

1953

Santa Clara Seep Ditch Company v. Henry Bowler and Bloomington Irrigation Company : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

SANTA CLARA SEEP DITCH COMPANY,
a corporation,

Plaintiff and Respondent

vs.

HENRY BOWLER, Water Commissioner,
and BLOOMINGTON IRRIGATION
COMPANY, a corporation,

Defendants and Appellant

FILE

MAY 28 1953

No. 7921

Brief of Appellant

On Appeal from the District Court of the Fifth Judicial
District of the State of Utah, in and for Washington
County.

HON. WILL L. HOYT, JUDGE

LEROY H. COX

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Attorney for Santa Clara Seep Ditch Company.

ERRATUM

Wherever the word "Trans." appears in this brief, it should be corrected to read "Record."

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Attorney for Santa Clara Seep Ditch Company.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a judgement entered by the District Court of the Fifth Judicial District of the State of Utah, in and for Washington County, against the defendant Bloomington Irrigation Company and in favor of the plaintiff Santa Clara Seep Ditch Company.

The facts which the appellant, Bloomington Irrigation Company, relies on in this appeal are those found by the Court in its Findings of Fact (Trans. 35), the pertinent portions of which are as follows:

1. (Trans. 35) That the plaintiff is an irrigation company organized under and by virtue of the laws of the State of Utah, with its principal place of business at St. George, Utah, that Henry Bowler one of the Defendants herein is the duly appointed water commissioner for the Santa Clara Rivier or Creek, and the Bloomington Irrigation Company, sometimes called the Bloomington Canal Company is an irrigation company duly organized under the laws of the State of Utah, with its principal place of business at St. George, Utah.

2. (Trans. 35) That the Plaintiff has a primary right, initiated prior to 1890, in the waters of Santa Clara Creek to use 3.98 c.f.s. for irrigating 239 acres of land belonging to Plaintiff's stockholders and lying south and southwesterly from St. George City.

3. (Trans. 36) That the Defendant Bloomington Irrigation Company also known as the Bloomington Canal Company, has a primary right initiated prior to 1890, in the waters of Santa Clara Creek to use 3.28 c.f.s. for irrigation of 196.7 acres of land on Bloomington Bench, southerly about two miles from Plaintiff's lands.

4. (Trans. 36) That Defendant company also has a primary right initiated in 1876 to divert water from the Virgin River for use upon the same 196.7 acres.

5. (Trans. 36) That said rights have been heretofore adjudicated and declared in general adjudication suits in this court involving respectively the Santa Clara Creek and the Virgin River, the Santa Clara decree being dated November 6, 1922, (Trans 58) and the Virgin River decree December 12, 1925. (Trans. 56).

6. (Trans. 36) That the Virgin River decree recites that the Santa Clara Creek is a tributary of the Virgin River and that the rights in said creek have been determined previously by court decree and are therefore not included in the Virgin River determination.

7. (Trans. 36) That said Virgin River decree provides with respect to Defendant's right in the Virgin River that said right is to be used as a supplementary supply to the right granted to said company from the Santa Clara River.

8. (Trans. 36) That in low water season the waters of Santa Clara Creek are insufficient to supply in full the rights of Plaintiff and Defendant. That the diversions of Plaintiff and Defendant are the lowest diversions on said creek. That the diversion point of the Plaintiff is located approximately a mile and a quarter up stream from the diversion point of the Defendant as described in the Santa Clara decree.

9. (Trans. 36) That Plaintiff diverts its water into what is known as the Seep Ditch which ditch roughly parallels Santa Clara Creek channel for some distance and then

extends northeasterly and then easterly to a point 600 feet west from a street or lane known as Silo Street which runs south from St. George City.

10. (Trans. 37) That the lands irrigated from Plaintiff's appropriation are located south of said Seep Ditch and between said ditch and the Santa Clara Creek and Virgin River. That the slope of the country in said area is to the south, and seepage and surplus waters from said area irrigated from the Seep Ditch would, if not diverted, drain into the Santa Clara Creek or the Virgin River.

12. (Trans. 37) That Defendant's Exhibit "A" illustrates the location of the diversion ditch of the Plaintiff known as the Seep Ditch, the location of the Defendant's diversion canal known as the Bloomington Canal, the location of the natural channel or creek bed of Santa Clara Creek, the Virgin River bed, and the location of the Defendant's ditch for diverting water out of the Virgin River.

13. (Trans. 37) That Defendant's Virgin River ditch extends approximately one mile roughly parallel to the Virgin River bed. That the greater part of the area irrigated from Plaintiff's ditch lies north of said Virgin River ditch and seepage and surplus waters drain from said lands into said Virgin River ditch and thence flow into Defendant's canal. That all such seepage and surplus water entering said Virgin River ditch enter it below the point of diversion described for Defendant in the Santa Clara decree.

14. (Trans. 38) That the amount of such seepage and surplus waters received into Defendant's canal from the area irrigated from Plaintiff's ditch fluctuates and during the low water season when the waters of the Santa Clara Creek are insufficient to satisfy the decreed rights

of Plaintiff and Defendant, the flow of such seepage and surplus waters is so small as to be difficult and costly to measure and cannot be accurately measured when waters of the Virgin River are flowing in said river ditch.

15. (Trans. 38) That some seepage and surplus waters flow into said Virgin River ditch which originate from sources other than the Seep Ditch or Santa Clara Creek, but during the low-water season the amount of such inflow from other sources is so small as to be of no consequence herein.

16. (Trans. 38) That Defendant's diversion from the Virgin River is approximately at a point where the river is very flat, wide and sandy to an unknown depth, and it is impossible at any reasonable cost to maintain a permanent diversion dam or diversion works to continuously divert water into Defendant's canal. That therefore Defendant cannot depend upon a continuous flow into its canal from said Virgin River. That the Defendant depends upon brush dams to divert water into its canal at low water season and such dams are frequently washed out by freshets in said river caused by thunder storms in the latter part of June and in July, August and September. That such freshets also frequently fill the upper part of the diversion ditch with silt which must be removed by sluicing or dredging.

17. (Trans. 39) That subsequent appropriators have approved applications for appropriation of waters from the Virgin River, and some of these convey water through the Defendant's Virgin River Ditch and the Bloomington canal. That waters flowing in the Bloomington canal in June, July and September as reported by the watermaster

and set forth in paragraph 22 below included water being diverted for use by such subsequent appropriators, but the rights of such subsequent appropriators are in each case subsequent and inferior to the rights of the Defendant as a primary appropriator from said Virgin River.

24. (Trans. 41) That the decree in the Santa Clara Creek general adjudication which sets forth the rights of the Plaintiff and Defendant above mentioned, contains the following recitals:

“The parties hereto and their successors in interest shall promptly install and perpetually maintain suitable and efficient head-gates, control works, and measuring devices at or near their respective points of diversion and all water herein allowed and decreed shall be measured at or near said points of diversion.”

STATEMENT OF POINTS

The errors relied upon by the defendant and appellant Bloomington Irrigation Company for a reversal of the judgment are that the court erred:

1. In ordering in paragraph 1 of the judgment that the defendant and appellant be charged with return flow waters received by it below the point decreed as its point of diversion from the Santa Clara Creek channel.

2. In paragraphs 2 and 3 of its judgment which said paragraphs are so vague and uncertain as not to admit of enforcement and therefore are void.

3. In paragraph 3 of its judgment in that said paragraph purports to affect water rights in the Virgin River,

the court not having before it the necessary parties to give it jurisdiction to adjudicate such rights.

4. In paragraphs 1, 2 and 3 of said judgment in that said paragraphs substantially modify and revise the final decree in the general adjudication suit upon the Santa Clara Creek, the issues finally decided in said decree being res judicata as to this action.

5. In paragraph 4 of its judgment denying the defendant and appellant the relief asked in its answer and counterclaim.

ARGUMENT

POINT 1.

Appellant contends that in charging it with return flow waters received below its decreed point of diversion from the Santa Clara Creek channel the court took a position contrary to the established law of this state and a position which would make the administering of the waters of any river system difficult if not impossible.

Section 73-5-4 Utah Code Annotated 1953 requires the installation of water measuring devices at EACH POINT WHERE WATER IS DIVERTED OR TURNED OUT, the statute clearly contemplating that water should be measured at the point of diversion and not at the place of use. In addition to this statutory direction the appellant emphasizes the fact that the Santa Clara Creek Decree (Trans. 58) expressly provides:

“The parties hereto and their successors in interest shall promptly install and perpetually maintain suitable and efficient head-gates, control works, and measuring devices at or near their respective points of diversion and all water herein allowed and de-

creed shall be measured at or near said points of diversion."

In ordering that the appellant be charged with return flow waters received by it below its decreed point of diversion the court necessarily required that the waters used by the appellant be measured not at or near its point of diversion but rather at some undetermined place between its point of diversion and the place of use of the water. In this respect the court's order is not only contrary to the established law of this state but also is in direct conflict with the express provisions of the final general adjudication decree on the Santa Clara Creek. It would seem apparent that any attempt to measure water at any place other than its point of diversion would result in hopeless confusion and an impossible task for the water commissioner charged with that responsibility. Under such a theory the commissioner would be forced to adjust the amount of water diverted according to the rapidly changing amounts of seepage water coming into a user's ditch from irrigated land above him.

In *Wrathall vs. Johnson* 40 Pac. (2nd) 755, 86 Utah 50, this court declared that . . . "the state is vitally interested in seeing that none of the waters are allowed to run to waste or go without being applied to a beneficial use." . . . In furtherance of this principle this court has held in an unbroken line of decisions that a lower user can gather and use seepage and waste water from irrigated lands above. *Robert vs. Gribble* 134 Pac. 1014, 43 Utah 411; *Wrathall vs. Johnson*, 40 Pac. (2nd) 755, 86 Utah 50; *Wellsville East Field Irrigation Company vs. Lindsay Land and Livestock Company* 137 Pac. (2nd) 634, 104 Utah 448; *Smithfield West Bench Irrigation Company vs. Union Central Life In-*

surance Company 142 Pac. (2nd) 866, 105 Utah 468. These cases are based upon the sound principle favoring the greatest possible utilization of the State's water resources and upon the theory that once water has been diverted from its natural channel, used upon the lands of an appropriator and then turned loose, it is fugitive water and subject to use by anyone unless and until it gets back into its original natural channel. By charging the appellant with return flow waters received in its ditch below its point of diversion the court in effect prevented the appellant from making full utilization of the water available during the dry season because the appellant will have charged against it at its point of diversion any return flow or seepage water collected in its ditch below that point. Therefore the appellant in this case and many water users in similar circumstances, are better off allowing the seepage water to run to waste rather than maintaining costly ditches to collect it.

POINT 2.

In attacking paragraphs 2 and 3 of the court's judgment (Trans. 44) the appellants rely upon the rule of law that . . . "a decree so indefinite and uncertain that it is impossible to determine the quantity or portion of water to be awarded is fatally defective" . . . Sharp vs. Whitmore 168 Pac. 273, 51 Utah 14. "One of the essentials of a valid judgment is that the judgement be valid and certain respecting the relief granted. In judgments defining and determining conflicting claims, rights and interest in and to the use of water in this arid region the application of the foregoing rule is indispensable." Sharp vs. Whitmore, *supra*. These rules of law were reiterated by this court in Garrison vs. Davis 54 Pac. (2nd) 439, 88 Utah 358. Paragraph 2

of the court's judgment (Trans. 45) in this case requires the water commissioner to ascertain when the appellant is entitled to draw water from the Virgin River and at the same time paragraph 3 of the judgment by necessary implication requires the appellant to use Virgin River water when available unless its diverting works have been washed out or made ineffective without fault of the appellant. In these two paragraphs of the judgment the water commissioner is therefore instructed first to ascertain when the appellant is entitled to draw water from the Virgin River and second is instructed by implication that the appellant is required to use Virgin River water unless it has been at fault in maintaining its diverting works. Any attempt by the water commissioner of the Virgin or Santa Clara Rivers to administer these two paragraphs of the judgment would inevitably result in hopeless conflict and confusion. These provisions of the judgment are clearly so vague and uncertain as not to admit of enforcement and therefore ought to be declared void.

Appellant contends that the Virgin River Decree (Trans. 56) merely gives the appellant right to use Virgin River water to the extent necessary to make up its 3.28 c.f.s. of water awarded by the Santa Clara Decree when it cannot be satisfied from the waters of Santa Clara Creek. This is the only logical interpretation which can be given to the Virgin River Decree and is the only interpretation which will save that decree from being so vague and uncertain as not to admit of enforcement. Any other interpretation of the Virgin River Decree would award an entirely uncertain and indefinite amount of Virgin River water to the appellant.

POINT 3.

By the necessary implication contained in paragraph three of the judgment to the effect that the appellant must use Virgin River water unless its diverting works have been washed out or made ineffective without fault of the appellant, the court has directly affected water rights in the Virgin River. It is elementary law that water rights like any other vested rights cannot be interfered with except by a court having jurisdiction under the pleadings and parties before it to adjudicate such rights, *Tanner vs. Bacon*, 136 Pac. (2nd) 957, 103 Utah 494. In this case none of the users of Virgin River water, except appellant, were before the court and consequently the judgment could not operate to bind other Virgin River water users. Paragraph 3 of the judgment therefore deprives the appellant of vested rights in the Santa Clara Creek and purports to substitute in place thereof rights in the Virgin River which the court was without jurisdiction to award.

POINT 4.

The Santa Clara Creek Decree (Trans. 58) became a final and conclusive decree upon its entry by the court on the 6th day of November, 1922. The Virgin River Decree (Trans. 56) was entered by the court more than three years later, to-wit, December 12, 1925. The Santa Clara Creek Decree makes no mention of any limitation or restriction upon the rights awarded to the appellant thereby and the court in paragraphs 1, 2 and 3 of the judgment in this case modifies and revises this decree in two respects, viz.: (1) Contrary to the provisions of the decree the judgement requires the measuring of the waters of the Santa Clara Creek used by the appellant at a point below its decreed

point of diversion.(2) The judgment requires the appellant to use or make an effort to use Virgin River water before it is entitled to its decreed rights in the Santa Clara Creek.

In making these substantial modifications and revisions in the appellant's rights under the Santa Clara Creek Decree (Trans. 58) the court violated the well settled principle of law that "where there has been no retention of jurisdiction by the trial court, unaided by statute, it has no power after the expiration of the term and certainly after the time for appeal has expired to change or modify its judgement in a substantial or material respect," Frost vs. The District Court of the First Judicial District, 83 Pac. (2nd) 737, 96 Utah 115.

POINT 5.

In accordance with the principles of law heretofore set forth in this brief, the appellant contends that the court ought to have ordered the State Engineer and the water commissioner of the Santa Clara Creek to distribute to the defendant and appellant, Bloomington Irrigation Company, its decreed portion of the waters of the Santa Clara Creek in accordance with paragraph 9 of the decree entered in the case of St. George Clara Field Canal Company vs. Newcastle Reclamation Company (Trans. 58) and that the appellant ought to have been allowed to prove its damages as a result of being denied the waters of the Santa Clara Creek after June 9, 1951, and to recover judgment against the plaintiff and respondent for the same.

The defendant and appellant concludes therefore that the judgment of the lower court should be reversed and the case remanded to the lower court with instructions to enter judgment ordering the State Engineer and the water

commissioner of the Santa Clara Creek to distribute to the appellant, Bloomington Irrigation Company, its decreed portion of the waters of the Santa Clara Creek in accordance with paragraph 9 of the decree entered in the case of St. George Clara Field Canal Company vs. Newcastle Reclamation Company and with the further instruction that the lower court grant the appellant a hearing as to the question of damages sustained by it.

Respectfully submitted,
COX & ANDERSON
Attorneys for Appellant