

1951

William D. Jackson v. Spanish Fork : Amicus Brief

Utah Supreme Court

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UTAH SUPREME COURT,

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In the Supreme Court of the State of Utah

WILLIAM D. JACKSON,
Plaintiff and Respondent,

vs.

SPANISH FORK WEST FIELD
IRRIGATION COMPANY, a cor-
poration; SPANISH FORK SOUTH
IRRIGATION COMPANY, a corpo-
ration; SPANISH FORK SOUTH-
EAST IRRIGATION COMPANY, a
corporation; THE SALEM IRRIGA-
TION and CANAL COMPANY, a
corporation; SPANISH FORK EAST
BENCH IRRIGATION and MANU-
FACTURING COMPANY, a corpora-
tion; LAKE SHORE IRRIGATION
COMPANY; ED WATSON, State En-
gineer of the State of Utah, a corpo-
ration; and WAYNE FRANCIS,
Defendants and Appellants.

CASE
NO. 7450

BRIEF OF AMICUS CURIAE

It is understood that this Court has granted a rehear-
ing in the above entitled cause for the sole purpose of de-
termining whether the decree below should be modified as
to the use of water during the non-irrigation season.

This brief is filed pursuant to permission granted by the Court for the writers to appear *Amicus Curiae*.

FACTS

A complete statement of the facts, or a detailed response to the statements of other parties, seems unnecessary and would be repetitious. It may be of assistance, however, to refer to the record concerning possible use of water by plaintiff during the non-irrigation season.

The trial court's Finding of Fact state that the predecessors of plaintiff went upon Thistle Creek at the head of the West Jackson Ditch, and "diverted from said stream through said ditch to, and upon, the said lands one cubic foot per second of the flow thereof and used the same upon the said lands for irrigation of about nineteen acres thereof and for stockwatering, culinary and domestic purposes throughout the entire year of each and every year; that such use was a beneficial use." (Finding 11, pp. 100-101 of record). .

The Decree awarded to plaintiff the "right to the use of a continuous flow throughout the entire year of one cubic foot per second of the waters of Thistle Creek to be used upon said lands for the irrigation of about nineteen acres thereof and for stockwatering, domestic and culinary purposes" (Para. 1 of Judgment, p. 105 of record).

The evidence, and particularly that of the plaintiff, deals primarily with the irrigation season, and the condition of the well during that season, and to a limited extent with stockwatering in the spring and the fall. Without arguing the view that this evidence is insufficient to show an adverse user of one second foot of water even in the irri-

gation season, we refer specifically to the evidence which seems to touch upon a possible use outside the regular irrigation season.

The plaintiff testified that when irrigating the south end of Parcel B, he observed differences in the water in his well with respect to being fresh or brackish (Tr. 14). After the water was turned off on the 12th of July, 1948, he observed that the water began to recede about one inch a day (Tr. 15). Prior to July twenty-eighth, the water was stale and the hot water tap had an odor (Tr. 17). Later in August, he made an observation after applying water on the land (Tr. 19). He observed the effect on the well of applying water on August twentieth (Tr. 22). He testified only in general that the water in the ditch was used continuously all the year around, except for cleaning of the ditch or clogs in the ditch (Tr. 31). There was talk of keeping the land growing and green (Tr. 33). He further testified that he watered stock (Tr. 37) and ran sheep, cattle and horses, during spring, fall and summer (Tr. 38). Live-stock grazing in the summer, spring and fall was mentioned (Tr. 41). In his early years, he testified, he observed the water, but only in the summer (Tr. 52).

Mr. Mariah H. Shepherd mentioned seeing ice, mud and stuff in the ditch in the winter months (Tr. 105).

Joseph H. Shepherd said he didn't remember seeing the ditch without water unless it was in the wintertime and then there was generally ice and you couldn't tell. "I think he had a little to run through for his cattle" (Tr. 122). He said there was water in the summertime (Tr. 123), and in the spring (Tr. 123), but didn't mention the situation in the fall. He said the last irrigation of the grain crop was maybe July (Tr. 130).

Earl Gardner's testimony was limited to the months of July, August and September (Tr. 144-145). George C. Jackson's observation was in the summer (Tr. 154). He did mention October (Tr. 155)and the spring (Tr. 156). Alvin L. Jackson observed crops in the summer and saw the ditch when he operated sheep in May and June (Tr. 167); also July, August and September (Tr. 167). David A. Mitchell talked about crops. (Tr. 180). T. E. McKean said that in the fall, Simmons would pasture the property (Tr. 194). He mentioned the fall and spring (Tr. 194). He said he noticed the smell of the water in the well in August (Tr. 197). He irrigated grain first about the middle of May. In the wintertime he tried to keep water for cattle (Tr. 199). Most of the cattle were in the fall and spring (Tr. 206).

James Hicks testified to watering cattle, but no specific number and no specific season (Tr. 209). He remembered when the well dried up late in the season but most of the time the water was good (Tr. 227). Max DePew testified about the ranch from 1930 to 1944. He found that the well would go dry if he didn't water around the field (Tr. 238). No time in the non-irrigating season was mentioned. He said the stream was more or less used for keeping up the well and for stockwatering purposes and it also had to be turned out by the house or else the well went dry (Tr. 248) . Ole C. Anderson mentioned the cattle in the summer and said that the cattle were pastured in the fall (Tr. 262). He said there were cattle "even in the late summer" (Tr. 285).

Dr. Farnsworth made his principal examination September eighteenth and did not purport to cover conditions in the non-irrigation season. He gave his opinion of the water requirements particularly with reference to "the

growing season—June, July and August, the heavy growing season” (Tr. 324). With respect to the nineteen acres he said he believed a second foot for irrigating the forage there could be beneficially used “during the season after high water” (Tr. 335). . He talked about keeping the pasture vegetation green (Tr. 337). He admitted that according to standards accepted by the State Engineer, one second foot would take care of sixty acres (Tr. 337). He made a computation of the requirements for water, that is, during the period ordinarily from June to the first of September (Tr. 339). But he said that water needed before that time “they ordinarily have stored in the soil during the snow and rainfall during the wet period” (Tr. 339). He said ordinarily they are coming to the end of the growing season by September first (Tr. 340). He would say that the water could be beneficially used from May first (Tr. 340).

ARGUMENT

THERE IS NO COMPETENT EVIDENCE TO SUSTAIN, AND THE RECORD AND APPLICABLE LAW DO NOT JUSTIFY, THE AWARD TO PLAINTIFF OF ONE SECOND FOOT OF WATER OR ANY OTHER AMOUNT DURING THE NON-IRRIGATION SEASON.

Within the limited area of reconsideration which the Court has specified, we submit that the decree below should be modified to deny the use of water in question to plaintiff during the non-irrigation season because there is no evidence that the plaintiff beneficially used the water for stock-watering or other domestic use during the non-irrigating season, and particularly, there is no competent evidence from which the Court could fix any quantity or period of

right, plaintiff having failed to sustain his burden in this respect; there is no evidence of any beneficial use of water for culinary purposes during the non-irrigating season, there being a complete failure of proof that the presence of water through the ditch in the non-irrigating season had any effect on the well or that this was a use that the law should recognize; there is no other possible justification of the award of any water to plaintiff during the non-irrigating season, plaintiff having failed to show any use adverse to defendants or any beneficial use whatsoever. We therefore believe that, as a matter of law, it should be determined that there was no acquisition of any right by adverse user or otherwise during the non-irrigation season.

While the foregoing statement of facts may not contain every reference to specific times when water use in the borderline period or outside of the irrigation season is mentioned, it contains, we believe, most of the references, together with other references limiting specifically the testimony to the irrigation season, and is representative of the entire record on the point. None of the references to times outside the irrigation season are fixed as to quantity, amount, or particular use. We think that it is fair to say that there is a total lack of any competent evidence of an adverse beneficial use of a second foot of water in the non-irrigation season, or for that matter, any amount. The most that can be said is that a few witnesses mentioned that in the winter there was ice in the ditch and that in the "spring" and "fall", cattle were watered from time to time. Certainly there is no quantity specified or estimated or any information from which the court could fix any quantity.

Where is there any proof of adverse user during the non-irrigation period?

All of the proof with respect to the well situation related to the summer months. Except for generalizations, which seemed to mean very little, the proof of even diversion during the winter months was almost non-existent. There was practically no proof of stockwatering during the winter and reference to stockwatering during the "spring" and "fall" fell far short of competent proof of adverse user for a continuous seven-year period.

In the winter months the evidence indicated that the ditch was frozen over or filled with ice. If the great body of snow and ice which covers the surface of this entire mountain area during the winter did not take care of the well, it is impossible that the turning of water into a frozen ditch would do so. We question the entire thesis that it is an acceptable use of one second foot of water to turn it loose to "sweeten" or supply a well in order to permit the use of an infinitesimal quantity as compared with a second foot. That is too wasteful a system to be countenanced in this arid region. Yet with respect to the non-irrigation season, there is no proof whatsoever that the use of water through the ditch was necessary or even desirable from the standpoint of the well. Moreover, the same defect in proof of adversity which applied to the irrigation season, as pointed out in appellants' brief, applies with even greater force to the non-irrigation season.

We shall endeavor to shun as much as possible the repetition of authority and reasoning already presented in appellants' briefs. By so doing, we do not mean to indicate that we do not agree with such arguments and supporting authority. We ask leave, however, to emphasize the following legal propositions as applied to the limited point reserved for reconsideration:

The presumption is against the acquisition of title by adverse use. *Clark v. North Cottonwood Irr. & Water Co.*, 79 Utah 425, 11 P.2d 300.

Because of the nature of the right sought to be established under the principles of adverse use, the elements constituting it must be proved unequivocally and no doubtful inference will suffice. The presumption is against such acquisition. *Ephraim Willow Creek Irr. Co. v. Olson*, 70 Utah 95, 258 Pac. 216; *Spring Creek Irr. Co. v. Zollinger, et al*, 58 Utah 90, 197 Pac. 737.

We think there is serious question that the defendant established a right to the use of any water by adverse user during the irrigation season. But since this matter is outside the scope of the question reserved for our reconsideration at this time, it seems pertinent to point out that even though adverse user be established for one period or season, this does not give the right to a use during other periods. *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 643 indicates that an adverse user may establish a right to use water even intermittently according to definite periods and it is not necessary that he establish a right to a continuous use. Certainly the plaintiff in this case has not established the right to a continuous use throughout the year.

It must be that to establish a right by adverse user, such use must be beneficial for the entire statutory period. Beneficial use is the basis, the measure and the limit of all rights to the use of water in this state. UCA 1943, Sec. 100-1-3.

In the case of *Big Cottonwood Lower Canal Co. v. Cook, et al* 73 Utah 383, 274 Pac. 454, it is pointed out that beneficial use is the cardinal principal of water rights. In-

cidentally, it is interesting to note that while in the instant case, there is no proof that any specific quantity was necessary for domestic purposes in the winter months, in the Big Cottonwood case the court refers to "satisfactory evidence" that five hundred gallons per day was sufficient for domestic purposes. A second foot of water flowing for a few minutes a day would be more than enough to furnish a family for domestic use if that were necessary. In Jackson's case he had a well which would certainly keep sweet in the winter from snow and other moisture. There is no evidence that there is any problem with the well at all in the winter, or that when the ground is frozen, surface water would have any effect even though there were a problem. To waste a cubic foot of water per second during the non-irrigation season because someone claimed that this would keep a well sweet in the irrigation season seems unjustified. To run such a stream to feed a single well even in the summertime seems highly wasteful, since a second foot of water is ordinarily considered sufficient to supply a fair-sized town with its domestic needs.

In the case of Richfield Cottonwood Irr. Co. v City of Richfield, 84 Utah 107, 34 P.2d 945, this Court commented as follows on a record which showed a diversion but was silent on the question of beneficial use: (p. 949).

" . . . We have a statute which provides that 'beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.' Rev. St. Utah, 1933, 100-1-3. Such has been the law in this jurisdiction ever since the territory of Utah was organized. This court has in numerous cases had occasion to apply that law. Among such cases are Sowards v. Meagher, 37 Utah 212, 108 Pac. 1112; Salt Lake City v. Gardner, 39 Utah 30, 114 Pac. 147; Big

Cottonwood Tanner Ditch Co. v. Shurtliff, 49 Utah 569, 163 Pac. 856; Cleary v. Daniels, 50 Utah 494, 167 Pac. 820; Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 Pac. 852; Mt. Olivet Cemetery Assn. v. Salt Lake City, 65 Utah 193, 235 Pac. 876; and Big Cottonwood Lower Canal Co. v. Cook, 73 Utah 383, 274 Pac. 454. The mere fact that the City of Richfield has for many years diverted water from Cottonwood Creek does not give it the right to the use of such water nor establish a right thereto"

In the case of Cleary v. Daniels, 50 Utah 494, 167 Pac. 820, it was determined that although a defendant had a prior and paramount prescriptive right to use waters of a spring for irrigation as against the plaintiff, she had no right to the waters except as she put them to a beneficial use. Mr. Justice Frick, speaking for the Court, said: (p. 822).

" . . . There is a period of time, therefore, between the first day of September of one year and the last day of May in the following year that the defendant has not used, does not and cannot use, the waters of the spring for any purpose. While it is true that in her prayer, as we have seen, she claimed the water of the spring for the entire year, yet there is not a word of evidence in support of that claim. She therefore cannot prevent the plaintiff from using the water when she cannot use it. Long on Irrigation, par. 60, p. 108. As before stated, therefore, the findings of the court and the decree are too sweeping as against the plaintiff, and that is especially true with regard to the portion of the decree containing the injunction. While it is true that under both the law and the evidence, the defendant has a prior and paramount right to use the water of the spring as against the plaintiff, yet she has no right to the water except as she puts it to a beneficial use. . . ."

It is true that the case of *Adams v. Portage Irrigation, Reservoir & Power Company*, 95 Utah 1, 72 P.2d 648, recognized that an individual can obtain by adverse use a right to water sheep from a natural stream. In that case the number of sheep was fixed definitely over a continuous period, the exact months were specified by the witnesses and the gallon consumption indicated (p. 655). Even where the proof was definite, there was no support given to waste, as the defendant was permitted to install a trough, "in the interest of further conservation of the very limited water supply . . ." For the watering of stock even where the proof might indicate an adverse user for specific periods, there could be no justification of running a quantity of water to waste having no relationship to the water used. A second foot of water flowing for a very few minutes would supply the needs of a large herd of animals, even though proof as to the right were adequate. A small fraction of a second foot would ordinarily supply all of the culinary needs of a farm community. But not only is there no justification for the amount awarded during the non-irrigation season, but there is no justification, we believe, for the award of any amount whatsoever during such season. In this case there is insufficient proof of the acquisition of any stock-watering rights or domestic or culinary rights whatsoever during the non-irrigation season. We do not think there is substantial proof during the irrigation season, but certainly in the non-irrigation season, the proof of continuity of use, the adverse nature of the same, the proof of quantity, that of period, and even diversion itself, wholly fail.

CONCLUSION

During the non-irrigation season there is no competent evidence of adverse user, and particularly there is no competent evidence of any beneficial use on the part of plaintiff. The very basis of a right to water is the beneficial use thereof, and if such beneficial use is essential to its appropriation and even to its use by the owner after appropriation, it must be essential to the acquisition of a right by adverse use, against which acquisition there are presumptions of law.

To award a year-round right on the evidence before the Court would be a departure from our doctrine of beneficial use, and to award it upon the basis claimed by the plaintiff would bring confusion to the law and great difficulty to those seeking to maintain without waste essential water rights. If plaintiff can take one second foot from this stream on the type of proof before the Court and merely because he claims to have made the diversion, a large number of others in like situation could do the same thing, until the entire stream would be substantially depleted, to the great prejudice of established rights for power and otherwise.

The Findings as to a year-round right are not supported by the evidence. The Conclusions and Judgment are not sound in this regard. The opinion of this Court should be revised so as to deny any water to the plaintiff at least during the non-irrigation season. Even then, he would be liberally treated in view of the record before the Court.

Respectfully submitted,

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