

1972

State of Utah, By And Through Its Road Commission v. Dennis K. Blackner And Bertha Mae Blackner, His Wife; Veterans Administration : Brief of Appellant

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH, by and through
its ROAD COMMISSION,
Plaintiff-Appellant,

vs.

DENNIS K. BLACKNER and
BERTHA MAE BLACKNER, his
wife; VETERANS ADMINISTRATION,
Defendants-Respondents.

Case No.
12867

BRIEF OF APPELLANT

Appeal from the Judgment of the Second District
Court of Davis County, Honorable Thornley K. Swan,
Judge, presiding.

VERNON B. ROMNEY
Attorney General
STEPHEN C. WARD
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellant

GLEN E. FULLER
15 East 4th South
Salt Lake City, Utah 84111
Attorney for Respondents

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

Plaintiff brought this action under the State's power of eminent domain in the District Court in Davis County, to acquire from defendants part of their property interests and property, for a highway. Plaintiff appeals from the judgment of the lower court with respect to the amount of property the defendants owned, part of which the plaintiff sought to acquire.

DISPOSITION IN THE LOWER COURT

The issue of the amount of property the defendants owned in the area to be acquired by the plaintiff was submitted to the court, sitting without a jury on October 29, 1971, and the court rendered a judgment in favor of the defendants and against the plaintiff. The defendants were adjudged to be the owners of the five acres of property in a gooseneck on the North side of the Weber River. The court reheard the matter on March 1, 1972. Immediately after the court reaffirmed its earlier decision on the title issue, the case was tried before a jury on the issue of the value of the property the State was taking from the defendants.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Judgment rendered by the lower court on the issue of the defendant's alleged ownership of the five acres located immediately to the North of defendants' existing property and the existing Weber River. The plaintiff asks that the Judgment of the lower court be reversed and the lower court be instructed to grant Judgment to the plaintiff awarding it title to the five acres in question.

STATEMENT OF THE FACTS

Plaintiff in this case initiated condemnation proceedings against the defendants to acquire a portion of defendants' property which is located in Davis County. The plaintiff was constructing a new highway through the area of South Weber which would connect the Uintah

and Riverdale interchanges. The alignment of the new highway caused the defendants' property which was located on the South side of the Weber River to be bisected, and as a result would leave remaining property on both the North and South of the new highway. No issue is taken with the verdict of the jury as to the amount of acreage and its value on the area of defendants' property which was situated to the South of the existing Weber River.

The sole question raised by this appeal runs to the ownership of the five acres on the North side of the gooseneck of the existing Weber River. (Hereinafter, this area will be referred to as the five acres in question.) Prior to the initiation of the present condemnation action, the plaintiff had previously purchased the five acres in question which is located North of the gooseneck from the recorded property owner in Weber County. The defendants raised the issue of their ownership to the five acres in question when the State initiated this condemnation action.

The court sitting without a jury on October 29, 1971, heard evidence and decided that the five acres in question located on the North side of the gooseneck of the existing Weber River belonged to the defendants.

The Court reheard the matter on March 1, 1972, and reaffirmed its original decision wherein the defendants were adjudged to be the owners of the five acres in question.

The defendants in presenting their case raised two issues and based their claim to ownership on the following:

1. That the original location of the Weber River was depicted by a green line on the defendants' Exhibit 1A, and that in 1952, as a result of the flood, the course of the Weber River was changed so that its new course followed the gooseneck which is shown on all of the aerial photographic Exhibits of the area in question.

2. That defendants through their predecessor in interest, acquired the property in question by adverse possession.

At the conclusion of the trial on October 29, 1971, the Court took the matter under advisement but made the statement that it would be most helpful to see an aerial photograph or maps that would be prior to 1946. The Court announced its decision by giving oral notice sometime later, and subsequently the plaintiff timely filed its Affidavit and Motion for a new trial, (pleadings 41, 42, 43). The Court heard plaintiff's motion for a new trial and entered its order on February 29, 1972.

The Court on March 1, 1972, reopened the case and heard additional testimony with respect to the ownership of the five acres in question. At the end of the evidence, the Court reaffirmed its original decision and subsequently defendants' counsel submitted Findings of Fact and Conclusions of Law and a Decree, which the Court eventually signed nunc pro tunc, as of March 1, 1972.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANTS WERE THE FEE OWNERS OF THE LAND IN QUESTION BY REASON OF THE AVULSIVE ACTIVITY OF THE WEBER RIVER WHICH ALLEGEDLY OCCURRED SOMETIME IN 1952.

In presenting their case, the defendants called as their witness Mr. Glen Ray, who marked by drawing a green line on defendants' Exhibit 1A, the main channel of the Weber River prior to 1952, (Tr. 8). Mr. Ray (Tr. 9) drew a green X on same exhibit where he testified that prior to 1952, the water was diverted into the gooseneck so that it could get into the irrigation ditches that supposedly ran to the South. This witness (Tr. 10) further testified that the Weber River changed its main channel to the gooseneck in the year of 1952 as a result of the flood. Mr. Ray further identified the old channel by drawing a green arrow on the defendants' Exhibit 1B (Tr. 14).

The defendant, Mr. Blackner, testified (Tr. 41) that since the time he acquired the property on the South of the Weber River in 1959, the River had remained in the gooseneck channel, where it presently is.

The plaintiff in presenting its case relied upon aerial photographs, plaintiff's Exhibits L and M which were explained and interpreted by plaintiff's only witness, Mr. Winston Neiman. The deed giving the defendants their

property, (defendants' Exhibit E) had been received into evidence, but the provision needing clarification was the defendants' North boundary, which was listed as the South line of the Weber River. Mr. Neiman, after setting forth his qualifications with respect to the reading and interpreting of aerial photographs (Tr. 64) proceeded to give his testimony and interpretation of plaintiff's Exhibit L, (Tr. 66, 67, 68) and gave his opinion that the main channel of the river as indicated by the various aerial photographs, had since 1946 always occupied the channel the Weber River occupies today.

The case was re-opened and additional testimony was heard on March 1, 1972, and the plaintiff presented further testimony on this matter and called as its witness Dr. Armond Eardley, a geologist and retired University professor. Dr. Eardley, after identifying the various aerial photographs, including plaintiff's Exhibit M, gave his opinion on whether the main channel of the Webeh River prior to 1952 ever occupied the area marked in green on defendants' Exhibit 1A, (Tr. 29, 29, 30). Dr. Eardley's opinion was that the main course of the Weber River from 1937 to the present had always occupied the gooseneck to the South which the Weber River presently occupies, and that no significant change occurred in the area in question in the year 1952.

Furthermore, plaintiff's Exhibit N which is a topographic map of the area in question, which was surveyed in 1923, 24, and 25 also showed the gooseneck as the main channel of the Weber River. The plaintiff also called

as its witness, a native of the South Weber area, Mr. Cecil Kapp, who testified (Tr. 14) that if a dam were placed in the area testified to by Mr. Ray, (green X on defendants' Exhibit 1A) that it would be to force the water out of the main channel in a Northwesterly direction, instead of to the South into the gooseneck. Mr. Kapp also testified that prior to 1952 (Tr. 13) the point of diversion and diversion canal, was the red line as indicated on plaintiff's Exhibit Ka, which is much further to the East than the area testified to by Mr. Ray. Mr. Kapp testified that the ditches, which ran south off of the Weber River, which were the ones that the river water was diverted into, were located much further to the East than the gooseneck (Tr. 14). Also, Mr. Kapp could not give any reasons for diverting the water into the gooseneck as testified by Mr. Ray, since there were no ditches going South off the gooseneck.

It was stipulated by the respective counsel for the parties that the only issue in this case is the location of the North boundary of defendants' property, (Tr. 58) and that there was no disagreement with the law on reliction and avulsive river changes as set forth in 49 Am. Jur. Sections 21, 22, 23, and 24. The defendants claim that prior to 1952, the North boundary was the South bank of the main channel of the Weber River which occupied the area marked by the green line on defendants' Exhibit 1A, but that avulsive activity, caused by the floods in 1952 caused the main channel to follow the gooseneck to the South. Admittedly avulsive activity does not result in a boundary

change, but plaintiff contends that no avulsive activity took place in the area in question. Plaintiff has indisputably shown that the main channel of the Weber River, both prior and subsequent to 1952 occupied the gooseneck. Therefore, there was no legal or factual basis for the Court to award or conclude that the five acres in question belonged to the defendant.

POINT II.

THE COURT ERRED IN ITS FINDING THAT THE DEFENDANTS WERE THE FEE OWNERS OF THE FIVE ACRES IN QUESTION BY REASON OF THEIR ADVERSE POSSESSION OF THIS PROPERTY ON THE FIVE ACRES IN QUESTION.

The defendants in presenting their case called Mr. Glen Ray, who testified that he remembers farming and cultivation of crops by the defendants' predecessor in interest, and this five acres was farmed as late as 1945 (Tr. 21). Mr. Ray also testified that farming could not have taken place if this five acres had been flooded every year (Tr. 20). Mr. Ray (Tr. 12) testified that the Weber River in the gooseneck, prior to 1952 was at least 20 feet wide, but yet horses and wagons were able to cross this area to farm the five acres in question. Mr. Blackner (Tr. 41) testified that at no time during his occupation of the property did he farm or cultivate the five acres in question.

The plaintiff at the first trial elicited testimony from Mr. Neiman to the effect that based upon his reading of the aerial photographs, no farming took place on the five acres in question (Tr. 68, 69, 70). Mr. Neiman testified that the vegetation in 1946 corresponded to the vegetation as shown on the later aerial photographs. In the later hearing, Dr. Eardley (Tr. 31) gave an opinion that based upon his interpretation of all of the aerial photographs he felt that no farming or cultivation had ever taken place on the five acres in question. The defendants admit to their paying taxes, but only after 1968, when they learned that the new freeway was going through their property and it was at that time they recorded their survey which showed their ownership of the five acres in question (Tr. 36).

Mr. Blackner did not testify that he used the property in question to the exclusion of others but that at times his cattle grazed on the five acres in question.

Plaintiff's Exhibits P and O which are Davis and Weber County plat maps show how the respective counties treat the property in question as far as the recorded ownership is concerned.

It is for the foregoing reasons that the Court erred in finding the defendants were the owners of the five acres in question by reason of their adverse possession. The only logical conclusion that can be drawn is that the plaintiff's interpretation of the aerial photograph was correct and that no farming ever took place on the five acres in

question. (See plaintiff's Exhibits Q, R, S, T, and U), which are present photographs of the five acres in question.

The defendant himself testified that he never farmed this area in question, but merely allowed his animals to occupy the five acres in question, but that it was not farmed (plaintiff's Exhibit Ka shows the present fences). The defendants and/or their predecessor in interest failed to comply with 78-12-11 and 12 of the Utah Code Ann. (1953) (as amended) as interpreted in the case of *Jenkins v. Morgan*, 113 U. 534, 196 P. 2d 871.

CONCLUSION

Plaintiff submits that the trial court erred in giving judgment to the defendants which made them the owners of the five acres in question. There was no legal or factual basis for the court's decision on either the theory of avulsion or adverse possession.

Plaintiff respectfully requests the court to reverse the trial court on the issue of the ownership of the five acres in question, and to grant judgment giving title to the plaintiff to the five acres in question.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

STEPHEN C. WARD
Assistant Attorney General

Attorneys for Appellant