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Lyman Grazing Association v. George W. Smith, Eleanor N. Smith and Keith Smith : Petition For Rehearing and Supporting Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

LYMAN GRAZING ASSOCIATION, a corporation,
Plaintiff and Appellant,

vs.

GEORGE W. SMITH, ELEANOR N. SMITH and KEITH SMITH,
Defendants and Respondents.

Case No. 11849

PETITION FOR REHEARING AND SUPPORTING BRIEF

Appeal from District Court of Summit County, Utah
Honorable Merrill C. Faux, Judge

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PETITION FOR REHEARING

The plaintiff and appellant respectfully petitions for a rehearing of the above case upon the following grounds:

1. The Court erroneously held that the statute of frauds has no application to this case.

2. The Court ignored basic property law in holding that Larsen's terminated contract right is in the plaintiff's chain of title.

3. The Court erroneously disregarded the decree binding on both parties, which awarded to the plaintiff's predecessors the right to use the Parley Main ditch.

4. The Court erred in holding significant the State Engineer's approval of application for change of point of diversion.

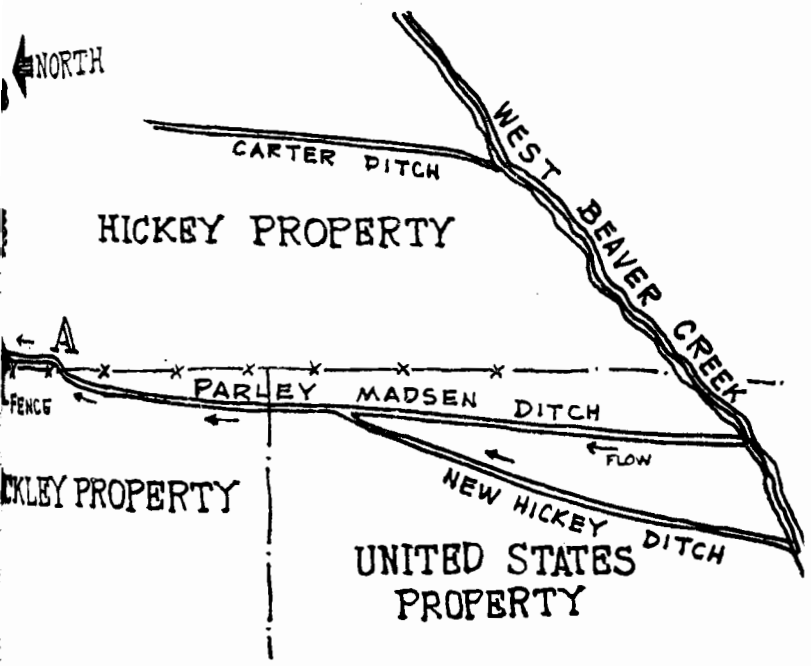
SUPPORTING BRIEF

1. THE COURT ERRONEOUSLY HELD THAT THE STATUTE OF FRAUDS HAS NO APPLICATION TO THIS CASE.

This Court mentions the contention of the plaintiff that the statute of frauds, section 25-5-1 Utah Code Annotated 1953, prevents transfer of an interest in real property by parol, which is fundamental property law, but avoids it by citing law to the effect that where an easement has once been established its location may be changed by an executed oral agreement between the owner of the dominant estate and the owner of the servient estate. The case of Tripp v. Bagley, 74 Utah 57, 276 P. 912, is cited.

We have no quarrel with the holding of that case but it has no application to this case. The New High-

and Parley Madsen ditches have a combined length of about 2 miles. See Map Ex. 1-P. Of this distance the first 1½ miles are on land owned by the United States and one Harry D. Buckley. Only the last one half mile is on land owned by Hickey subject to the Larsen contract. The following sketch shows the location of the ditch and the ownership of the land.



Larsen obviously had no right to consent to a change of location of a ditch from land he was purchasing to land owned by the United States and by Buckley. Tripp v. Bagley did not so hold. It merely holds that the owners of the dominant and servient

estates may by executed oral agreement accomplish a change without violating the statute of frauds. I have accomplished the change of location in this case the defendant would have had to prove that both the United States and Buckley had orally consented to the change. There is no such proof.

The statute of frauds clearly strikes down the attempted transfer or creation of an easement across the land of the United States and Buckley.

2. THE COURT IGNORED BASIC PROPERTY LAW IN HOLDING THAT LARSEN'S TERMINATED CONTRACT RIGHT IS IN THE PLAINTIFF'S CHAIN OF TITLE.

The main opinion is based upon conversations between Smith and Larsen which took place in the absence of the plaintiff or its predecessor, Hickey. Timely and proper objections were made under the hearsay rule. This Court held that Larsen's "equitable interest" in the land was in the chain of title and that the declarations of Larsen and Hickey were admissible. This was error.

The so called "equitable interest" mentioned by the Court was created by the Sale Agreement, Hickey to Larsen, dated May 26, 1961 (R 74, Ex 8D).

The abstract of title, Ex 6-P, shows on page 466 an assignment of the Sale Agreement to Beeville State Bank, dated March 18, 1963, to secure the payment of certain promissory notes. On July 26, 196

Larsen quit-claimed the land described in the contract to the bank. (Ex 6-P pp. 492-494). On April 30, 1965, Hickey deeded the land and appurtenances to the bank and the bank *on the same day* deeded to the plaintiff. (Ex 6-P pp. 495-498).

The chain of title "consists of those instruments and events . . . by which the title has been transferred."

Real Estate Conveyancing, North and Van Buren, p 141.

A contract of sale which is terminated by a quit claim deed is not in the chain of title. As indicated above, the chain of the plaintiff's title was from Hickey to Beehive State Bank to plaintiff. *Larsen never had fee title* and the plaintiff was not a successor in interest to Larsen. The self serving testimony of Larsen was therefore inadmissible under the hearsay rule. The error in the main opinion is evident on the face of the opinion and is a precedent which will have disastrous and far reaching effects. As well stated in Justice Henriod's dissent:

> "One wonders what this Court's position would be if, under identical circumstances, this case was concerned, not with the creation or grant of an easement for transportation of water, Larsen orally had agreed or attempted to convey half of Hickey's land to Smith for half of Smith's adjoining tract."

As indicated above, Larsen never had fee title, but had only a possessory right and during the short

time he was owner of the sale contract he had no rig to confer on a third person a greater right than possessed. Cook v. Rigney, 113 Mont. 198, 126 P. 325; Lesser v. Dame, 77 Miss. 798, 26 So. 961; Chan ler v. Hamell, 67 N.Y.S. 1068.

The text and case citations in the main opin on the hearsay rule apply only where the declarant a *predecessor in interest.* Larsen was not in the cha of title and his testimony as to conversations w Smith and Hickey were hearsay and inadmissib There was no competent evidence to support the fi ings and decree for the defendants.

3. THE COURT ERRONEOUSLY DISRE GARDED THE DECREE WHICH AWARDE TO THE PLAINTIFF'S PREDECESSOR TH RIGHT TO USE THE PARLEY MADSE DITCH.

This Court disregarded the decree adjudicat water rights on the West Fork of Beaver Creek, dat September 25, 1964, which gave the plaintiff's pre cessor the right to convey water through the Par Madsen ditch. No such right was given to the defe ants although the decree is dated later than the a claimed by the Smiths which created their rights the ditch. Although both parties are bound by t decree, the Court failed to even mention this import point unless it is included in the "tenuous points" m tioned in the last paragraph of the main opinion. Wh all elements of res adjudicata are present an argum

based on this fundamental rule is hardly tenuous. The stipulation in open court referred to on page 26 of the appellant's brief, and the decree mentioned above clearly established the plaintiff's right to use the ditches and it was gross error to enter and affirm a judgment which completely ignores the plaintiff's rights. *The Court settled nothing and left the parties with undefined rights in a situation where tempers have been flaring for years and violence may be the next step.*

4. THE COURT ERRED IN HOLDING SIGNIFICANT THE STATE ENGINEER'S APPROVAL OF AN APPLICATION FOR CHANGE OF POINT OF DIVERSION.

It was obvious and palpable error for the Court to say: "Hickey's consent may further be implied from his failure to protest when Smith's application for a change of diversion was advertised . . . " There was no reason for Hickey to protest because no action of an administrative officer can divest property rights. The state engineer cannot grant a right to an applicant to use the property rights of another. Assuming Hickey knew about the application, his failure to protest can have no bearing on property rights and therefore has no significance whatever. Whitmore v. Murray City, 107 Utah 445, 154 P2d 748.

CONCLUSION

The Court decided this case as a result of mi application of familiar and fundamental principles o property law relating to such importance subjects a the statute of frauds, and the significance of the cha of title in determining whether the hearsay rule appli Further, the Court erroneously based its decision o the assumption that this is a change-of-location-of-a easement case. The map on page 3 of this petition di closes that the New Hickey and Parley Madsen ditch are located on lands not owned by the plaintiff or p predecessors. The question whether a right to use ditch under such circumstances could be created transferred was apparently not recognized and ce tainly was not discussed by this Court. This decisi settled nothnig but left the parties to their own devic to determine the ownership of ditches, a subject whi is calculated to inflame tempers and lead to violen as a poor substitute for the orderly settlement by a com plete court decree. This Petition for Rehearing shou be granted.

Respectfully submitted.

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