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James C. Whittaker v. Richard H. Spencer : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

7181 AB

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES C. WHITTAKER,

Plaintiff,

VS

RICHARD LEO SPENCER, Administrator of
the Estate of Richard H. Spencer, Deceased,
JOHN EDISON SPENCER, ELIZABETH A.
TIBBS, VORD SPENCER, IRWIN M. PRICE,
QUE JENSEN, INDIANOLA IRRIGATION
COMPANY, a corporation, and THE STATE OF
UTAH,

Defendants.

No.
7181

ANSWERING BRIEF OF INDIANOLA IRRIGATION
COMPANY, A CORPORATION, TO BRIEFS OF
APPELLANT AND CROSS-APPELLANT HEREIN

Appeal from the Seventh Judicial District Court of Utah,
in and for Sanpete County

Hon. John A. Hougaard, Judge

JENSEN & JENSEN
Attorneys for
Indianola Irrigation Company

Offices:
Ephraim, and Nephi, Utah.

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L A W

None quoted or cited. Sufficient in other briefs.

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INDICIA, ALIASES, AND SYMBOLS

We shall herein adopt the same Indicia, Aliases, and Symbols as appear in the brief of the cross-appellant, Richard Leo Spencer, Administrator of the estate of Richard H. Spencer, Deceased. We shall add the following: The name of Irwin M. Price will sometimes be referred to as Price.

I

INDIANOLA IRRIGATION COMPANY CROSS-COMPLAINED TO HAVE EXCESS STOCK CANCELLED. CLAIMS OF PRICE, EDISON AND ADMINISTRATOR THAT THEY WERE BONA FIDE PURCHASERS FOR VALUE WERE ABANDONED.

In this case, the I. I. Co. cross-complained against the defendants Richard, Edison, and Price therein setting out the history of the court records concerning, and the record transfers of, Richard with his 448 shares of class "A" water right herein involved. Among other things in said cross-complaint it is set out by virtue of the foreclosures in Civil No. 2888 referred to herein and the issuance of Certificate No. 57, which was later divided into certificates No. 72 and 73 of said irrigation company, it appeared there were certain conflicting claims to said 448 shares of water right; that the District Court in Civil 2888 had determined the water rights of the plaintiff and Simon Hugentobler came out of the water rights represented by said certificates, and the said defendants should be directed by the court to surrender certificates Nos. 72 and 73 for cancellation (J. R. 73-77.)

The defendants Edison and Price filed a counterclaim against the defendant I. I. Co., and pleaded that Price was a bona fide holder for value of certificates No. 72 and 73 of said company representing 160 shares of Class "A" stock therein and that their damages were \$12,800.00 in the event said certificates were cancelled; and that the water rights represented by said certificates had been conveyed to said company by Richard from what is designated as the "Wansitz" 160 acres (J. R. 38-40, 128-135, 185-89).

The administrator of the estate of Richard cross-complained against the I. I. Co. that Richard at the time of his death was the owner of 445 shares of class "A" water right represented by certificates Nos. 72, 73, 84 and 86 of said company (J. R. 141-45). Subsequently said administrator amended his cause to further pray that if the estate was not awarded all of said certificates that said administrator be given judgment against the I. I. Co. for the value of the shares not awarded to said administrator (J. R. 176-78).

Issues were joined upon the said cross-complaint and counter-claims and a considerable part of the record made by the I. I. Co. was to establish that said defendants had no cause to recover a money judgment against the I. I. Co. and their counterclaims in that respect were without merit.

During the trial of the cause the claims of said defendants for a money judgment against the I. I. Co. were abandoned.

"MR. HANSEN: I'll state, your honor, frankly we don't feel under the developments of this forenoon.

that we could under any degree of honor to ourselves or any possibility of your Honor paying attention to us argue that Price is entitled to any damages in this lawsuit (T. T. 497).

And again:

"MR. HANSEN. No. In this case. We ask, if we didn't recover those two certificates for Price for 160 shares, we give him the value of it. Now, apparently he comes in and swears to an affidavit that he received his money. Of course he has no standing for damages." (T. T. 498).

The same result was reached by counsel for the administrator:

"MR. A. H. CHRISTENSEN. We never brought any evidence on that.

Q. That is true?

MR. SHERMAN CHRISTENSEN. We make no claim to a money judgment in this case". (T. T. 804)

II

ADMISSIONS AND AGREEMENTS

We agree with the appellant and Que Jensen that the conclusions and decree should be modified to specify that the rights of Que Jensen are limited to 55/1728 of the primary or class "A" water rights in Thistle Creek and its tributaries.

If the main issue between the plaintiff and the Spencer defendants in this case is decided in plaintiff's favor the conclusions and decree should likewise be modified to deter-

mine plaintiff only has 55/1728 part of the class "A" water rights of said Thistle Creek and its tributaries.

As to the claim of the appellant that the deed of water rights from the irrigators to the I. I. Co. is void for uncertainty, we adopt the argument of the plaintiff that said deed is valid. We do not oppose the argument of the cross-appellant that the conveyances to the irrigation company should stand and that out of the Certificates 72, 73, 84 and 86 the over-issue or unauthorized issue should be cancelled. To that we add the appellant Edison, pleaded said conveyance to the I. I. Co. was valid, and therefore he can not maintain a position to the contrary upon appeal. In part Edison and Price plead:-

"5. That said certificates No. 72 and 73, which were taken from certificate No. 57 in said Indianola Irrigation Company, were validly issued by said company for water deeded to the said Indianola Irrigation Company by the said Richard H. Spencer." (J. R. 187).

Further the appellant Edison recognized in his testimony the conveyance of his father of the 160 shares (Nov. 25, 1931) was a valid conveyance.

Q. Now, do you recognize that your father has conveyed to the Indianola Irrigation Company, 160 acres in the deed to water rights, Indianola Irrigation Company's exhibit No. 5?

A. Yes, sir. (T. T. 697)

In view of the sworn pleading and testimony on that point we submit the conflicting position taken by the appellants upon trial, and now in their brief that conveyance of

water rights to the I. I. Co. is not valid, can not be maintained.

Further we adopt the argument of the plaintiff in his brief, pages 13, 14 and 15, concerning the Price Affidavit and situation.

We adopt the argument of the Cross-appellant set out in his point "5" pages 43, 44 and 45 of his brief.

For purposes of this brief the law cited and quoted by the plaintiff, appellant, and cross-appellant as they refer to the position of the Indianola Irrigation Company is sufficient.

Except as herein stated we agree with the facts stated in the "Statement of Facts" in the briefs of all the other parties now served and filed herein.

III — SOME DISPUTED FACTS

On page 11 and page 115 of the brief of Edison and Elizabeth A. Tibbs are certain references to a conveyance from Richard and Annie to the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Sec. 3, Twp. 12 S., R. 4 E., S. L. M. "together with twenty acres of primary water right from Clerk Creek, Rock Creek and Thistle Creek". This was under a deed dated May 21, 1931 (Ex. D., T. T. 35-36) and I. I. Co. Ex. 15 (T. T. 327-33). It appears to be the contention of said appellants that by said deed water rights passed and the conveyance was sufficient to transfer the water rights without specifying that

they came from or were used upon said lands. On or about May 7, 1920, the day after the decree in Civil 1406 was entered, said twenty shares of primary water right was transferred to the I. I. Co. and in exchange therefor said company issued its certificate which on Oct. 26, 1921 went into certificate number 20 for twenty shares of class "A" stock to Richard (T. T. 312-316). Neither said certificate No. 20 or the water represented thereby went into any of the certificates here involved. It is inferred this conveyance had something to do with the 448 shares of Richard involved herein. We disagree with this. The testimony of Elizabeth A. Tibbs, the offer of counsel to show it was no part of the 448 shares, (T. T. 314-16) and the agreement of counsel showed it had nothing to do with the 448 shares (T. T. 327-333); and should not be involved in the facts of this appeal.

On pages 11, and 27, of the appellants brief are statements that the other 62 shares of the 285 shares or acres of water mortgaged to the Federal Building and Loan Association belonged to H. M. Spencer and Elizabeth Tibbs. They argue this proposition on pages 75-77 of their brief. We have with care reread these references and are unable to find any reliable evidence in support thereof.

The original deed to the water rights which H. M. Spencer signed was not found (T. T. 272); but the certified copy I. I. Co. Ex 6 shows that H. M. Spencer and Ida Spencer his wife executed the deed to water rights to the said company for 42½ shares of primary water rights and the same was acknowledged May 7, 1920; (T. T. 277); that H. M.

Spencer couldn't remember signing said deed, but he could remember that he and his wife received the 42½ shares of primary water right from the Indianola Irrigation Co. (T. T. 423). Said certificate was issued December 15, 1921. That was the same certificate which he pledged to the Commercial Bank of Spanish Fork. It was certificate No. 39 of I. I. Co. It was the same water right he lost and which went to one Ray Tanner (T. T. 393-99).

It appears clear to us from the record that on May 21, 1931 that Richard had no water right appurtenant to lands in said Section 3. The irrigated lands within Section 3 originally belonged to an Indian by the name of Mouve. The land was called the "Old John or Mouve Land". The total water right recognized on said land by the irrigators and the irrigation company in 1920, at the time of the entry of the decree in Civil No. 1406 was 80 shares of class "A" water right. The president, and former water master of the irrigation company for many years, testified in substance that there were 80 acres of water recognized on said land and that certificates were issued in 1920 representing same. Said certificates went to the persons he named who were using said water (T. T. 254-259). It is equally clear that Mrs. Tibbs did not claim the water under said deed for which certificates were issued in 1920. She testified as follows:

Q. I'll ask you now whether you do claim any 20 shares of water under this deed.

A. No.

Q. You do not?

A. No sir; no.

Q. I'll ask you whether or not, as far as you understand the fact to be, that your brother, Leo, was in possession of the ground and this 20 shares that was spoken of in this deed was the 20 shares represented by certificate number 20 which was issued to your father through the decree in the name of your brother, Leo.

A. That's right.

Q. Is that as far as you understand the fact to be?

A. Yes. (T. T. 330-1)

In substance counsel for the appellant agreed that this 20 shares of water were no part of the 448 shares involved in this appeal. (T. T. 327-33). The situation then appears clear to us that the view of the appellant on the 62 shares is not supported by the evidence, but instead the fact was that Richard was executing too many conveyances to the water rights; and it was because of his writings the controversy herein arose and by which there was an excess issue of stock.

Appellants and cross-appellants herein claim the Indianola Irrigation Co. was in error in issuing to the Federal Building & Loan Association at Ogden its certificate No. 81 representing 285 shares of stock in said company, which certificate was for convenience of R. H. Spencer subsequently divided into certificate No. 84 for 125 shares and Certificate No. 83 which went into certificate No. 86 for 160 shares of said company. They differ on their position as to the excess amount of stock issued. The cross-appellant argues that all outstanding certificates should be returned

to the Indianola Irrigation Company and the excess cancelled. If we understand the claim of the appellant it is that Edison and his sister Mrs. Tibbs own 390 shares or acres of the primary certificated water right. They admit the 55 shares of Que Jensen should come out of certificate No. 84.

It appears to us immaterial as to which side of the Spencer family prevails in this contest, in which the I. I. Co. has been obliged to remain more or less as an onlooker, ready to continue the regulation and ticketing of the water to the rightful owner of the water. But to put an end to the controversy we feel on this matter the cross-appellant is correct; and whatever is by the court determined to be an excess issue should be cancelled, and a reissue should be made to the rightful owner, or owners. And that all the certificates should be returned to the irrigation company for cancellation.

By way of aid to the court for clarity and consistency we make the following observations:

The mortgage of November 9, 1926 of Richard and Annie to the Federal Building and Loan Association, a corporation, was of certain land which as the cross-appellant has pointed out in his brief, totals 234 acres. The appellant recognizes the foreclosure proceedings to be a valid conveyance of the mortgaged shares, but maintained it was only 223 shares as set out in the assignment, (I. I. Co. Ex. 1, T. T. 150-1, 697-8). The appellant's apparent explanation was that the difference was $14\frac{1}{2}$ acres of H. M. Spencer's land included in the mortgage — which didn't have a water right (T. T.

694-5), less a 3-acre reservoir site (T. T. 696) making the difference between the computation of the appellant and cross-appellant.

Cross-appellant contends the I. I. Co. was negligent in issuing its certificate No. 81 for 285 shares upon the conveyance to it by the Federal Building & Loan Association. The mortgage provision and part of the assignment provision are given in his brief on pages 34 and 35. An additional part of the assignment provision is:

“ . . . and I further assign to said Federal Building and Loan Association any additional interest in said stock that may accrue to me in said stock, which at this time is unissued and should the same be issued I direct that it be issued to the Federal Building and Loan Association, and I hereby constitute and appoint the Federal Building and Loan Association my true and lawful attorney irrevocably for me instead to transfer said stock on the books of said company with full power of substitution and irrevocation.”
(Ex. 1, I. I. Co.)

At that time there were no other valid outstanding conveyances or mortgages of Richard against said water, except the Huentobler mortgage. Taking the mortgage and the assignment together we see nothing invalid about them. It was recognized the stock was not issued at that time. There appears to be some ambiguity in the construction of the assignment as to whether the authority was limited to the 223 shares designated in the assignment or whether “any additional interest in said stock” referred to the 285 shares in the mortgage. There was a foreclosure proceedings, and under the above a conveyance was made to the I. I. Co., for

285 shares and the company issued said stock to said F. B. & L. Co. In the reacquisition of said 285 shares by Richard and those who dealt for and on his behalf in refinancing the obligation, there is not one word that the balance thereof was not with the approval and consent of Robert L. The fact is in 1938 Richard paid the balance of his debt to said F. B. & L. Co. and acquired the said certificates. After that he and William F. Long paid the corporation upon said shares and certificates held and sold by them that the same were valid and bona fide.

It appears to me that by virtue of the action of the parties and the subsequent recognition of the 285 shares as valid, whatever was done by Richard he used valid and approved the meaning of said mortgage to be 285 shares and subjected said certificates under the articles of incorporation, and his own certificate of conveyance of said 285 shares. At least his administrator should be estopped to assert otherwise. We take the argument of his counsel that since Richard was and so is the administrator of his estate, need to obtain any relief against the F. B. & L. Co. and that in equity from the certificates 24 and 26 must come the person entitled to the certificates to be paid. Yes, that is the administrator that all of the certificates should be cancelled and then order issued to remove any reference to the same which held the invalid issue.

V -- EFFECT OF NO. 2838 IS RES ADJUDICATE

Whether this can be done largely depends upon the

effect of the proceedings in Civil No. 2888. With Price out of this proceedings, then the issues herein were substantially tendered or could have been tendered in Civil No. 2888 where all the parties effectively herein were before the court. Therein in the "Answer, Counter-Claim and Cross-Complaint of Indianola Irrigation Company, a Corporation" in paragraphs 5 to 10 of pages 4 and 5 thereof it substantially submitted the same issues as were tendered herein.

It appears to us as it did to the plaintiff, as against the appellants herein and the cross-appellant, said matter is res adjudicata, and the excess stock as determined in Civil No. 2888 is in Certificates No. 72 and 73 and they must be returned and cancelled. In such event substantially the same result will be reached as the trial court reached.

An examination of the record of the instruments executed by Richard together with the verified pleadings of Edison and his testimony under oath, to our minds, establishes the fact Edison and perhaps Richard with him were launched upon a program of wrongful dealing under cover of the names of Price and F. B. & L.; and the cause of all this difficulty was their wrong doing, apparently directed to stick the I. I. Co. for the value of 160 shares of class "A" water right. As only part of the evidence on this matter we refer to the findings in Civil 2888 and the testimony as to what Richard said to the Secretary of I. I. Co. to get Certificate 57:

Q. You may give the conversation then, Mr. Houtz.

A. He came up there that evening and told my father who was secretary at that time that that was the

list (last) of his stock that was not mortgaged to the company, and as he wanted to get security with the stock, he wanted to deed it to the company and get a certificate for it. (T. T. 267)

VI -- CONCLUSION

Accordingly it appears to us the judgment as to cancellation of the excess outstanding certificates should be affirmed and the judgment for costs in favor of the I. L. Co. should stand.

Respectfully submitted,

JENSEN & JENSEN

Attorneys for Indianola
Irrigation Company