

1949

Lehi Irrigation Company v. Clarence T. Jones and Ed H. Watson : Respondent's Reply to Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Mulliner, Prince and Mulliner; Attorneys for Respondent;

Recommended Citation

Response to Petition for Rehearing, *Lehi Irrigation Co. v. Jones*, No. 7189 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/893

This Response to Petition for Rehearing 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 (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

LEHI IRRIGATION COMPANY,
Plaintiff and Appellant,

vs.

CLARENCE T. JONES and ED. H.
WATSON, State Engineer of the
State of Utah,
Defendants and Respondents.

Case No.
7189

RESPONDENT'S REPLY TO
PETITION FOR REHEARING

FILED MULLINER, PRINCE and MULLINER
Attorneys for Respondent.

APR 1 - 1910

CLERK, SUPREME COURT, UTAH

In the Supreme Court of the State of Utah

LEHI IRRIGATION COMPANY,
Plaintiff and Appellant,

vs.

CLARENCE T. JONES and ED. H.
WATSON, State Engineer of the
State of Utah,
Defendants and Respondents.

Case No.
7189

RESPONDENT'S REPLY TO PETITION FOR REHEARING

The petition for rehearing, except on Point 1, as to evidence, raises no matter of law or fact not heretofore argued at length by *amicus curiae* and considered by the court.

While mentioning that this is an appeal from the District Court, the petition ignores the fact that the matters again attempted to be raised and discussed, were not in the trial court or reserved for consideration by this

court, on appeal, at all. The argument again emphasizes the fact that, as between the actual parties to this action, and on the question decided and reserved, the decisions of the trial court, and of this court, are correct.

This petition, erroneously, ignores the settled principles, (a) that questions not presented and reserved in the trial court are not available on appeal (3 Am. Jur. p. 25), (b) that, except where interests litigated below have been succeeded to by death of a party or by succession, as in changes in officials, the only parties who can be heard, on the questions reserved, are those in the trial court (2 Am. Jur. p. 941), and (c) that rights of others are in no way affected or prejudiced by the judgment or the appeal.

If confusion is to be avoided, it is very important to adhere to the plain and established procedure under our water laws, that (a) if a party does not protest an application, his rights are unaffected by any order of the State Engineer thereon thereafter, (b) that he is, therefore, not aggrieved by the order, and does not have a right of appeal therefrom, the statute providing that any such order is subject to "all prior rights", (c) that parties aggrieved may appeal and have a trial *de nova*, and (d) that such trial is one "in equity generally", and, therefore, the rules referred to in the preceding paragraph apply.

The petition seeks to pick out certain statements of the court, and assume effects of the decision not justified, and, by twisting these, seeks grounds of unjustifiable criticism.

We will refer to each ground of this petition briefly, and will cite our first brief, by use of the letter "F", and our brief in reply to *amicus curiae* brief, by use of the letter "R".

1. The statement by the court that the engineer's letter was the "foundation of this appeal (from the State Engineer) and the trial (thereafter) *de nova* in the District Court, is entirely correct". This is an appeal from the District Court, but the foundation was just as it was stated.

The letter embraced the Engineer's findings. Without objection, and by understanding between the parties to the action, it was introduced to establish the facts which his investigation had revealed to him. Technically, perhaps, the defendant might have required us to put him on the stand, to introduce these facts. This was not insisted upon. No point of error is preserved. Nor do we believe that these facts were "neither relevant or material".

As held in the *Terry* case, 77 P. (2) at 366, that on this proceeding, "the court stands in the same position as the Engineer". It is true that neither he nor the trial court "considered the rights of the United States", or the rights of many other people who may be interested in Utah Lake drainage. That is one reason why these cannot be considered here. And no such rights are, in the least, affected by what has been decided.

2. This court did not say that its decision was "controlled by the pronouncement in Little Cottonwood", etc. It merely cited this case, among others, as supporting

its decision, and affirmed the rule announced by all of these. (202 P. (2) at 893, Par. 2)

As we pointed out (R. 15-18), there is nothing in the 1939 amendments calling for any change in the rule, as announced in all these cases, and here. At least two of these other cases, cited by this court, were decided long after 1939.

And, notwithstanding that the court here again points out that "*The proposed source*" of the water, as referred to in 100-3-8, is the springs here, petitioner persists in ignoring this vital fact.

Another point that is fatal to all of petitioner's arguments on this statute and as to "*unappropriated water*" is that the Weber River Application and Application No. 12144 on the Lake, and the approval thereof, have appropriated no water. That any waters referred to therein are "unappropriated" until final proof and certification of appropriation. Further, that the trial court, and this court, cannot here determine water rights at all, or what is, or what the appropriated water rights of these applicants may be, or are.

3. We do not understand that this court held that "the waters in question are those within the scope of approved Application 12144". The court said only that this exchange application "indicates some interest in the seepage water which returned to Utah Lake", and then points out some reasons why this spring water may never be within Application 12144, and that the applications here may even result in helping the supply thereunder. The court also points out reasons why it cannot

decide this lake question here, and without proper "proceedings, arguments, and parties, which may be adversely affected".

4. It is complained that the court here held "that, as between the owners of an approved application for a right to use water and a subsequent application for a right to use from the *same source*", the burden is upon the former to establish "interference or conflict". Further, that the waters of the Jones application "have been definitely determined to be those covered by No. 12144".

We cannot find where the court so held, either as to the parties, or as to the source of water here, or that it had ever been "determined" what water rights exist under No. 12144. We are certain that this determination has not been made. We think the burden will be on the party seeking to establish his right on his final proof.

The court, with great patience and courtesy to *amicus curiae*, went outside of the issues here to discuss the claims made, and to enlighten *amicus curiae*, and made it clear, at some length, that there is no issue or proper proceedings or parties for the determination of the things discussed on these other applications.

5. The point raised by this number is simply a reiteration of that raised under number 4. Again, we cannot see where the court has held, what it is there claimed.

Reference is made under this number, again, to the Weber or "foreign water shed filings". That is, apparently, the "near source", again erroneously so referred

to by petitioner. Those filings are in no way before the court.

We cited, at some length, authorities (R. 8-12) that a person, having an actual right to the use of water, may not object to its use by another, when such owner is not in position to, or is not making a beneficial use thereof. There has been no appropriation of this water under any of these filings, or at all.

It is clear, and without dispute (Tr. 9, 13, 14, 23), that the increase in these Jones springs ("proposed source") results mainly from irrigation by defendant under his previous rights, and as supplemented by his rights as a stockholder in this project. That such irrigation is on his own higher lands, and on the same tract of land in which the springs arise. This is the *near* source of supply.

And, as pointed out by the Court, there is a question, not yet presented, as to whether the owners of either the Weber Applications or No. 12144 can ever claim this water, or interfere with defendant's use of it. This question could come up in the general adjudication suit pending, or, possibly, when the attempt to make final proof and acquire certificate of appropriation is made on these Weber and Utah Lake filings, or on ours. How can this project use other peoples' lands for run off or swamp storage of seeping waters?

6. For reasons already stated, there is no merit in petitioner's ground 6. The reservation of these matters, "until a proper case" is presented, was, obviously, proper and necessary.

In this connection, the opinion here, in attempting to go as far as possible to explain the contentions of *amicus curiae*, says something with relation to judicial notice of records, which we think may prove embarrassing.

While this, in no way, affects the decision here, as the Court indicated, we are concerned about its affect upon future litigation, and, therefore, consider it our duty to present our views. This is somewhat in the role of *amicus curiae*, because it arose in discussion of matters not actually here involved.

If this matter of judicial knowledge, as stated by the court, is limited to the purpose of noticing records for discussion of the irrelevant suggestions of *amicus curiae*, merely, of course, it could do no harm. But, if this be followed as a guide in future water litigations, we fear that it would result in nothing but trouble and confusion for the courts and litigants.

The opinion says (202 P. (2) at 895), "the State Engineer had before him . . . his own records". These, "reveal that there were approved applications which brought about this (Deer Creek) water, and also an exchange application which indicates some interest . . . in the seepage water which returned to Utah Lake. In addition, he had . . . knowledge of this matter as it developed in" the *Tanner* case.

Then, after stating that none of these records were ever put before the trial court, the opinion says, "by virtue of Sec. 104-46-1(3), as interpreted in" *State Land Board v. Ririe*, 56 Utah 213, "it is clear that judicial

knowledge may be taken of *these documents as public records*. Thus, it is immaterial that they were not introduced in evidence”.

This matter is too big for full briefing here. In our second brief (R. 18-21), we cited three Utah cases holding that neither the trial court nor this court could take judicial notice of their records in another and different case, and that neither court can, in another case, take notice of a “determination of water rights filed by the State Engineer with the Clerk of the Court”, where such document was not *pleaded* in the case under consideration. The document there involved was, by statute, required to be made and kept of record in the State Engineer’s Office, and a copy filed in the supervising court.

We are aware that such determination was not a final adjudication of the water rights involved, until approved by the court, but neither is an application to appropriate water, or the approval thereof, an adjudication of water rights.

The first point we suggest on this is that judicial notice is a rule of evidence. It simply relieves a party litigant of proof of some allegations of fact, upon which he relies. (20 Am. Jur. p. 47)

If, as indicated by the Utah decisions referred to above, the document or record is not pleaded as a basis of claim, or presented as an issue in the litigation, it could not properly be judicially noticed therein. Such notice, it seems, could not inject, especially on final appeal, new claims or issues, and, particularly, a possible claim by parties foreign to the litigation. We do not

believe that this court intended to indicate that it could. The contrary appears to be indicated in other portions of the opinion.

The trial judge had rejected the applications as not being relevant or material. His ruling was not reserved or presented here. There clearly was no claim or issue pleaded as to these. If that court had been asked to judicially notice them, his ruling is indicated by the one he made in rejecting them. Thus, it seems clear that this Court cannot rightly consider them on appeal from the trial court's judgment.

The above quoted statements appear as *dicta*. They are to the effect that documents or records in the State Engineer's Office may be judicially noticed, though not brought to the attention of the trial court, or offered at the trial. We think this indication is very serious, even if these documents did bear upon issues between the parties, as raised by their pleadings.

The State Engineer's Office has numerous records. He has taken thousands of measurements on water sources throughout the State. There have been hundreds of statements and rulings contained in letters by different holders of this office. Some of these, as to the same waters, are conflicting and hard to reconcile.

This suggestion will, also, affect general adjudication suits. Can a water user, having, or asserting, some general claim in the trial court, leave the court to search the Engineer's Office, or, on appeal, leave this court to do so, for supporting or conflicting evidence? Or can the attorneys in any water litigation rely upon these records

without bringing them to the attention of the trial court?

We doubt that the Engineer himself, in any hearing, should be required to examine back over all his records, or be confronted, on appeal, with something not brought to his attention by the parties.

We call attention now that 104-46-1(3) does not mention notice of "public records", or "documents". It does mention "official acts of the . . . executive" and the other two departments of the State, as something that may be judicially noticed.

The Constitution creates the three departments, and says (Art. VII, Sec. 1), this executive department "shall consist of" the elective State officers, there named. The *Ririe* case cited (56 Utah 213), said nothing about noticing records. It held that the court could take judicial knowledge that the Land Board and Auditor had bought town bonds, as State investments, and said the court "is authorized to take . . . judicial knowledge of the *acts* and *proceedings* of the two offices". That both are "parts and parcels of the executive department". This last was true, as applied to the Auditor.

As stated before, it is not necessary for us to argue this matter. We merely call it to the attention of the court for such consideration as it may be worth.

7. Under this number, petitioner complains of the statement of the court that no vested rights with which plaintiff's applications will interfere "are called to the attention of the court".

This statement, of course, is entirely correct. None of the applications here discussed, or the approval there-

of, establish any vested rights, or any water rights, or any actual appropriation of water. It is for this reason that the cases cited on this petition, dealing with conflicts with vested water rights, have no bearing here. Nor is there anything that destroys, or in the least relates to, what was decided in *Tanner v. Beacon*, or that affects any claim of the clients of *amicus curiae*, whoever they are, and they are in no way prejudiced.

The *Tanner* case held two things. One, that the statutory power of the Engineer to withhold approval of an application in the interest of public welfare was properly exercised.

It also held that 100-3-21, the priority section, "applies only to vested rights, and not to the right to appropriate water in the future" (p. 962), and that "the doctrine of *res adjudicata* does not operate to affect strangers to a judgment". (p. 959)

These holdings are in harmony with all previous decisions as we have heretofore and hereinabove attempted to point out. The latter are applicable to the matters argued here.

Mr. Clyde, who appeared as attorney for the State Engineer on our first brief, has since resigned his position.

We respectfully submit that the petition for rehearing should be denied.

MULLINER, PRINCE and MULLINER

Attorneys for Respondent