of appellant's brief appellants say there is no evidence that the owners of the title to the land which was sold to Larsen agreed to the use by the defendants of the New Hickey and Madsen ditch-

es. The evidence is that not only did Defendants-Respondents have an agreement to re-locate the ditch here in question, with Larsen, who was at the time purchasing the property affected by both the old and new easement, under contract but respondents also had permission to relocate the same as early as 1961 from Joe Hickey who was the fee title owner in 1961 and who sold the property affected under contract to Larsen, (Tr.130). It was to the mutual benefit of the parties to relocate the ditch and a benefit to the property.

At page 7 appellant states "On May 10, 1966 the plaintiff filed a temporary change application No. 66-27 to change its point of diversion from the Madsen ditch heading to the New Hickey ditch heading. (Tr. 43). A hearing was held before the state engineer and this application was approved July 8, 1966. (Tr. 43)." The fact is that application was approved subject to the installation of diversion facilities including:

1. Measuring devices to measure the total quantity to be delivered into the ditch and the amount being passed on down to the Smith interests.
2. Proper headworks to allow regulation of all waters being diverted into the ditch.
3. Screw-type gates in each turn-out (you) intend to utilize.

all of which were required to be made, prior to any diversion of water under the change application, by appellant. (R.42). None of these requirements were

met by appellant. (R.43). Copies were to be made a part of the record of this case. (R.44).

The ditch known as the Parley Madsen ditch somewhat parallels the New Hickey ditch a part of its course and these ditches join at a point near the north line of Section 25 at which confluence the ditch continuing on in a northerly direction is the Parley Madsen ditch flowing into the Carter Ditch as it nears the Wyoming border.

ARGUMENT

POINT 1

WHEN AN EASEMENT HAS ONCE BEEN ESTABLISHED, ITS LOCATION MAY BE CHANGED BY AN EXECUTED ORAL AGREEMENT.

Much time at the trial of the case was taken by plaintiff-appellant over the objection of defendants-respondents, in reviewing the adjudicated water rights of parties and ditches not involved in this action even after counsel for plaintiff-appellant admitted defendants-respondents were granted water rights from the West Fork of Beaver Creek which flow into the New Hickey and Madsen ditches, by the State Engineer, and after having admitted that respondents had an easement through the property involved in the old Carter Ditch the waters of which were also fed from the West Fork of Beaver Creek, the same source as those flowing into the New Hickey ditch, and also having admitted that respondents

had been granted a change in point of diversion of their waters by the State Engineer.

The only question involved in this case is this: May the purchaser of real property under a written contract, which property is encumbered by an easement for the conveying of waters, and the owner of the easement enter into an oral agreement, with the consent of the owner of the fee title, to a relocation of the easement, and if the easement is relocated does a purchaser of the fee subsequent to the relocation take subject to the easement as relocated.

Now the New Hickey ditch as it runs north through the property involved joins with a ditch called Parley Madsen ditch and as the waters flow in a northerly direction through the property involved for several miles they cross the Utah-Wyoming border and onto the property of respondents.

Our Utah Court has had this question before it in Tripp v Bagley, 74 U. 57, 69 ALR 1417, which involved a dispute between owners of adjoining lands as to ownership of a strip of ground and defendant also claimed a right to course irrigation water which was used to irrigate defendant's land across the land owned by the plaintiff. The plaintiff contended that defendant had no such right in which the court speaking through Mr. Justice Hansen said at page 75:

> "The law is also well settled that, when an easement has once been established, its location may be changed by an executed oral agreement between the owner of the servient estate and the

owner of the dominant estate. Citing Thompson et al. v. Madsen et al, 29 U. 326, 81 P.160. The consent of the owner of the servient estate to a change in the location of an easement may be implied from acquiescence. Citing Rumill v Robbins 77 Me. 193; Larned v Larned, 1 Metc. (Mass) 421; Wynkoop v Burger, 12 Johns (N.Y.) 222.

Appellant relies on Sec. 25-5-1 UCA 1953 and argues that because an easement in land is an interest in real estate the interest can be transferred only by a deed of conveyance in writing, by executed contract with the owner, or by operation of law.

It appears the Courts have adopted the same principal of law under facts such as appear in this case as have been adopted in those cases where a dispute as to boundaries exist and where one may acquire title to the real property involved without a conveyance from the fee title owner.

In this case there was performance on the part of defendants-respondents for a valuable consideration in their having given up an existing easement and having performed valuable services and having assumed the cost of relocating the easement.

The case of Mannix vs Powell County, 75 Mont. 202, 243 P.568 is cited and relied upon by appellant. The Mannix case is not in point inasmuch as the cause was disposed of upon the theory that plaintiff had failed to show that he or his predecessors in interest had ever acquired a right of way for the ditch over the particular strip of ground mentioned. The

court there further said that a vested interest in the public lands to a right of way for an irrigating ditch is not secured until the ditch is completed.

In the instant case it is admitted that there was an existing easement through which defendants-respondents had been conveying their waters to their lands for many years. It is to be noted that the relocated ditch passes through the same quarter section and almost parallels the old ditch. Neither was the New Hickey ditch located on public lands.

In the Thompson et al. v Madsen et al. 81 Pac. case cited by our Utah Court in Tripp v Bagley it is said at page 161:

> "If, then, the predecessors of the defendants, in consideration of the closing of said portion of the north and south alley, granted to plaintiffs and to their predecessors a right of way over the east and west alley in lieu thereof, which was accepted by the plaintiffs and their predecessors, the defendants will not now be allowed to close the new or substituted alley without first restoring the old one; and the fact that such grant was oral matters not, if on the faith of it rights have been acquired or relinquished and acted upon. Wright et al. v Willis (Ky.) 63 SW 991; Hamilton v White, 5 N.Y. 9; Smith v Barnes, 101 Mass. 275; Beinlein v Johns, 102 Ky. 570, 44 S.W. 128; Robinson v Thrailkill 110 Inc. 117, 10 N.E. 647. And where the owner of a right of way, whether acquired by prescription or otherwise, consents to the closing of the said right of way in consideration of substituting and granting to him a new one, the right to

> the use of such new way at once attaches, and he is not required to use the new way for a period of time to give him title by prescription."

In the instant case it is evident that both the owner of the fee title to the property through which both the old ditch ran and the new ditch runs, and the purchaser under contract, were desirous of having the ditch relocated because of the continued obstruction of the flow of waters caused by beavers damming the ditch. The overflowing of the banks flooded the lands through which the ditch passed.

POINT 2

THE CONTRACT FOR RELOCATING THE DITCH HAVING BEEN BETWEEN PREDECESSORS IN INTEREST OF PLAINTIFF-APPELLANT AND HAVING BEEN FULLY PERFORMED, THE TESTIMONY OF LARSEN AND KEITH SMITH WAS ADMISSIBLE AND NOT HEARSAY.

The evidence is to the effect that on May 26th, 1961, Joe C. Hickey and wife entered into a written agreement to sell the land affected and the water rights to Lewis H. Larsen, sometimes referred to in the evidence as Dude Larsen et al, and that Larsen took possession of the property under said contract on June 1, 1961 and continued in possession thereof until the fall of 1965 when plaintiff-appellant acquired the property. While the record reflects the fact that a deed passed from Larsens to Beehive

State Bank bearing date July 26, 1963, Larsen testified to the fact that the deed was given as security only and that he remained in possession until the fall of 1964. The agreement between Larsen and Smith to relocate the ditch was made in 1962 and the relocation took place in 1963 when an application was filed by defendants-respondents for a change of point of diversion. The application was approved by the State Engineer on Apr. 3, 1964 all of which was prior to plaintiff-appellant having acquired any interest whatsoever in the property affected. Appellant's agreement to purchase said land bears date of Apr. 30, 1965. Therefore the contract between defendants-respondents and the predecessor in interest of plaintiff-appellant having been fully performed for a valuable consideration at the time appellants acquired an interest in the property the testimony of Larsen and Keith Smith was properly admitted into evidence.

POINT 3

THE CONTRACT PURCHASER, LARSEN, HAD LEGAL AUTHORITY TO ENTER INTO THE AGREEMENT WITH RESPONDENT KEITH SMITH TO RELOCATE THE DITCH.

Inasmuch as the evidence shows that not only did Larsen, the contract purchaser, request the relocation of the ditch but Joe Hickey the fee title holder had also requested the relocation of the ditch. Therefore, the argument of appellant under its point 3 is not applicable.

POINT 4

THE DECREE ADJUDICATING WATER RIGHTS IS IN EVIDENCE. THE RIGHTS ADJUDICATED BY SAME ARE NOT AFFECTED BY THE DECISION IN THE INSTANT CASE.

Appellant seems to take the position in its argument under its point 4 that respondents are making claim to water rights not awarded to them or those affecting one, Joe Hickey. There is no evidence reflecting the fact that Hickey's rights whatever they might be are affected by the judgment in the instant case. It is evident that application for change of point of diversion of those waters adjudicated to respondents was filed with the State Engineer, that notice to all affected parties or those who might be affected by the change was given by the State Engineer and that no one filed a protest and as a result the application for change was granted.

POINT 5

APPLICATION FOR CHANGE OF POINT OF DIVERSION HAVING BEEN GRANTED AFTER NOTICE AND WITHOUT ANY PROTEST, RESPONDENTS HAD THE RIGHT TO USE THE NEW HICKEY AND MADSEN DITCHES.

Even if the argument of appellant under its point 5 be true, in which we see no point, inasmuch as no action for a violation of Sec. 73-3-3 UCA 1953

has been taken by anyone, the fact that appellant admits respondents' application for change of point of diversion was approved April 3, 1964, which is a time prior to appellant having acquired an interest in the property, this of itself defeats appellant as to this point of argument.

Under Secs. 73-1-6 and 73-1-7 UCA 1953 it is provided that one has the right to use someone else's ditch to convey his water if he compensates the owner or if the owner agrees to allow the use. Therefore, a written deed or easement is not required. Respondents both compensated the then owner and obtained the owner's permission to relocate the ditch.

POINT 6

THE DOCUMENT BY WHICH PLAINTIFF-APPELLANT ACQUIRED TITLE TO THE PROPERTY AFFECTED RECITES THAT IT IS SUBJECT TO EASEMENTS OR RIGHTS OF WAY FOR DITCHES. APPELLANT IS THEREFORE ESTOPPED FROM ASSERTING ITS CLAIM AGAINST DEFENDANTS-RESPONDENTS.

Both the deed executed by Joe C. Hickey and wife, bearing date April 30th, 1965 and recorded May 3, 1965, and that from Beehive State Bank bearing date April 30th, 1965 and recorded May 3, 1965, to plaintiff-appellant contained the following:

"The above described premises are conveyed subject to:

(a) Any and all easements or rights of way for roads, ditches, canals, pole lines, transmissio

lines or like facilities now existing over, under or across the premises described above or hereinafter constructed under patent reservations covering any part of said premises."

The evidence is that Sylvester Phillips, president of plaintiff-appellant corporation, examined the property affected before appellant purchased the same. He testified to the fact that it was when Dude Larsen was in possession. He went over the whole property, probably in '64, with a group of people. Larsen was in possession and his brother was there irrigating. This was in the summer and fall of '64. He was asked (R.80)

Q. I presume, you went and examined what water rights were attached to the property, did you not?

A. Well, we have a lawyer do that too and other advisers.

Q. I mean, on the property itself, you went—you wanted to know where the ditches were, did you not?

A. Sure.

Q. You observed the location of the ditches, did you not?

A. Well, sure.

(R.83)

Q. I believe you testified to the fact that you went into possession—the Lyman Grazing—

went into possession in the fall of '64. Am I correct in that?

A. That's right.

Q. When you first observed the ditches, which are shown on the exhibit here on the board, was water running through the ditches?

A. Yes.

Q. Now, during the year 1966, you have testified to the fact that Mr. Keith Smith—was it—that told you they were taking over the new Hickey ditch?

A. Yes sir.

Q. And what was said, other than that, at that time; do you recall?

A. Well, that is about all that was said. He said he had done a lot of work on the ditch, and we hadn't contributed anything to it, and he didn't think we had right in the ditch.

Q. And didn't he tell you on what he based his claim to the use of the New Hickey ditch?

A. He says they had changed the point of diversion; were taking their water out in the New Hickey ditch.

Q. Did you question, at that time, his right to do that?

A. No.

POINT 7

PLAINTIFF - APPELLANT HAVING WRONGFULLY INTERFERED WITH THE RIGHTS OF DEFENDANTS-RESPONDENTS REQUIRING THEM TO ENGAGE THE SERVICES OF AN ATTORNEY AND CAUSING RESPONDENTS TO INCUR EXPENSES TO PROTECT THEIR RIGHTS, RESPONDENTS ARE ENTITLED TO THE AWARD FOR DAMAGES.

The evidence fully supports the award for damages under the judgment including the award for attorney's fees incurred by respondents in obtaining a restraining Order.

In 22 Am. Jur. 2d, Sec. 166 under title "Damages", the law is stated as follows:

> "It is generally held that where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages."

Numerous cases are cited under said general principal of law including the Utah case of Prudential Federal Savings & Loan Assoc. vs. Hartford, 7 U 2d 366, 325 P2d 906, wherein the trial court awarded attorney's fees in a suit involving a contract bond and in which the defendant contended that attorney's fees should not be allowed. The Court said:

"The attack Hartford makes upon the judgment is that plaintiff's expenses for attorney's fees should not have been allowed because they are not generally recoverable unless expressly provided for by contract or authorized by statute. That such is the general rule we agree. But it applies to claims for attorney's fees within the action itself, and not to situations such as the instant case."

While respondents had prayed for $2500 attorney's fees incurred by them in the prosecution of the case, exclusive of that fee incurred in obtaining the Restraining Order, the court disallowed the same. The other items of damage allowed by the court were as a result of plaintiff-appellant cutting off and interfering with the waters of respondents and were properly fixed on the basis of the evidence.

POINT 8

THE COURT PROPERLY FOUND ON ALL ISSUES OF THE CASE AND THE FINDINGS ARE SUPPORTED BY THE EVIDENCE.

There was no contention on the part of respondents that appellants were not entitled to the use of the Madsen ditch nor was there any issue as to same. The case was an action to quiet title on the part of plaintiff-appellant against defendants-respondents and praying that the court adjudge that respondents had no right to the use of the New Hickey and Parks Madsen ditches for the conveying of their waters through the property of appellants. There was no

counter-claim filed by respondents seeking exclusive use of either the New Hickey or the Madsen ditch and the court adjudged that it did not find an exclusive use of the Madsen ditch in either party.

CONCLUSION

It having been admitted by appellant that respondents had an easement through the property purchased by appellant for the conveying of respondents' waters to their lands, and the uncontradicted evidence showing that the owners and predecessors in interest of appellants requested and agreed to the relocation of the easement, which was beneficial to the land through which the easement passed, and the agreement to relocate having been for a valuable consideration and having been fully performed before appellant acquired any interest in the property, and appellant having taken with notice of such easement and subject to the same, the evidence fully supports the judgment and the same should be affirmed.

Respectfully submitted,

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