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Opal C. Wells, And Opal C. Wells, As Guardian For The Estates Of Patricia Ann Hill, Ramona Hill, John Roland Hill, Mary Kate Hill, And Joseph William Hill, Minors v. William Marcus And Audrey Y. Marcus : Brief of Appellants

THE SUPREM
THE STATE

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CASES CITED

AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

OPAL C. WELLS, and OPAL C. WELLS, as guardian for the estates of PATRICIA ANN HILL, RAMONA HILL, JOHN ROLAND HILL, MARY KATE HILL, and JOSEPH WILLIAM HILL, minors,
Plaintiffs and Respondents,
vs.
WILLIAM MARCUS and AUDREY Y. MARCUS,
Defendants and Appellants.

Case No. 11939

BRIEF OF APPELLANTS

STATEMENT OF NATURE OF CASE

This is an action quieting title to land and water rights of the parties and determining right of easement across said property for recovery of water.

DISPOSITION IN LOWER COURT

Judgment was entered quieting title to land in plaintiffs and awarding two-thirds of the water of Corbert Creek to plaintiffs. Defendants were restrained from entering upon or constructing, maintaining or reconstructing a pipeline across plaintiffs' land for the purpose of conveying water from Corbert Creek.

RELIEF SOUGHT ON APPEAL

Defendants-Appellants seek reversal of judgment as it pertains to a restraining order prohibiting said defendants from exercising a right of easement across the land of plaintiffs-respondents to remove one-third of the water of Corbert Creek, or, that failing, a new trial.

STATEMENT OF FACTS

Plaintiffs-respondents are owners of property in Davis County with water rights flowing from Corbert Hollow, having acquired title from George A. Hill. Defendants-appellants are the owners of property in Davis County also with water rights flowing from Corbert Hollow, deriving title from Margaret Schmaltz in 1946. At or about 1950 appellants constructed, with the help of John Hill, deceased husband of plaintiff-respondent, a pipeline conveying water from Corbert Hollow Springs to each of their respective properties. Appellants furnished heavy equipment and labor and Mr. Hill provided necessary material. This line was used for approximately ten years by the parties until the death of Mr. Hill in 1961. The area covered by the pipelines in dispute traverses the property of plaintiffs-respondents. Both parties herein have at different times benefitted from the pipeline and claim opposing interest in its ownership.

In September 1966, plaintiffs-respondents filed suit to quiet title to said property and water rights in dispute. Trial was held August 1, 1968. Decree of judgment was entered March 7, 1969. The trial court entered judg-

ment quieting title in the real property to plaintiffs and granted two-thirds flow of Corbert Hollow Springs to them. Defendants were restrained from going to plaintiffs' property to maintain, construct or reconstruct the pipeline conveying their water rights from Corbert Hollow Springs.

Appellants made and oral motion for modification of a proposed decree and, in the alternative, a new trial. The motion was denied.

ARGUMENT

POINT I

APPELLANTS' RIGHT TO QUIET TITLE IN ONE-THIRD FLOW OF CORBERT HOLLOW SPRINGS.

The Second Judicial District Court of the State of Utah, Weber County, entered its judgment in Case No. 7487, *Plain City Irrigation vs. Hooper Irrigation Co.* In that case at page 17, Right No. 30 reflects title to the water diverted from Corbert Hollow and Springs to be vested in George A. Hill and Margaret Schmaltz, dating to 1865. Mr. William Marcus, defendant-appellant, acquired title to the Schmaltz property in approximately 1947. (Trial transcript, Page 36, Line 1.) At this time he acquired not only interest in the Schmaltz real property but also the water rights. The deed was recorded at Book 2B, Deeds, Page 9, dated September 26, 1946, Davis County Recorder's Office.

The trial court in the instant case found that plain-

tiffs were entitled to two-third flow of Corbert Creek Springs but entered no finding regarding one-third interest in defendant William Marcus. Mrs. Opal Wells testified at the trial that one-third flow of Corbert Creek belonged to defendant. (Trial transcript, Page 15, Line 15.)

The knowledge of one-third water right being vested in defendant was known to those familiar with the surroundings as evidenced by the testimony of Carl D. Hill given at trial. (Trial transcript, Page 20, Lines 23-25). To fail to enter its order respecting defendants' rights to their share of water leaves open this issue and subjects defendants to future expense and litigation.

POINT II

APPELLANTS' RIGHT TO EASEMENT.

The general rule is that an easement in land can only be created by parol. Despite the general rule, however, it has been recognized that easements may exist and have been enforced by virtue of an estoppel, agreement, or covenant. *Rose v. Peters,* 59 Cal. App.2d 833, 139 P.2d 983, (1943); *Paden City v. Felton,* 136 W. Va. 127, 66 S.E.2d 280, (1951); *I Minor on Real Property, Second Edition, Sec.* 104. The rule set forth in *I Thompson, Real Property, Sec.* 356 (Prem. Ed. 1939), states:

> Under the equitable doctrine of part performance, a verbal agreement for an easement has been enforced by some courts. This doctrine applies to all cases in which a court of equity

> would entertain a suit for specific performance if the alleged contract had been in writing. The doctrine also applies to a parol agreement for an easement although no interest in the land is intended to be acquired. . . . If expenditures be made in permanent improvements inuring to the benefit of a licensor under an express oral license given by him, then such license becomes irrevocable, and, if it relates to the use or occupation of real estate, it becomes an easement.

In the instant case, the record indicates (Trial transcript, Page 20, Line 21), Carl D. Hill testifying, that John Hill had granted to William Marcus one-third interest in the water coming from Corbert Creek Canyon and that Carl D. Hill, cousin of John Hill, had been present at the time William Marcus and John Hill had installed the pipeline transporting said water. William Marcus stated that the pipeline in question was installed to convey Corbert Creek water from the canyon to Mr. Marcus' home in order to avoid the need for pumping the water. (Trial transcript, Page 38, Line 12). Mr. Marcus further testified that the agreement between John Hill and William Marcus was for Mr. Hill to furnish material and Mr. Marcus was to provide the equipment and labor necessary. (Trial transcript, Page 38, Line 22.)

It is the position of Mr. Marcus that oral statements between Mr. Hill and himself established a verbal agreement, either partially or wholly performed by which both parties benefitted; that such performance amounts to an executed oral contract removing this issue from the Statute of Frauds and creating an enforceable, valid

easement for the existing pipeline and its future maintenance.

For the Second Judicial Court of Davis County to deny Mr. Marcus the continued use of this easement onto the Hill property in effect excludes Mr. Marcus from all rights to the water in Corbert Creek Canyon. There is no other feasible way for the water to be removed to the Marcus property without access across Hills' real estate. Even if such alternative route did exist, the labor, costs and improvements have already been mutually expended and benefits conferred in reliance upon the early agreement. The nature of the pipeline construction, being part cement and part buried beneath the ground, indicates the intent of the parties at the time of construction to create a permanent line. This fact is further evidenced by both parties mutually using the pipeline for their individual and joint benefit for a period of nearly ten years with no known dispute arising until after the death of John Hill in 1961. It is of further significance that Mr. Marcus built his home using the pipeline in dispute to transport to his residence culinary water for him and his family. (Trial transcript, Page 37, Line 38.) All of these factors indicate the intent of the parties to create an easement in the property for the continued beneficial use of the water.

The Supreme Court of Colorado has recognized that "Implied Easements" should be enforced and that said easements arise out of existence of certain facts implied from the conduct of the parties. *Wagner v. Fairlamb*, 379 P.2d 165, 151 Colo. 481, Cert. Denied, 375 U.S. 879,

(1963). See also in this regard *I Thompson, Real Property, Sec.* 390 (Prem. Ed. 1939).

A case similar in many respects to the case at hand, which states the rule in California, is the case of *Cooke v. Ramponi*, 38 C.2d 282, 239 P.2d 638, (1952), as follows:

> Where plaintiff and purchaser of adjoining property orally agreed to jointly use and maintain a road across purchaser's property giving the only access to plaintiff's land and both paid a respective share of one year's repair work, and plaintiff orally agreed with defendant who thereafter purchased the adjoining proyerty for mutual use of a road and for maintenance by plaintiff only, and plaintiff incurred subsantial expenditures for necessary maintenance in the succeeding year, and defendant accepted benefits of such work and used the road, plaintiff had an executed, irrevocable parol license to use the road and owned an easement therein.

The court goes on to explain that the reason for such an equitable estoppel is to prevent a fraud from being perpetrated upon the party who relies upon verbal statements and then expends money or labor upon such reliance.

The case before this court faces the same injustices to defendants.

A cardinal rule of the State of Utah regarding use of water has been conservation. This court has previously said that it is contrary to the policy of Utah to

permit waste of water. *United States v. District Court*, 121 U. 1, 11-12, 238 P.2d 1132 (1951).

This doctrine was affirmed by this court in 1969. *Salt Lake County v. Kazura*, 22 U.2d 313, 452 P.2d 869. *Water Co. v. Kimball*, 76 U. 243, 289 Pac. 116 (1930); *Big Cottonwood Tanner Ditch Co. v. Moyle*, 109 U. 197, 159 P.2d 596 (1945); *Wrathall v. Johnson*, 86 U. 50, 40 P.2d 755 (1935).

Speaking further on this subject, the court recognized that the conservation of water is of utmost importance to the public welfare of the State and the waste of that water is injurious to the welfare of our State and should be avoided. *Brian v. Fremont Irrigation Co.*, 112 U. 220, 186 P.2d 588 (1947).

As stated earlier, for a water right to exist without a right of access to recover said water creates waste.

Respectfully submitted,

STANLEY M. SMEDLEY
BEAN, BEAN & SMEDLEY
190 So. Fort Lane
Layton, Utah 84041
Attorney for Appellant