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

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.

No. 79

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

Defendants and Appellant

BRIEF OF RESPONDENT

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

FILED

HON. WILL L. HOYT, JUDGE

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JUL 31 1953

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**IN THE SUPREME COURT OF THE
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**SANTA CLARA SEEP DITCH COMPANY :
a corporation, :**

Plaintiff and Respondent :

vs. :

No. 7921

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

Defendants and Appellant :

BRIEF OF RESPONDENT

**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

**ELLIS J. PICKETT
Attorney for Respondent**

**LEROY H. COX
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STATEMENT OF CASE AND FACTS

We will accept the Statement of the Case and Facts set forth in Appellant's brief as far as they go and will refer to the same without setting them out in this brief.

For a clear understanding of all the facts in the case it is necessary that the following Findings of Fact should be included and considered with Appellant's Statement of the Case and Facts; to-wit:

11. (Record 37) That the Santa Clara Creek originally flowed past the points of diversion of the Plaintiff and Defendant in a broad channel which spread out widely as it approached the Virgin River. That in the year 1921 the Defendant cut a new ditch leading from a point in the natural channel about seventy-five feet from their decreed point of diversion and thence easterly to their canal bordering the Virgin River on its westerly side at a point at which a cement diversion dam or spillway was constructed by C. C. C. work in about the year 1938. This latter point is referred to as Point B. on Plaintiff's Exhibit 1. Shortly after this new ditch was dug the water diverted therein cut and deepened the channel to such an extent that the entire flow of Santa Clara Creek (except in the time of

very high water) has since flowed through this new channel.

20. (Record 40) That on June 9, 1951 the Defendant Water Commissioner measured the water of Santa Clara Creek near the diversion ditch of the Plaintiff and found 3.00 c.f.s. flowing into the Plaintiff's ditch. That he on the same day attempted to measure the water flowing into Defendant's canal but was unable to measure it because of its large volume.

21. (Record 40) That on said day the Water Commissioner, without instruction from either party, turned all of the 3.00 c.f.s. of water he found in Santa Clara Creek at Plaintiff's point of diversion into Plaintiff's ditch and thereafter in the 1951 season all Santa Clara Creek water flowing in the creek channel at Plaintiff's point of diversion was diverted for use by Plaintiff and the only part of Santa Creek water received by Defendant thereafter in said season was such as resulted from seepage or return flow below Plaintiff's point of diversion.

22. (Record 40) That subsequent to June 9, 1951, the Water Commissioner made measurements of waters flowing in Plaintiff's ditch known as the Seep Ditch as follows:

| | |
|----------|-------------|
| June 15: | 1.85 c.f.s. |
| June 23: | 1.50 c.f.s. |
| July 28: | 0.95 c.f.s. |
| Sept. 4: | 0.70 c.f.s. |
| Sept 10: | 0.70 c.f.s. |

That on each of said days except September 10 the commissioner found so much water flowing into Defendant's canal chiefly from the Virgin River through the Virgin River ditch that he was unable to measure it with facilities available to him. That on September 10 he measured 0.64 c.f.s. in Defendant's canal which represented water entering said canal from seepage or surface drainage below Plaintiff's diversion and part of it from below the Defendant's decreed point of diversion, but none by direct flow from the Virgin River.

26. (Record 41) That the point of junction of the Defendant's Virgin River ditch with Defendant's old ditch leading from the Santa Clara Creek prior to 1921 is approximately five hundred feet down the creek channel from the point of diversion as above described. That the point of diversion being used by Defendant for diverting its water from the creek channel in 1922 at the time of the Santa Clara decree was at or near the place described in said decree.

ARGUMENT ON APPELLANT'S POINT I

In this brief we will refer to the points made by Appellant in our argument to sustain the judgment of the Court in the above matter.

It should be remembered that the Defendants are not now using the point of diversion decreed in the Santa Clara River decree, nor have they been using the same for a period of at least 20 years, but they have been using the point marked "B" upon Plaintiff's Exhibit 1, which is the dam across the Santa Clara Creek practically at at the junction of the Virgin and the Santa Clara Creek, as their point of diversion and we submit that this should be considered as their point of diversion for all of the arguments herein. Appellant's point of diversion mentioned in the decree is high and dry, could not be used if Defendants so desired and has not been used for a period of many years. The point of diversion was changed by the Defendants for their own convenience and was done without the formality of applying for a change of point of diversion.

in the manner provided by statutes. (See Finding 11 (Record 37), also see Plaintiff's Exhibit 1.)

The Santa Clara Creek bed from Points A to B (Plaintiff's Exhibit 1) catches the waste and seep water from Respondents' lands immediately above and is diverted at point "B" by Appellants. There cannot be any question that the waters from the Santa Clara Creek, even though it is seep water from the land of the Seep Ditch Company immediately above, are diverted at point "B" by Appellant and must be considered as waters for which Defendant is accountable under their decreed rights on the Santa Clara Creek (Finding 10, Record 37). The Defendant's canal from point "B" to "C" on the Virgin River also collects some of the waste and surplus water from the Plaintiff's land

which would otherwise go into the Virgin River, this water is diverted at point "B" into the Defendants canal. (Finding 10, Record 37) The Defendant Company has been using this Bloomington Canal paralleling the Virgin River between "C" and "B" for a period of time prior to 1876 because the use of the Virgin River water and the use of said canal was the basis of the decreed right to supplemental water allowed in the Virgin River decree, (See Findings 4 and 5, Record 36).

The Defendant Bloomington Irrigation Company, sometimes called the Bloomington Canal Company, has decreed primary right initiated prior to 1890 in the waters of Santa Clara Creek to use 3.28 c.f.s. for the irrigation of 196.7 acres of land on Bloomington Bench, (See Finding 3, Record 36) but there is not sufficient water in the

Santa Clara River to satisfy the requirements of the Defendant Company and the Plaintiff Company and others, because during the low water season the waters are insufficient and the Defendant Company from before 1876 to the present time has diverted water from the Virgin River and used seep and waste water running into their canal, which right has not been and is not now being questioned in the present action.

In charging defendants with the return flow from Santa Clara Creek or the Bloomington Canal if it in fact reaches Defendants' point of diversion "B" (Plaintiff's Exhibit 1) the Court is simply holding that Defendant is entitled to 3.28 c.f.s. for irrigation of 196.7 acres of land on Bloomington Bench and if it is in fact getting, at its point of diversion part of that water from the Santa Clara Creek of seepage through the Bloomington Canal,

then it should be charged with the amount diverted as against the right decreed. If the Court had held otherwise or if the law were otherwise, it would simply mean that one can get all of the water that one wants from seepage and various other ways and add that to the decreed water and use it upon the land in question which might and could well be considerable more than the decreed amount of water or considerable more than could be beneficially used upon the said land.

We submit that for all of the arguments in this case, the Defendant's points of diversion should be considered as point "B" (Plaintiff's Exhibit 1) because that is in fact its present point of diversion and has been for many years and it would be inequitable and unjust to now determine the

issues involved in this case by reference to some decreed point of diversion five or six hundred feet up the Santa Clara Creek bed from their actual point of diversion, and it would permit Defendant to take advantage of a situation that now prevails through its own omission.

In paragraph 1 of the Judgment in the present case, the Court has recognized the fact that the actual point of diversion used by the Defendant is the place where the measurement of water should be made and not at some decreed point of diversion which has subsequently been abandoned by the Defendant; and that when the water available in the Santa Clara Creek is not sufficient to satisfy the wants of Plaintiff and Defendant, the waters which Defendant actually diverts at its present point of diversion should be charged against them.

It is true as argued by Appellant under Point 1 that adequate measuring devices should be provided by Plaintiff and Defendant at or near their points of diversion so that the water they use may be determined at any time the proper official desires to measure same, but the failure to so provide adequate measuring devices at points of diversion is ordinarily a common fault with all or nearly all irrigation companies. The water in the Seep Ditch Company has been measured from time to time by the water commissioner, particularly on June 9, 1951 as shown by Finding 20 in Record 40 and on the said date as shown by said Finding he attempted to measure the water flowing into Defendant's Canal, but was unable to measure it on account of its large volume, indicating that the Defendant itself failed to provide an adequate measuring device at or near its present point of

diversion; and certainly Defendant should not be permitted to profit by its omission in this respect. Finding 20, Record 40 shows that subsequent to June 9, the Water Commissioner made measurements at or near Plaintiff's point of diversion and that on each of said dates he attempted to measure the water at or near the Defendant's present point of diversion but was unable to do so on account of the large volume of water present in the Canal at that time.

The fact that Defendant has arbitrarily and without the consent of the State Engineer changed its own point of diversion down the creek five or six hundred feet from the decreed point, and that for all practical purposes its present and actual point of diversion must and should be considered for determination of waters used by it, should be sufficient answer to Defendant's arguments

on Point 1 that the water of the Santa Clara Creek decreed to it should be measured at its decreed point of diversion.

ARGUMENT ON APPELLANT'S POINT 2

Answering the arguments upon Point 2 the Court has simply said that if in fact Defendant is using waters from the Virgin River under its supplemental rights sufficient to irrigate adequately its lands, that is the 196.7 acres upon the Bloomington Bench, then Defendant company could not demand proration of the waters of the Santa Clara Creek if the said waters were insufficient to supply fully Plaintiff's decreed rights in said stream. This is not only practical and good sense but it is also good law, and is not an attempt to adjudicate the waters of the Santa Clara Creek or Virgin River but only an attempt to interpret the decrees already entered. Number 2 of the Judgment simply states that

if Defendant is in fact getting enough water to irrigate its 196.7 acres of land on Bloomington Bench from its decreed rights on Virgin River plus seep water from the Santa Clara Creek, then it cannot expect any more water from the Santa Clara Creek if the Plaintiff does not have more than its decreed amount. Number 3 of the Judgment simply states that if Defendant is not using and can not use the waters of the Virgin River to irrigate the said 196.7 acres, then the decreed rights on the Virgin should not be charged against the amount due under the Santa Clara decree. The Court has attempted in Numbers 2 and 3 of the Judgment to make a practical interpretation of the said decrees and has not attempted to modify them in any respect.

ANSWER TO POINTS 3, 4, AND 5

We submit that the argument of Defendant for reversal of Judgment set forth in

its point 3, 4, and 5 have been sufficiently answered in our argument and answer to Appellant's Points 1 and 2.

That Plaintiff and Respondent respectfully submit that the Judgment of the Court should be affirmed.

Respectfully submitted,

ELLIS J. PICKETT
Attorney for Plaintiff
and Respondent