Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

1951

William D. Jackson v. Spanish Fork : Response to Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
P.N. Adderson; Dilworth Woolley; Attorneys for Plaintiff and Respondent.
Elias Hansen; Attorney for Appellants.

Recommended Citation
Legal Brief, *William D. Jackson v. Spanish Fork*, No. 19517450.00 (Utah Supreme Court, 1951).
https://digitalcommons.law.byu.edu/byu_sc1/43

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
.S9
DOCKET NO. 7450 R-H

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM D. JACKSON,
Plaintiff and Respondent,

vs.

SPANISH FORK WEST FIELD IRRIGATION COMPANY, a corporation, SPANISH FORK SOUTH IRRIGATION COMPANY, a corporation, SPANISH FORK SOUTHEAST IRRIGATION COMPANY, a corporation, THE SALEM IRRIGATION AND CANAL COMPANY, a corporation, SPANISH FORK EAST BENCH IRRIGATION AND MANUFACTURING COMPANY, a corporation, LAKE SHORE IRRIGATION COMPANY, ED WATSON, State Engineer of the State of Utah, a corporation, and WAYNE FRANCES,
Defendants and Appellants.

Case No. 7450

BRIEF ON RE-HEARING

The appellants have received a communication from the clerk of this court under date of April 16, 1951 wherein it is recited that "The Court has this day granted a Re-Hearing in the case of William D. Jackson vs. Spanish Fork West Field Irrigation Company, et al,

No. 7450 for the sole purpose of determining whether the decree below should be modified as to the use during the non-irrigation season."

While the Order does not expressly state what, if anything, has been done with the other grounds upon which the appellants seek a re-hearing, we are hopeful that the Court will grant the relief sought in accordance with appellants contention without further argument with respect thereto. However that may be, we find it difficult, if not impossible, to confine our argument on re-hearing to that period of time referred to as the non-irrigation season. Such difficulty arises because first, there is an absence of evidence as to when the irrigation season begins and ends, and second; in the main the reasons that appellants claim the evidence fails to support the decree appealed from applies equally to the irrigation and non-irrigation season.

At the outset it is obvious that the appellants, being as they are, mutual irrigation companies engaged in the control and distribution of water for irrigation purposes to their stock holders, do not themselves directly suffer any injury because the decree appealed from awards a flow of one second foot of water to the plaintiff during the non-irrigation season. In our Brief seeking a rehearing, we mentioned the fact that the winter water was in demand for the purpose of generating electricity during the winter season by companies in which the appellants are interested.

At the trial of this cause, plaintiff offered no evidence whatsoever as to any quantity of water beneficially used by him during the non-irrigation season. When, by its order, this court indicated that the parties were to confine their argument to the non-irrigation season, it would seem that the court did not wish to hear further argument touching the use of water during that season of the year when water may be beneficially used for irrigation. If the argument is to be confined to the "non-irrigation" season which we understand to mean when water cannot be beneficially used for irrigation, then there would seem to be little, if anything, to argue about. Prior to the decision of this case, the law, as we understand the numerous pronouncements of this court, has been uniform in holding that a water right cannot be acquired by adverse use or appropriation except to the extent of the beneficial use thereof. That being so, it would seem to necessarily follow that during non-irrigation seasons, that is when no benefit is derived by the application of water to the land, no right can be acquired to the use of water in such manner no matter how long continued.

In this case there was some evidence tending to show that throughout the year water was diverted from a tributary of Spanish Fork River into and along the ditch to the west of the Jackson property from which it was concluded that such water was, throughout the entire year, adversely and under claim of right used by the predecessors of the plaintiff.

In our original Brief and in greater detail in our Brief in support of our Petition for a Re-hearing, we have at some length discussed the elements necessary to acquire title to a water right by adverse use and wherein the evidence in this case fails to establish the necessary elements to thus acquire a water right during the non-irrigation season, or at all.

The doctrine of the acquisition of title to a right to the use of water by adverse use is analagous to the acquisition of a title to land by adverse use. As is said by this Court in the case of *Investment & Trust Co. vs. Board of Education,* 35 Utah 2; 7; 99 Pac. 150—"It may be conceded that a mere passive possession without intending to claim the property, is insufficient, regardless of the length of time such a possession continues, or however open, notorious or exclusive it may have been. This is so because such a possession is not adverse to the rights and title of the real owner. It is not the mere possession that determines the rights of the parties, but it is the character of the possession that controls." As stated in our Brief in support of the Petition for a Re-hearing, there is not one scintilla of evidence that either Leven Simmons or Spencer Simmons, who owned the land when it is claimed title was acquired by adverse use, even claimed any water in Spanish Fork River adversely to that decreed to the various parties by the McCarty Decree, and that purchased from the United States Government under its Strawberry Project. On the contrary, at all times prior to the controversy which led up to the present action, so far as is made to appear, plaintiff and his predecessors, without

one word of protest, submitted to the regulation of the waters of Spanish Fork River in conformity with the McCarty Decree and the water purchased from the United States. Certainly there is nothing in this record which shows, or tends to show, that the plaintiff acquired any right to the use of any of the waters of Spanish Fork River by adversely using any water during the non-irrigation season that had been decreed to the appellants.

It will be seen that by the McCarty Decree, the principal provisions of which are set out in our original Brief, only a small quantity of water was awarded to the appellants during the non-irrigation season. We do not and have not contended that the rights to the use of the waters of Spanish Fork River awarded to the appellants during the non-irrigation season have or will be interferred with by plaintiff's use of one second foot of water during the non-irrigation season when the appellants have no use for such water. Obviously the plaintiff could not acquire a water right by adverse use in the absence of the use being adverse to the rights of someone who owned such rights. That is to say, the plaintiff could not acquire title to the one second foot of water by adverse use unless the appellants owned such water right during the years that plaintiff claims to have diverted such water into the ditch to the west of his land. There can be no adverse use of public water and since 1903 no title to such waters can be acquired without a compliance with the law touching the filing upon such waters in the office of the State Engineer. *Deseret Live Stock Co. vs. Hooppiania* 66 Ut. 25, 239 Pac. 479

Among the cases in this jurisdiction that shed light on the use of water at a time it cannot be put to a beneficial use are *Hardy vs. Beaver County Irrigation Company,* 65 Utah 28; 234 Pac. 524; *Cleary vs. Daniels,* 50 Utah 494; 167 Pac. 820; *Jensen vs. Birch Creek Ranch,* 76 Utah 356; 289 Pac. 1097. It is, of course, of the very essence of the law relating to the use of water in this arid region that beneficial use is the measure and the limit of the right to its use. That being so, we refrain from citing the numerous cases so holding. In our search for, and examination of cases in this jurisdiction dealing with the beneficial use of water and the correlated question of the duty of water, we have been unable to find a case and we think none can be found where a continuous flow of one second foot of water has been awarded for the irrigation of as little as 19 acres of land, especially where such land already has a water right such as the evidence shows the plaintiff's property has. We submit that the courts will take judicial notice that a continuous flow of one record foot of water cannot be put to a beneficial use during the non-irrigation season where the only possible use is to provide water for a few livestock and there is a total absence of evidence as to the quantity that will be consumed by such livestock.

An examination of the cases which fix the irrigation season vary somewhat, but quite frequently the irrigation season is fixed at six months, extending from April 1st to October 1st, a period of 183 days. A second foot of water flows substantially two acre feet in twenty-four

hours. Thus in 183 days, a continuous flow of a foot of water will flow 366 acre feet, which is substantially 19.8 acre feet per acre on the Jackson land. In addition to such water he had on the land and appurtenant thereto, the Strawberry water of one acre foot, plus the McCarty decreed water which would make the water available during a six month period of in excess of 21 acre feet of water per acre. That certainly is quite some moisture. Such a quantity of water would seem to be more than sufficient to satisfy the fondest desires of the most ardent water hog to be found anywhere. It is more than four times the maximum amount of water that Dr. Farnsworth, plaintiff's witness, testified could be beneficially used upon the Jackson farm; that is to say, he placed the maximum at 60 inches. Trs. 338 In making this statement, we have not overlooked the testimony of the witness Farnsworth when he said that a second foot of water could be beneficially used on the Jackson property. He did not elaborate upon such statement and we must engage in some speculation to determine whether or not he meant that a stream of one second foot rather than a larger or smaller stream could be beneficially and economically used in irrigating the Jackson farm or whether he meant, as the trial court apparently believed and found, that a constant flow of a second foot could be beneficially used on the Jackson farm throughout the entire year. Certainly if the testimony of Farnsworth is given full credit, not to exceed 60 inches of water per annum can be beneficially used upon the Jackson property in any year.

We have again directed the attention of the court to the evidence when viewed in a light most favorable to the plaintiff with the thought in mind that upon this record the decree appealed from awards to the plaintiff a water right far in excess of the amount testified to by plaintiff's witnesses, and far in excess of any award that has been sustained by this and, so far as we are advised, any other appellate court. If such an award is permitted to stand, it will be a departure from the repeated holdings of this court to the effect that water is the life blood in this arid region and the courts will not sustain an award of a water right beyond the amount that has or can be put to a beneficial use.

In light of this record, we submit that the cause should be remanded to the court below with leave for the parties to offer additional evidence to the end that these appellants will not be unjustly deprived of their water rights and the doctrine that the beneficial use of water is the extent and limit of the right that may be acquired to the use of the waters in this state is still the law. If that should be done, we apprehend that very material light will be shed upon this controversy as to whether or not the respondent has or could put to a beneficial use the water which has been awarded to him.

Respectfully submitted,

ELIAS HANSEN,

Attorney for Appellants.