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State of Utah, By and Through Its Road Commission v. Cox Corporation And Salt Lake City Corporation : Brief of Appellant Cox Corporation

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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

vs.

COX CORPORATION,
Defendant-Appellant,

and
SALT LAKE CITY CORPORATION,
Defendant-Respondent.

CASE NO.
12924

BRIEF OF APPELLANT
COX CORPORATION

Appeal from Judgment of the Third Judicial
District Court of Salt Lake County,
Honorable James S. Sawaya, Presiding

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Defendant-Respondent.

CASE NO.
12924

BRIEF OF APPELLANT COX CORPORATION

STATEMENT OF THE CASE

The State of Utah, by and through its Road Commission, brought an action seeking to condemn certain real property located in Salt Lake County, joining Appellant Cox Corporation and Respondent Salt Lake City Corporation as parties Defendant.

DISPOSITION IN LOWER COURT

The Lower Court, the Honorable James S. Sawaya, Judge, granted Plaintiff's Motion for Summary Judgment declaring Respondent Salt Lake City Corporation's interest in the property in question to be fee simple title to all of the property de-

scribed in a deed to Salt Lake City in 1881 and that the remaining property not so described and belonging to Cox Corporation, is subject to a prescriptive easement in favor of Respondent Salt Lake City Corporation, which easement extends 33 feet on either side of the center line of the Salt Lake Jordan Canal. (Record on Appeal at pp. 108 and 109)

RELIEF SOUGHT ON APPEAL

Appellant Cox Corporation prays that the District Court's Order Granting Summary Judgment be vacated and that an order requiring the Lower Court to enter summary judgment in accordance with guidelines to be given by this Court be entered.

STATEMENT OF FACTS

In the year 1880 Salt Lake City commenced construction of an irrigation canal from the Salt Lake-Utah County boundary line to the City of Salt Lake, a distance of about 30 miles. The canal was, at the time of its completion in 1882, approximately 18 feet wide and is now, at the point where it traverses the property of Defendant Cox Corporation, 15 to 18 feet wide. (Record on Appeal at p. 45)

In the year 1881 Neils Neilsen conveyed to Salt Lake City Corporation a tract of land which was irregular in shape, the description of which did not close. The description of this tract, conveyed to Salt Lake City Corporation, does not correspond to the location of said irrigation canal nor does it describe in its entirety land situated within an area 33 feet wide on either side of the center line of said canal. (Record on Appeal at p. 89)

Since 1882 Respondent Salt Lake City Corporation has used a portion of the property sought to be condemned by the State of Utah as an irrigation canal, 15-18 feet wide. Salt Lake City Corporation claims fee simple title to all of the property described in the Neils Neilsen deed, pursuant to said deed, or by adverse possession under color of title, and further claims a prescriptive easement 66 feet wide, 33 feet on either side of the centerline of the canal, traversing the tract not described in the 1881 deed. The only references of record made to any interest of Salt Lake City Corporation in and to said tract of land or any part thereof since 1919 are contained in warranty deeds described in paragraphs numbered 4(d), 5, 6 and 7 of Plaintiff's Answers to Defendant Cox Corporation's Interrogatories. (Record on appeal at p. 53) The references made in said warranty deeds are general references only and are as follows: (a) "excepting the right-of-way of the Salt Lake City canal." (b) "excepting therefrom the right-of-way of the Salt Lake Canal." (c) "less existing right of way." (Record on appeal at p. 90)

Appellant Cox Corporation claims fee simple title to all of the subject property, including that portion described in the Neilsen deed, by virtue of an unbroken record chain of title to said tract of land commencing over 40 years ago; i.e., October 14, 1919. (Record on Appeal at p. 86) The fact that no notice has been recorded as required by Section 57-9-2 of the Utah Code Annotated (1953) to preserve any adverse interest since 1919 is not disputed. Cox Corporation concedes, however, that because the canal was physically observable at the time of its root of title that its fee interest is subject to a right-of-way in favor of Salt Lake City for a canal 15 to 18 feet wide. Utah Code Ann. § 57-9-6 (Supp. 1971)

ARGUMENT

POINT I

APPELLANT COX CORPORATION HAS MARKETABLE RECORD TITLE TO THE DISPUTED TRACT OF LAND SUBJECT TO AN EASEMENT ACROSS A PORTION OF THE TRACT FOR AN IRRIGATION CANAL.

Section 57-9-1, Utah Code Annotated, 1953, provides:

Any person having the legal capacity to own land in this State, who has an unbroken chain of title of record to any interest in the land for forty (40) years or more, shall be deemed to have a marketable record title to such interest.

That Cox Corporation had such an unbroken chain of title enabling it to a marketable record title is not disputed. In Section 57-9-3, Utah Code Annotated, 1953, the meaning of the term marketable record title is set forth as follows:

One holding marketable record title shall hold such property free and clear of all interests, claims or changes, whatsoever, the existence of which depends upon any act, transaction, event or admission that occurred prior to the effective date of the root of title. All such interests, claims or changes, however denominated, whether legal or equitable, present or sui juris or under a disability, whether such person is within or without the State, *whether such person is natural or corporate, or is private or governmental, are hereby declared to be void.* (emphasis added)

Because Cox Corporation has a marketable record title (Record on Appeal at p. 86), it is manifestly clear that any interest claimed by Salt Lake City Corporation from a deed executed

prior to Cox Corporation's root of title of October 14, 1919, is void. This includes the Neilsen deed to Salt Lake City Corporation of 1881 because no notice has been recorded during the period constituting Cox Corporation's record chain of title to preserve any interest claimed under said deed pursuant to Section 57-9-4, Utah Code Annotated, 1953.

Moreover, the qualitative possession necessary to establish fee simple title by adverse possession since 1919 has not been established by Salt Lake City. The City has used the property in question solely for the purpose of an irrigation canal. As stated by Kinney on Irrigation and Water Rights:

The claimant cannot, on one hand gain a right which is in excess of his actual possession and use during the period of time that the statute [of limitations] was running. (2 Kinney, Irrigation and Water Rights § 1056.)

The possession or use by Salt Lake City Corporation of the canal was for the purpose of conveying water. To award the City fee title to any of the property would therefore be a grant in excess of the actual possession and use. As stated by the Utah Supreme Court in *Nielson v. Sandberg*, 105 Utah 93, 354 P.2d 696, 700 (1943) "no one can acquire a right-of-way to conduct water over the land of another except by consent of the owner of the fee, by eminent domain or by prescription." It seems, therefore, that adverse use of another's property to convey water across it will mature into a prescriptive easement for a ditch or canal and is not an adequate possession to ripen into fee ownership of the property by adverse possession.

Utah's Marketable Title Act does provide, however, that certain interests established prior to a root of title may be preserved even though not recorded. One such exception is an easement which is clearly observable at the time of the root of title. (Utah Code Ann. § 57-9-6, Supp. 1971) The facts clearly show that there was a canal 15 to 18 feet wide running through the property as of the time of Cox Corporation's root of title in 1919. The Utah Supreme Court held in *Jones v. Grow Investment and Mortgage Co.*, 11 U.2d 326, 358 P.2d 909 (1961), that an open irrigation ditch is an easement which is clearly observable by physical evidence of its use. Cox Corporation concedes, therefore, that its marketable record title was and is subject to a canal right-of-way.

The Lower Court, however, apparently ruled that Respondent Salt Lake City Corporation has, by virtue of the canal use, adversely possessed under color of title part of the property described in the 1881 Neilsen deed and that, therefore, the City is entitled to fee title to the entire tract described in said deed pursuant to Section 78-12-8, Utah Code Annotated, 1953.¹ This conclusion is clearly in error. Because Salt Lake City Corporation had a legal right to its easement, inasmuch as it was clearly observable in 1919, and because Cox Corporation had no right to prevent Salt Lake City Corporation's use of the

¹The statute provides:

Whenever it appears that the occupant, or those under whom he claims, entered into possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property under such claim, for seven years, the property so included is deemed to have been [held] adversely

canal, it cannot be said that the use of the canal had constituted adverse possession.

A possession which is rightful and not an invasion of the rights of others is never deemed to be adverse. (3 Am. Jr. 2d Adverse Possession § 34)

Regarding that portion of the property sought to be condemned by the State of Utah and which was used as a canal right-of-way by Salt Lake City Corporation but not described in the 1881 Neilsen deed to Salt Lake City, the Lower Court ruled that Salt Lake City Corporation's interest amounted to an easement by prescription. The Lower Court further ruled that the easement was 66 feet wide, extending 33 feet on each side of the center line of the canal. (Record on Appeal p. 108)

The rule regarding prescriptive easements, however, is similar to adverse possession and requires hostile use.

An important essential in the acquisition of an easement by prescription is that the use made of the easement claimed must be adverse to the owner of the servient tenement and hostile to his title. (25 Am. Jur. 2d Easements and Licenses § 51)

It is Cox Corporation's assertion, therefore, that the Marketable Title Act renders void any interest claimed by Salt Lake City Corporation in the subject property, provided that a canal may be maintained across the property to the extent said canal was clearly observable in 1919; this right not having extinguished by the Marketable Title Act. Because Salt Lake City Corporation had a right to use the canal, its subsequent use for that purpose was not hostile to Cox Corporation's title. Thus, adverse possession or prescriptive use have not been established.

POINT II

SUFFICIENT FACTS TO ESTABLISH ADVERSE POSSESSION IN FAVOR OF SALT LAKE CITY AND TO DIVEST COX CORPORATION OF MARKETABLE TITLE HAVE NOT BEEN SHOWN.

There are five principal elements necessary for the acquisition of title by adverse possession: First, the possession must be actual occupation, open, notorious and exclusive. Second, the possession must be hostile against the right of the party against whom the right is claimed. Third, it must be held under a claim of right, as the property of the claimant. Fourth, it must be continuous and uninterrupted for seven consecutive years. Fifth, all of the taxes that are levied against the property must be paid by the claimant.

One of the first requirements, therefore, of adverse possession is that the possession be exclusive. Respondent Salt Lake City Corporation presented no evidence in the Court below, however, showing that it exclusively possessed any of the property. It has already been shown that the second element, possession hostile to Cox Corporation's title, was not established in the Lower Court proceedings. Moreover, it was not established in the proceedings before the Lower Court that all taxes levied on the property described in the Neilsen deed were paid by Respondent City as required by Section 78-12-12.1, Utah Code Annotated, (Supp. 1971). Instead, the fact that adverse possession was established by the City prior to the time when the requirement of payment of taxes was made effective in 1888 is cited by Salt Lake City Corporation as evidence that this requirement is not applicable. (Record on Ap-

eal at p. 103). This argument is moot, however, since the Marketable Title Act cuts off all interests prior to 1919. If this Court should rule, therefore, that the City's use of the property described in the Neilsen deed was adverse, the case should be remanded to the lower Court for a determination of whether taxes have been levied upon the property and, if so, whether Salt Lake City Corporation has paid said taxes.

POINT III

THERE IS INSUFFICIENT EVIDENCE TO SHOW THAT SALT LAKE CITY CORPORATION HAS PRESERVED ITS INTEREST UNDER THE 1881 NEILSEN DEED FROM THE EFFECTS OF THE MARKETABLE TITLE ACT BY CONTINUOUSLY POSSESSING SAID PROPERTY FOR A PERIOD OF 40 YEARS.

Subsection 57-9-4(2), Utah Code Annotated, 1953, provides that the general effect of the Marketable Title Act of extinguishing interests adverse to the holder of a marketable title may be stayed:

If the same record owner of any possessory interest in land has been in possession of such land continuously for a period of forty years

In order for Salt Lake City to have "continuously" possessed the entire tract described in the Neilsen deed of 1881, much of which lies outside the present location of the Salt Lake-Jordan Canal, it must be shown that neither Cox Corporation nor anyone else, has at any time interrupted that possession by possessing or exercising possession, over any or all of the property. Otherwise, Salt Lake City's possession would not be

“continuous” as required by the statute. There is no evidence, of any use or possession by the City, however, beyond the banks of the canal. Moreover, it is undisputed that Salt Lake City Corporation’s use of the property has been solely for the purpose of maintaining an irrigation canal and that the canal has been used only during the growing season. There were not enough facts before the Lower Court, therefore, to establish continuous possession of the entire tract for 40 years as required by the statute.

There are no guidelines provided in the Marketable Title Act which explain what would constitute “possession” in the context of the Act. It would seem reasonable, however, that an interest would be preserved to the extent that the property affected by the interest was actually possessed. Thus, if some of the land in question was used and possessed as a canal for 40 years, that interest would be preserved and use or possession for that purpose could continue. The interest thus preserved would amount to an easement for a canal through the subject property 15 to 18 feet wide. Hence, even if “possession” for the purpose of subsection 57-9-4(2), Utah Code Annotated, 1953, is given a broad construction so as to include occasional use as an irrigation canal, it is submitted that only that part of the land actually possessed or the property upon which the canal is located would fall within the 40 year exception of the Marketable Title Act, and only the interest actually possessed would be preserved. Thus, use of the canal for 40 years would not preserve an interest in the property not actually used or possessed.

POINT IV

RESPONDENT SALT LAKE CITY CORPORATION'S INTEREST IN THE SUBJECT PROPERTY IS NOT PRESERVED FROM THE EFFECTS OF THE MARKETABLE TITLE ACT BY A SPECIFIC REFERENCE TO THE CREATION OF SUCH INTEREST IN APPELLANT COX CORPORATION'S CHAIN OF TITLE.

Another exception of the Marketable Title Act's general rule to void interests established prior to the root of title is set out in Section 57-9-2(1), Utah Code Annotated, 1953, which provides:

All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided, however, that a general reference in such muniments, or any of them, to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easements, use restrictions or other interest.

In the present case there are only general references in the muniments of which Cox Corporation's record chain of title is formed to easements, use restrictions and other interests created prior to the root of title. (Record on Appeal pp. 86-88). These general references, according to the above statutory language of Section 57-9-2(1), are not sufficient to preserve any interest Salt Lake City Corporation may have acquired by the Neils Neilsen deed since no specific reference is made in any of the documents which identifies or refers to a specific recorded title transaction which creates an interest in favor of Salt Lake City Corporation.

POINT V

ASSUMING, ARGUENDO, THAT RESPONDENT SALT LAKE CITY CORPORATION HAS A PRESCRIPTIVE EASEMENT, THE LOWER COURT ERRED IN FINDING THAT SAID EASEMENT IS 66 FEET WIDE, 33 FEET ON EACH SIDE OF THE CENTER LINE OF THE SALT LAKE CITY-JORDAN CANAL.

It has long been the rule that an adverse possessor or prescriptive user, absent a grant conveying more, is entitled only to that which he actually possesses. (25 Am. Jur. 2d, Easements and Licenses, § 84. The United States Supreme Court in *District of Columbia v. Robinson*, 180 U.S. 92 (1901), determined the right to an easement of a roadway acquired by a prescriptive use of the road is confined to the lines and width of the road as actually used for the period of prescription.

The argument presented before the Lower Court by counsel for Salt Lake City Corporation, however, was that land in addition to the actual canal was needed to maintain and service the canal. As stated in Salt Lake City Corporation's Memorandum of Law and Authorities:

Although Defendant Cox does not specifically allege it, he seems to presume that the City was able, by some sort of levitation, to maintain its vehicles suspended in air over the canal and that, therefore, under either an adverse possession or prescriptive right, Defendant City's right extended no further than the actual width of the channel of the canal. (Record on Appeal at p. 103)

In accord with the City's argument that the amount of land needed for canal banks and the extra amount of land needed

for men and equipment extended well beyond the banks of the canal, the Lower Court ruled that Salt Lake City Corporation had an easement 66 feet wide extending 33 feet outwards from either side of the center line of the canal.

Contrary to the City's position, the Utah Supreme Court held in *Holm v. Davis*, 41 Utah 200, 125 Pac. 403 (1912), that the owner of an easement had the right to go onto the servient estate to make necessary repairs and quoted Jones' Treatise on Easements wherein he states:

The owner of a dominant estate having an easement has a right to enter upon the servient estate, and make repairs necessary for the reasonable and convenient use of the easement, doing no unnecessary injury to the servient estate. (41 Utah at p. 209. See also, 25 Am. Jur. 2d, Easements and Licenses, § 86, and the authorities cited at 41 Utah at p. 210 and 169 ALR 1141.)

The Lower Court ruled, that Salt Lake City Corporation had an easement for not only the width of the canal (15 to 18 feet as stated by the City's affiant) but for a total width of 66 feet, 33 feet on either side of the center line of the canal, as requested by Salt Lake City in its Memorandum of Law and Authorities. (Record on Appeal at p. 104) Presumably, this was done in order to permit the City to maintain the canal. The result, however, is to give Salt Lake City the right to widen the present canal to a width of 66 feet with no indication that the implied secondary right to go onto the servient estate to make repairs would be in any way limited.

CONCLUSION

With respect to the subject property which the State of Utah seeks to condemn, the Lower Court erred in ruling that Salt Lake City Corporation had acquired fee simple title to the portion of said property described in the 1881 Neilsen deed.

The Marketable Title Act cuts off all interests which do not appear of record since 1919 — Cox Corporation's root of title — unless they are specifically excepted from operation of the Act. One such interest not extinguished by the Act is an easement the use of which is observable at the time of the root of title. Cox Corporation concedes that the canal was so observable and hence its interest is subject to an easement for a canal to the extent the easement was visible in 1919. The only other plausible way for Salt Lake City Corporation to have preserved its interest from the operation of the Act is under the provision of 40 years continuous possession. It is illogical, however, to assume that running some water through a portion of the property for a few months each year is adequate possession under the Marketable Title Act to preserve any interest except the right to an easement to convey water over the property.

Regarding adverse possession and prescriptive use since 1919, the facts needed to establish key elements of adverse possession were not shown. The Court further erred in ruling that Salt Lake City Corporation had a prescriptive easement 66 feet wide on the property not described in the 1881 deed. It is well established that a prescriptive user is entitled to an easement only to the extent use is actually made of the prop-

erty, in this case 15 to 18 feet, and that there is a secondary right pertaining to such easements to go upon the servient estate to make repairs. This makes the grant of a 66 foot wide easement unnecessary and not justified by law.

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