

1976

# McEwan Irrigation Co. v. Normand Michaud et al : Brief of Respondent

Utah Supreme Court

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Robert L. Gardner; Attorney for Appellant;

David L. Mower; Attorney for Respondent;

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IN THE  
S U P R E M E C O U R T  
OF THE  
STATE OF UTAH

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McEWEN IRRIGATION COMPANY, )  
aka McEWAN DITCH COMPANY, )  
a Utah corporation, )

Plaintiff and Respondent,)

Case No. 14601

vs. )

NORMAND MICHAUD, aks )  
NORMAND P. MICHAUD, aka )  
BUD N. MICHAUD, )

Defendant and Appellant. )

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BRIEF OF RESPONDENT

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Appeal from the District Court of the  
SIXTH JUDICIAL DISTRICT IN AND FOR THE  
COUNTY OF GARFIELD, STATE OF UTAH  
Honorable Don V. Tibbs, Judge

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BRIEF OF RESPONDENT

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STATEMENT OF THE KIND OF CASE

This was an action commenced by the Plaintiff (Respondent herein) to compel the Defendant (Appellant herein) to remove a bridge he had installed across an irrigation ditch claimed by the Respondent, on the Appellant's land, and for damages. The matter was before the Court on Respondent's order to show cause.

DISPOSITION IN LOWER COURT

The lower court entered Findings of Fact and Order on Respondent's Order to Show cause. The Order permitted

Respondent to remove the bridge, provided that its agents exercise due care and diligence not to excessively damage the bridge or any other property of Appellant. The Order reserved ruling on all other issues.

#### STATEMENT OF FACTS

Respondent has substantial disagreements with Appellant's Statement of Facts. Therefore, Respondent will set forth hereunder a Statement of Facts, showing therein the disagreements with Appellant's statement.

The Appellant purchased a small tract of land north of Panguitch, Garfield County, Utah, in the summer of 1975. The parcel had been unoccupied for a least ten (10) years, although there was a dilapidated frame home located thereon. (T page 23, line 14.) The Appellant had moved a trailer home on the parcel for his own use and a second trailer home for the use and occupation of his elderly mother.

The property acquired by the Defendant was traversed by a ditch, which was claimed by the Respondent company. The ditch cut diagonally through the property, making it necessary to cross the ditch for access from the road to Panguitch, Utah, to Appellant's home. The ditch is owned by the Respondent and has been used for at least thirty (30) years to convey Respondent's decreed water right out of the South Fork of the Sevier River onto farmland of Respondent's stockholders. Respondent has a decreed water right as follows: (1) Primary rights, 16.10 c.f.s., period of use, March 15th to November 15th; and 6.01 c.f.s., period of use, November 15th to March

15th; (2) third-class rights, 5.68 c.f.s., period of use, March 15th to November 15th. The winter primary right is not presently being used. This statement as to the use of the ditch is at substantial variance with Appellant's statement that the ditch is used only to collect Spring run-off water.

There is no evidence to show that Appellant wrote a letter to Respondent in the Fall of 1975 advising Respondent of the necessity of a bridge. The Defendant merely cut down the ditch banks and caused a bridge to be constructed from large pine poles and bridge timber and placed over the ditch. This paragraph is at variance with Appellant's corresponding statement.

Appellant's statement alleges that Respondent began cleaning the ditch in early 1976. The evidence shows that ditch cleaning operations were accomplished in November, 1975. (T page 20, lines 28-30.) The ditch was cleaned by use of a bulldozer. The ditch was cleaned up to the bridge where the bulldozer was removed from the ditch and resumed cleaning on the opposite side. The area near and under the bridge was not cleaned, pending the outcome of negotiations between the parties regarding the placement of the bridge.

The negotiations were unsuccessful, and the Respondent filed suit to compel the Appellant to remove the bridge and for damages. The complaint also requested an order to show cause requiring the Defendant to appear before the Court to show cause why an immediate order should not be entered permitting the Respondent to remove the bridge in advance of

trial on the basis that the bridge constituted an obstruction in the ditch.

The files and records will show that an order to show cause was issued by the Judge but was never personally served on the Appellant. The record will also show that the Appellant was not served personally with a copy of the summons and complaint, but that the same were served on the Appellant's mother, who lives in a trailer home on Appellant's property. The summons and complaint were served on the 29th day of April, 1976, but the Deputy Sheriff for Garfield County testified that by reason that he knew that an order to show cause had to be served personally on the Appellant, it was not served with the summons and complaint at that time. The testimony of the Deputy Sheriff also shows that the Garfield County Sheriff and Appellant's mother had a conversation regarding the matter on April 29, 1976. The Sheriff had the summons, complaint and order to show cause in his possession, ready to be served, at that time.

On Tuesday, the 4th day of May, 1976, the Appellant contacted Robert L. Gardner, Attorney at Law, relative to representing him in the action. On that same date, Robert L. Gardner contacted David Mower, Attorney for Respondent, in an effort to resolve the matter by way of settlement, if possible. During that conversation, Mr. Gardner was informed by Mr. Mower that the matter would appear on the Garfield County Law and Motion calendar on Thursday the 6th day of May, 1976, for a hearing on the order to show cause. After

some discussion, it was agreed that a settlement could probably be worked out. The attorneys were to discuss the matter with their respective clients, looking toward the execution of a stipulation on May 6, 1976, and an order of dismissal from the Court.

On the Thursday the 6th day of May, 1976, the attorneys met. Attorney Mower advised Attorney Gardner that it would be impossible to agree to the terms previously discussed over the telephone on May 4, 1976. The matter was on the Law and Motion calendar to be heard on the order to show cause. Attorney Mower, approximately five (5) minutes before the calendar was called, caused a copy of the order to show cause to be delivered to Attorney Gardner. As the matter was called by the court approximately thirty (30) minutes later, Attorney Gardner advised the court that since his client had not been served with the order to show cause and in view of the fact that Attorney Gardner assumed the matter had been settled, the Defendant was neither ready nor prepared to proceed with the hearing at that time but did agree to meet at anytime after the Appellant had a reasonable opportunity to prepare. The court originally acknowledged the fact that it did not have jurisdiction to proceed in the matter by reason of lack of service. (T page 3, lines 19-20.) Thereafter, the court asked if the Defendant was in the courthouse, and upon being advised that he was, the court requested that the Appellant be contacted to see about proceeding immediately. Appellant's attorney again objected



by reason of the court not having jurisdiction to hear the matter by reason of lack of service of process and adequate notice.

When the matter was recalled later on the calendar, Attorney Gardner again advised the court that his client was not ready to proceed at that time; that the court had no jurisdiction to consider the matter; and further that based upon information that the Attorney had just been given by the Appellant concerning some past differences between the Judge and the Appellant, that the Court should disqualify itself in the matter.

The court thereupon ordered the Plaintiff to proceed on the order to show cause and further ordered the Attorney for the Appellant to remain in the courtroom during the hearing although the court had been advised that the Appellant was not prepared to participate nor did Appellant intend to participate.

The Respondent called as its first witness Deputy Sheriff Jackson, who testified concerning the service of process on the Appellant, as there was no Return of Service on any of the papers in the file. The Deputy testified in substance that a copy of the summons and complaint had been served on Mrs. Presley, mother of Appellant, on the 29th day of April, 1976, but that he specifically recalled that the order to show cause had not been served, as it was his understanding that the order had to be served personally. He further testified that to his knowledge the Appellant had

never been served with the order to show cause up to that time.

The court then took testimony from Mr. Dale Gubler, representing the Respondent. The Appellant refused to enter the courtroom, despite several requests. At the conclusion of the hearing, the court entered an order authorizing the removal of the bridge without providing access in any fashion for the Appellant to that portion of his property on the other side of the ditch. The court ordered findings of fact entered, which, among other things, were to include a finding that the Appellant had acted maliciously and wilfully.

The Respondent thereafter removed the bridge.

#### ARGUMENT

##### APPELLANT'S POINT I

THE COURT LACKED JURISDICTION TO HEAR THE MATTER REQUESTED BY THE ORDER TO SHOW CAUSE BY REASON OF LACK OF PROPER SERVICE AND NOTICE TO THE DEFENDANT.

Appellant contends that Rule 5(a) of the Utah Rules of Civil Procedure requires personal service upon a party whose appearance is called for. Careful reading of Rule 5 (a) reveals no such requirement. On the contrary, Rules 4(e)&(f) of the Utah Rules of Civil Procedure provide means of substituted service, such as service upon a person of suitable age and discretion residing at the usual place of abode of the person to be served, or, service by publication.

This, of course, is consistent with the doctrine which has come to be known as "procedural due process." Procedural

due process embodies the concepts of justice and fair play. The fundamental concepts of the doctrine are notice and opportunity for a hearing appropriate to the nature of the case. Montana State University v. Ransier, 536 P.2d 187, Mont. 1975.

"Under the 'due process of law' mandate, no person can be affected by a hearing or an adjudication of court without his voluntary appearance or service of process affording opportunity to appear and contest the claim against him." Dillard v. McKnight, 209 P.2d 387, 34 C.2d 209, Calif., emphasis added.

The evidence in this case shows that the Appellant probably received notice of the order to show cause and the hearing thereon on the 29th day of April, 1976. That was the date the Sheriff went to serve the papers and had a conversation with the Appellant's mother, upon whom the summons and complaint were served. The conclusion that the Appellant probably knew of the hearing date is made certain by his voluntary appearance in the courthouse on the hearing date. That the Appellant would not come into the courtroom is of no consequence, since he had the opportunity to do so.

#### APPELLANT'S POINT II

THE JUDGE, BASED UPON HIS PAST INVOLVEMENT WITH THE DEFENDANT, SHOULD HAVE DISQUALIFIED HIMSELF FROM THE MATTER WHEN REQUESTED TO DO SO BY APPELLANT'S ATTORNEY.

Respondent recognizes the fact that the Appellant has had previous confrontations with the Judge. The Appellant

is in the habit of preparing his own pleadings, not in proper form, which are sent to the county clerk, without filing fees. Appellant's letters to the President of the United States, the F.B.I., the U.S. Justice Department, the President of the Church of Jesus Christ of Latter-day Saints, and many others, have gained some notoriety in the State. Most of these letters and purported pleadings have been uncomplimentary to the Judge -- in fact, they have been uncomplimentary to everyone else in the world other than the Appellant.

All must learn to deal with recalcitrant and litigious individuals. The fact that one might be upset by the actions of such an individual does not necessarily lead to a conclusion of bias or prejudice.

The evidence shows that the Judge was fair and that he acted in reaction to his knowledge of this Appellant as well as his knowledge of the difficulty for litigants in Garfield County to obtain a hearing of an urgent matter. The Judge is the lone Judge of the Sixth Judicial District, which comprises seven (7) counties. On the 6th day of May, 1976, the Judge was in Panguitch, Garfield County, for his once a month Law and Motion day. The next most accessible Judges would be in either the Fourth or the Fifth Judicial Districts. The Judge of the Fifth District is a lone Judge for four (4) counties. A Judge from the Fourth District would have to travel at least two hundred (200) miles for a hearing in Garfield County.

The Judge in this case ruled in the only practical manner, and in fairness to all parties concerned.

#### CONCLUSION

The court did have jurisdiction to hold a hearing on the order to show cause. Appellant received actual notice of the hearing and appeared voluntarily at the courthouse on the hearing date. Appellant's counsel received notice of the hearing two (2) days prior to the hearing date.

The Judge made a ruling dictated by the practicalities and exigencies of the circumstances. The Judge was aware of his duties to both treat litigants fairly and reach a decision.

The rulings in the case thus far should be upheld, and the case remanded for further proceedings.

Respectfully submitted,

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