1953

Utah Copper Company v. Hays Estate : Reply Brief

Utah Supreme Court

IN THE

Supreme Court

of the

STATE OF UTAH

UTAH COPPER COMPANY,
a corporation,
Plaintiff and Respondent,

vs.

STEPHEN HAYS ESTATE, Inc., a corporation of Utah, JULIA HAYS HOGE, STEPHEN J. HAYS, LAWRENCE J. HAYS, MRS LOU GOREY, MRS. ETHEL V. REILLEY and MARY LOUISE O'DONNELL,
Defendants and Appellants.

No. 5302

RESPONDENT'S REPLY TO APPELLANTS' ANSWER TO PETITION FOR REHEARING.

In this reply we have no intention of devoting much space to comment upon defendants' discussion by their

answer to petition for rehearing that a reasonable familiarity with the record, the issues and the briefs filed, will disclose as obvious bombast. If after all that has been written and said in this case this Court can take stock in such assertion, it would be a waste of time for us to be led into an analysis of the several statements that compose that answer. Suffice it to say that we have intended no insult to this Court, and of course have not insulted this Court, nor has there been the least change in a single theory we originally entertained in this suit. Our course has been consistent from its inception. We founded our right to condemn upon many theories, none of which either were or are inconsistent. We have argued them all earnestly and sincerely, and we stand upon them all today as we did when the complaint was filed. There could be no more convincing assurance of our respect for this court than the effort we are now making.

The nature of a suit to condemn, its future aspects only, the distinctions between such a suit and a suit to quiet title, the legal effect of the order to occupy, the legal effect of the grant of an easement for the conveyance of copper solutions thereafter to be produced, the effect accordingly of the judgment in condemnation and its relation back to the order to occupy, the nature of these copper solutions, the artificial manner of their production, their characteristics as a manufactured product, plaintiff's labor and investment in their produc-

tion, the purchase in fee of the drainage area of Dixon Gulch within which to deposit them, the law as we conceive it to be when applied to such a product and our use of the natural channel or creek bed of Dixon Gulch for the conveyance of that product to our intake for these and other similar solutions elsewhere produced then being conveyed to plaintiff's precipitating plants for the second stage of their treatment, the filing with the State Engineer before the creation of the Dixon Gulch dumps of an application to appropriate the copper solutions thereafter to be produced, wherein the point of diversion was fixed at the Hays Spring, lest the solutions to be produced be held waters of a character whereof the State Engineer might have jurisdiction,—all these aspects of this suit and points in the argument, and more, have been exhaustively discussed in the briefs and in oral argument. But there is at least one that in the course of all this argument counsel have been content to pass with the least possible reference,—we suspect in the hope that it would not be emphasized. The point to which we refer is the following:

> "V. POINT:
>
> "A liquid or artificial increment artificially produced and added to a natural stream or introduced into a natural channel, by the labor of man without intent to abandon, belongs to the man whose labor produced it or brought it there when naturally it would not have existed there. Such liquid increment may be taken out of the natural

> stream or channel by its owner and may be recaptured and reclaimed by him at such point on the natural channel as may best serve the owner's purpose. Water Rights in the Western States, 3d Ed. Wiel, Vol. 1, p. 38."

If all the rest of our contentions are to be ruled against us, and now we are to be governed by the law of waters, then we confidently assert the point last mentioned has not been and cannot be answered.

Inasmuch as this court held in Utah Copper Co. vs. Montana-Bingham Consolidated Mining Co., et al, 69 Utah, at page 430-431, as follows:

> "*** the waters carrying copper or other minerals in solution, so long as they are in the dump and thus a part of it, *** are, like the dump itself, the property of the plaintiff; that it is as lawful for the plaintiff, so long as the waters are in the dump, to collect and remove them as it is to remove the dump itself; ***"

applying by analogy the law of waters, counsel contend that the dump is as a spring in plaintiff's land, the water whereof will be plaintiff's property while within plaintiff's land. Carrying the conception further, no other conclusion can be indulged than that the waters from this spring, when leaving the spring, flow down a natural water course in a channel that is known and defined, and that plaintiff, in addition to its ownership while upon and within its land, filed upon those waters as waters of a natural stream flowing in a natural water course or channel known and defined, and there-

in designated its point of diversion at the Hays Spring. Concluding the analogy and supplementing the fact that plaintiff is the owner of the water while on or in plaintiff's land, plaintiff filed upon it below, where it constitutes the water of a natural stream, the Bingham & Garfield Railway Company having acquired the ancient rights to the stream before the creation of plaintiff's dumps or "works for the reduction of ores;" and supplementing all those facts, we conclude the analogy by due recognition of the fact that defendants have not now and never had any right whatever to or interest in those waters as waters of a natural stream, never had any use for them as waters at all, and admittedly never wanted them. "It is the copper only in the water that they seek." (Finding XVII, Tr. 4057, Abs. 612.)

This court must conclude that the water as it leaves plaintiff's dump flows down Dixon Gulch as a natural stream in a natural water course along a natural channel that is known and defined, because the court below so found and this court adopted that finding in the face of error assigned by defendants, and again we repeat the finding below which this court has adopted:

(XXX, Tr. 4063, Abs. 620):

> "Now and at all times with which this cause is concerned the railroad fill, including the westerly slope thereof, is and had been porous and has at all said times and does now freely admit the passage of water and solutions from plain-

tiff's dumps above. The westerly slope of that fill has not been sealed."

to which defendants assigned error. (Assignment No. 20, Abs. 705).

(XXXII, Tr. 4064, Abs. 620):

> "The average grade of Dixon Gulch is about 26°. The copper waters or solutions flowing at the so-called Hays Spring *flow* through and out of the railroad fill through, at or near the rock wall, but they do not flow from the sulphide vein and on the contrary are waters merely that have come to and into the railroad fill from and through plaintiff's dumps in Dixon Gulch above the railroad fill, have *flowed* and percolated down into and laterally through the railroad fill, have *flowed* down the bottom of Dixon Gulch on bedrock or on and through surface soil in the bottom of Dixon Gulch and emerged from the downhill slope and near the toe of the railroad fill in the bottom of Dixon Gulch. The course so pursued by said waters is definitely known and positively defined, said course being Dixon Gulch down to, through and across Tract D and the whole thereof and above bedrock. ***" (Italics ours).

to which defendants assigned error (Assignment No. 22, Abs. 707). But in disposing of these assignments, this court properly held by its majority opinion that this being a law action, it was bound by the findings. The court below, having found that these waters flow in a known and defined channel, a natural stream, and this court having adopted that finding, we are not insulting this court, nor are we disrespectful, nor are we guilty

of conduct that is at all censurable, nor are we doing anything but what our duty requires us to do when we assert earnestly and emphatically that no court can rightly hold these copper solutions percolating waters title to which is in the defendants because this natural stream or water course, this known and defined natural channel, traverses a part of defendants' land! A court may not rightly find waters those of a natural stream and then decree title thereto in the owner of the land traversed by the stream, the latter on the theory that such waters are *not* the waters of a natural stream, but instead percolating waters! Such is the situation in which the majority opinion places this court.

The dictionary definition of "percolate" is "to strain through; to pass or cause to pass through small interstices as a liquor; filter: literally and figuratively." (Century) The Century definition of "seep" is "to ooze or percolate gently; flow gently or drippingly through pores; trickle." Subterranean waters that neither seep nor percolate within those definitions would indeed be rare. That subterranean waters both seep and percolate within those definitions is assumed when classifying them. Waters that percolate are of course very frequently not percolating water within certain legal definitions of such. Subterranean waters seeping, flowing or percolating in defined and known channels may be percolating waters within the dictionary definition of such, but they certainly are not per-

colating waters within the legal definition. Kinney on Irrigation and Water Rights, 2d Ed. Vol. 2, Ch. 62, p. 2149, § 1185 et seq. Likewise, of course, it is true that subterranean waters that flow may be percolating waters within the legal definition. It is not important that such waters seep, flow or percolate, but it is all important that they do or do not seep, percolate or flow along channels or courses that are known or defined, knowledge of course or channel being the classifying criterion. 67 C. J. 836. There is nothing either new or startling in this statement, this court like all others having frequently so held. Crescent Mining Co. v. Silver King Mining Co., (1898) 17 Utah 444, 70 Am. St. Rep. 810, 54 Pac. 244; Herriman Irr. Co. v. Keel (1902), 25 Utah 96, 69 Pac. 719. In the case at bar the channel is well-known and defined. The court below so found, by which finding this court very properly confesses itself bound, and hence these waters cannot be held percolating waters within the legal definition the majority opinion has wrongly applied. As held in Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585, the waters of a subterranean stream are not changed into percolating waters merely because the known and defined channel of the stream is filled to a considerable extent by boulders, sand, gravel and other porous material, through which the waters of the stream flow. 55 A. L. R. 1389. This case was discussed in respondent's brief at pages 80 to 84.

We call the court's attention to the following from the majority opinion in the case at bar:

> "*** Nor do we see how it can help the plaintiff's case to say that the waters or solutions follow a known and defined course in passing from plaintiff's land across Tract D to the intake on Tract C, the known and defined course being Dixon Gulch. *** There is no stream flowing in that gulch either upon or beneath the surface. The waters do not move with a current, as flowing waters do, but in the manner usually referred to as by seeping and percolating; except the so-called Hayes Spring waters, where they issue out of the toe of the fill, and the drain tunnel waters with which we are not concerned. This is so manifest that counsel for plaintiff frequently use those very words in describing the manner of progression of the waters across Tract D. Therefore, the law pertaining to the right to the use of water flowing in streams does not apply to this situation; and so it can make no difference that the waters find their way across Tract D from the west toward the east and between the walls of Dixon Gulch."

We respectfully submit that therein the court mis-states the law in this, that the channel's being a natural stream channel that is known and defined, it would make no difference were there at times no stream naturally flowing along its course, (in addition to the citations heretofore made, see 67 C. J. 1047, Hoffman v. Stone, 7 Cal. 46) and mis-states the fact in this, that there is now and always has been a natural stream flowing in that gulch constantly throughout the year, the source of which has

always been the natural springs at the head of the gulch, now augmented by the copper solutions from plaintiff's dumps, and again mis-states the fact in this, that the waters flow with a very decided current down a 26° grade, and again mis-states the law in this, that whether or not we described in our briefs this flow as "seeping and percolating" is, we most respectfully submit, of no interest or importance whatever, the channel or course of such seepage or percolation being known and defined. Also, the majority opinion makes an exception of the Hays Spring waters, but actually and under the findings of fact by the court below, adopted by this court, there are no other waters here involved, the drain tunnel waters confessedly having been eliminated from this case.

Surely the court misconstrued or overlooked the facts and those expressly found below and adopted here to have arrived at such a conclusion. The difference it makes is that in this jurisdiction the owner of the land traversed by the natural water course or stream bed can have no right, title or interest in the waters seeping, percolating or flowing therein, merely by reason of his ownership of the land. But in the excerpt quoted above from the majority opinion, the court refers to the "progression of the waters across Tract D," and "that the waters find their way across Tract D from the west toward the east and between the walls of Dixon Gulch." We respectfully submit that by that definition the majority of this court by its opinion have removed

these waters or solutions from the realm of percolating waters within the legal definition and have themselves in contradiction of their conclusion defined them as waters flowing in a course that is known and defined, waters wherein the mere land owner can have no right, title, interest or claim.

As long ago as Hoffman v. Stone, 7 Cal. 46, it was held by the supreme court of California that a ditch company might use the natural channel of the stream as a part of its ditch system without danger of abandonment of its water or its right to divert that water below out of the natural channel, the court saying:

> "It would be a harsh rule ** to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or canon. ***"

and the supreme court reversed the trial court which had enjoined such diversion, the theory of the trial court being that once the water had been allowed to leave the possession of the ditch company and flow into and down the natural channel, the ditch company had abandoned it whatever might have been the ditch company's intention with relation to its diversion from the creek channel below. The supreme court held there was no abandonment, because the ditch company intended

to take its water out below. So far as we are aware, there has been until now no departure from that rule.

Moreover, it seems to us that no one should lose sight of the fact we have asserted so often that these defendants are not interested in the waters, that on the contrary their sole interest is in the copper which is wholly plaintiff's contribution and to the production of which defendants have contributed nothing, and never intend to, and never will, contribute anything, copper that is the result solely of plaintiff's industry and investment. The water is a mere instrumentality for the conveyance of plaintiff's copper to plaintiff's precipitating plant, and in conveying that copper the court below found, and this court has adopted the finding, that plaintiff has availed itself of the natural stream or water course of Dixon Gulch, and that its waters so transporting its copper use and follow that natural channel or water course, which is both known and defined.

Is it any wonder that we protest so emphatically the proposed seizure by defendants of this copper in the course of its transportation along this natural water course as a part of a natural stream, to plaintiff's facilities? We are sincerely of the opinion that there is no law and no analogy that will permit its seizure; that the present opinion of the majority of this court stands alone in judicial decisions, an anomaly without

precedent to support it and wholly inconsistent within itself. To uphold defendants' contention that they may seize this copper as so transported in this natural stream, the bed of which traverses a part of defendant's property, is to grant defendants the right to avail themselves of the fruits of the capital and labor of the plaintiff without compensation to the plaintiff and without plaintiff's consent and against plaintiff's will—a doctrine too monstrous and absurd to be sanctioned by judicial authority. Hoffman vs. Stone, 7 Calif. 46.

It is a fundamental principle of the law that its rules must be "calculated to secure persons in their property and possessions, and to preserve for them the fruits of their labors and expenditures." Katz v. Walkinshaw, 141 Cal. 116; 70 Pac. 663; 74 Pac. 766; 99 A.S.R. 35. The majority opinion of this court ignores that fundamental principle. In all this debate it has not been denied, nor can it be denied, upon the record:

1. That while plaintiff's contribution in the future will quite likely be both water and copper, its present contribution to the so-called "waters" of Dixon Gulch is the copper in solution, artificially produced by plaintiff, the intentional result of plaintiff's labor and investment, constituting a regular and legitimate phase of the mining, milling and metallurgical operations plaintiff was organized to carry on.

2. That this copper in solution, plaintiff's contri-

bution solely, is desired by these defendants, to the creation of which defendants have contributed nothing, will not and never have intended to, contribute anything.

3. That in the course of plaintiff's operations plaintiff proposed to utilize the natural stream channel or creek bed in Dixon Gulch for the transportation of this copper in solution, so produced by plaintiff, to plaintiff's diversion facilities situated in the natural stream bed upon Tract C, where are collected also plaintiff's similar copper solutions flowing through plaintiff's lines coming from the south, and as well the solutions from the drain tunnel in Dixon Gulch.

4. That because this natural stream bed traverses a part of defendants' property, and by reason of that fact only, the defendants claim that the defendants acquired title to such copper solutions while following this natural channel down Dixon Gulch to plaintiff's intake.

5. But it is a sound and universally recognized rule of law that:

> "A liquid or artificial increment artificially produced and added to a natural stream or introduced into a natural channel, by the labor of man without intent to abandon, belongs to the man whose labor produced it or brought it there when naturally it would not have existed there. Such liquid increment may be taken out of the natural stream or channel by its owner and may be recaptured and reclaimed by him, at such point on the natural channel as may best serve

the owner's purpose. Water Rights in the Western States, 3d Ed. Wiel, Vol. 1, p. 38."

6. And it is a fundamental principle of law that its rules must be calculated to secure persons in their property and possessions and to preserve for them the fruits of their labors and expenditures.

Upon that record, whether or not the majority of this court may agree with the other grounds urged by us in support of our action, we respectfully submit that a reversal of the judgment below is impossible. Were we without respect for this court, we would not be making here the effort now made to procure the withdrawal of this majority opinion, and we have no hesitancy in declaring here, manifesting thereby all due respect to this court without insult to anyone, that the majority opinion can result only in a gross miscarriage of justice if it be allowed to ripen into the final judgment of this court. Such a judgment upon this record in this suit under the pleadings by which we are bound would be a denial of due process to this plaintiff in violation of the Federal constitution as heretofore stated, and likewise a denial to this plaintiff of the equal protection of the laws.

How absurd it is now for counsel to assert that the affirmative defense pleaded by defendants in their answers is a counterclaim! At the very commencement of the trial, when Judge Ritchie was endeavoring to

inform himself concerning the pleadings and the issues to be tried, we were asked if we had filed a reply to the defendants' answers, to which question we replied we had not, that there was no matter pleaded that required a reply, that we stood upon the denial afforded by the statute under such circumstances; and in the course of that discussion, Mr. Parsons turned to Mr. Badger and asked him if he construed his pleading as a counterclaim, and Mr. Badger's answer was that he did not. That discussion apparently was not transcribed by the reporter, and its occurrence must rest upon the recollection of counsel. Had they regarded the answer as setting up a counterclaim, why did they not take judgment upon their counterclaim by default? The answer is in all respects similar in form to that in any condemnation suit; it contains affirmative allegations with relation to damages as answers in such suits always do; but there is no counterclaim.

It was never our contention that if the copper solutions, for the transportation of which plaintiff seeks to condemn an easement, originated in defendants' lands as alleged by the defendants, that plaintiff could condemn them, and accordingly plaintiff did not attempt to condemn them. It was also true that if the solutions were of the origin defendants contended for them, and therefore plaintiff would not own them, then there would be no occasion for plaintiff's acquisition of an easement for their transportation, and there would ac-

cordingly be no reason for the suit. However, plaintiff contended that the only copper solutions it sought to transport over the easement to be condemned were those plaintiff had produced in its dumps above in Dixon Gulch, of which plaintiff was the owner, that all parties conceded to plaintiff ownership of the waters in plaintiff's dumps; that all the solutions so to be transported by plaintiff came from these dumps in Dixon Gulch, washed out of the dumps by waters falling or placed thereupon, joining the natural creek flow from the springs above and continuing their course down the gulch in the natural creek channel across the easement condemned to plaintiff's intake on Tract C—so the lower court found, and this court declares itself bound by that finding. Having held that plaintiff is expressly within the statute's provisions conferring the right of eminent domain, we insist that, having found both facts and law for the plaintiff, judgment herein can not be rightly reversed.

Respectfully submitted,

DICKSON, ELLIS, PARSONS
& McCREA,
Attorneys for Plaintiff
and Respondent.