

The Smiths are the owners of certain ranch property in the State of Wyoming; they have certain water rights in the west fork of Beaver Creek. They transported the water decreed to them through the Carter Ditch, which was located on lands owned by Joe C. Hickey. The Carter Ditch ran down through meadows of the Hickey property in an area where there was excessive accumulation of water caused by beaver dams. The flooding of the meadow area was a problem to both the Smiths and Hickey. In 1961, Hickey orally consented to a change in the Carter Ditch with Smith, although at that time no definite location was designated. In June of 1961, Hickey informed Smith that he had sold the property to Larsen and that he had informed Larsen that he had previously consented to the relocation of the ditch.

In the early summer of 1962, Larsen also consented to the relocation of the ditch, acknowledging that the present location down through the meadows was a problem and a relocation to higher ground would be better. Larsen indicated to Smith the area where he should relocate the ditch, i. e., Smith should utilize an old existing ditch part of the way and construct the remainder following old fence lines. As consideration for his consent to relocate the ditch Larsen had Smith perform certain ditch work including cleaning and rebuilding. Smith further agreed to abandon the upper portion of the old Carter Ditch. Smith testified that after he had constructed the new channel, Larsen, in fact, filled in part of the old ditch.

Smith testified that he performed most of the ditch work which constituted the consideration for Larsen's consent to relocate the Smith easement in 1962. Most of the work to build the new route was performed in 1963, the year the Smiths made their application to change their point of diversion with the State Engineer. After due notice of processing, the application was granted on April 3, 1964, and thereafter the water was transported at all times through the ditch as relocated.

Larsen did not complete the contract to purchase the property and quit-claimed the equitable interest to Beehive State Bank. Beehive entered into an agreement to sell the property to plaintiff. On April 30, 1965, Hickey conveyed by warranty deed the fee title to Beehive State Bank; contained therein was a provision that the conveyance was subject to:

(b) Any liens or encumbrances arising since May 26, 1961, as a result of the actions of Grantee or of the Buyers under that certain Sales Agreement dated May 26, 1961, executed by Grantors and covering the subject premises and any easements or rights-of-way for roads, ditches, canals, pole lines, transmission lines or like facilities granted by said Buyers or by Grantee since May 26, 1961. [Emphasis added.]

Beehive State Bank conveyed the property to plaintiff; its deed contained a provision that the grantee took the property subject to easements for ditches and canals existing over and across the property.

Based on the foregoing facts, the trial court concluded that plaintiff's predecessor in interest, Larsen, occupied a status that enabled him to transact business with defendants relative to the Hickey Ditch and its extension; that Larsen and Smith made an arrangement involving mutual valuable consideration, whereby Smith abandoned the old Carter Ditch and Larsen consented to the enlargement and use of the Hickey Ditch by Smith; that the relocation and enlargement of the Hickey Ditch was an accomplished and usable fact at the time plaintiff acquired its interest in the land through which the ditches proceed; and that plaintiff's prayer for exclusive quiet title should be denied.

On appeal, plaintiff asserts that a permanent right to use a ditch is an interest in real property and cannot be transferred in part, Section 25-5-1, U. C. A. 1953.

In *Tripp v. Bagley*¹ this court stated:

1. 74 Utah 57, 75-76, 278 P. 912 (1929).