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William A. Hubble and Isaac Frank Creger v. Cache County Drainage District Number Three : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

WILLIAM A. HUBBLE and
ISAAC FRANK CREGER,
Plaintiffs and Appellants,
-vs-
CACHE COUNTY DRAINAGE
DISTRICT NUMBER THREE, a
corporation,
Defendant.

BRIEF OF
APPELLANTS
Appeal No. 7932

FILED

APR 11 1953

Clerk, Supreme Court, Utah

Appeal from the District Court of Cache County, Utah

Honorable District Judge

GEO. D. PRESTON

Attorney for Appellants.

TABLE OF CONTENTS

	Page
Statement of Facts	1
Statement of Points	
That the Court erred in the following respects: ..	4
Point 1. By making and entering its Decree in favor of the defendants and against the plaintiffs and dated the 30th day of October, 1952	4
Point 2. By making and entering its following findings of fact: Nos. 4, 6, 8, 10, 12 and 13	4
Point 3. By making and entering its following conclusions of law: Nos. 1, 2, 3, 4, and 5	4
Argument	
Point I	4
Point II	11
Point III	13

INDEX OF CASES AND AUTHORITIES CITED

Gunnison Irrigation vs. Gunnison Highland Canal Company, (Utah) 174 P. 852	10-11
Huber vs. Newman, (Utah) 145 P. 2d. 780	10
Salt Lake City vs. Salt Lake Water & Electric Power Company, (Utah) 174 P. 1134	8
Salt Lake City vs. Telluride Power Company, (Utah) 17 P. 2d. 281	6
Utah Power and Light Company vs. Richmond Irrigation Company, et al (Utah) 13 P. 2d. 320	7

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STATEMENT OF FACTS

I shall attempt to state the facts with sufficient simplicity to minimize references and to make a further statement by opposing counsel unnecessary. (All references are to the page marking of the Clerk).

The case was before this Court previously on appeal by defendant, from a decree in equity. While the decision on the appeal was pending an Amended Decree in Equity was entered upon stipulation of counsel (p. 84). After the entry of this decree and during late 1951 and early 1952, H. C. Pitcher, with the knowledge and consent of the defendant and its officers constructed on his property, within the Drainage District, 1480 feet of underground, covered tile drain.

Cache County Drainage District No. 3 is located

west of the city of Lewiston, Utah, in the Northern part of Cache County. A detailed map is attached to the original complaint of the total proceedings (p. 1). The drains which gave rise to the injunction proceedings are marked in red, and commonly referred to through the entire matter as the "new or red drains". The old drains are in black. The District is, by natural geographical conditions, divided into two divisions—the North and the South Division. The North division flows over plaintiffs' lands into what is designated on the map as "Outfall No. 1", and the South flows into "Outfall No.2". The division line is definable by the direction of the flow of water as indicated by arrows.

Mr. Pitcher's land is the tract shown under his name in the North-west quarter of Section 18, and upon which he caused to be constructed, the additional 1480 feet of tile drains. This construction consisted of two separate drains—one for a length of 700 feet and another one of 780 feet, both of which varied in depth from 5 feet to 5.9 feet, and both containing 6 inch tile pipe (p. 894). In the spring the water collected on Mr. Pitcher's land, and these drains were put in to hasten the early run off (p. 918), and to lower the water table.

After the entry of the Amended Decree the defendant company constructed an open drain from 7 to 8 feet deep (p. 927), and which conformed in general to the already existing open drains in black and red. The beginning of this drain was at approximately the center

ment of Points above all run to the same general proposition. We have thus narrowed the issues and are now confronted with the interpretation by the Court in its Decree of the 30th day of October, 1952, of the terms and provisions of the Amended Decree of the Court dated the 10th day of December, 1951. The Decree appealed from is found at page 872 of the record. The Amended Decree with which we are concerned with the interpretation is found at page 846 of the record.

It is our contention that the Amended Decree needs no interpretation because of the plain wording thereof. In paragraph 1, the drainage district is granted a perpetual easement over the plaintiffs' lands for the purpose of draining all of the lands being in the northern division of the district, and to drain those lands by means of, "ditches and drains from its system in the manner of operation as the same existed on April 8, 1947." Paragraph 2 is the restraining provision and enjoins the defendants, its officers, its agents, and its employees from the construction of any new drains, either within or without the district, and prevents any enlargement of any old drains. The defendants claim the right to construct the new tile drains because of their diversion dam, which diverts a portion of the waters from outfall No. 1 to outfall No. 2. If the defendants will abandon the portion of their easement as granted them in the Amended Decree, this matter could be rapidly settled without an appeal; but this they will not do.

In construing the Decree, effect must be given to all of its provisions as stated by this Court in the case of Salt Lake City vs. Telluride Power Company, (Utah) 17 P. 2d. 281, where this Court said:

“In construing the decree, it should be construed together as a whole so as to give meaning and force to all of its terms, and if a reasonable construction can be had which will give force to all of its wording, such a construction should be made. 23 Cyc. 1101. This being so, the only way to give effect to the words “pumped water” would be to construe the two paragraphs together. This we interpret to mean that all of said irrigation and canal companies shall pay for the operation and maintenance in proportion to the number of acre feet of pumped water used by each. The language of the fifth paragraph referring to the number acre feet used is limited by the wording of paragraph 3, where the first reference is made to the means of apportioning the cost of maintaining and operating the pumps. Any other construction would treat as surplusage the words “pumped water,” and in effect amount to striking them from the decree. This being so, it is the opinion of this court that the North Jordan Irrigation Company, under the decree of 1912, would only be obligated to pay for the number of acre feet of pumped water actually used by it.”

The construction placed on the Amended Decree by the lower court in effect amounts to striking from paragraph 1 of the Decree the last portion which provides that the easement may only be effective by the use of the drains and ditches as the drainage system existed

on April 8, 1947. The lower court's construction further amounts to striking from paragraph 2 the injunction which prohibits the defendants from draining any water within or without the district which may be, "created, developed, or increased by the construction of any new drains." Defendants have always contended in these contempt proceedings that they, in effect, have not coursed more water over plaintiffs' lands than was previously the case, and have contended in fact that they have benefited the plaintiffs. This contention places the perpetual duty on the plaintiff of measuring the amount of water from year to year in the drain and to compare it to the waters flowing through this system as of April 8, 1947. This proposition was decided by this Court in the case of Utah Power and Light Company vs Richmond Irrigation Company, et al, (Utah) 13 P. 2d. 320. Our case is sufficiently similar to the Utah Power case that we feel it is controlling of every element presented by this appeal and rely strongly on that case. The question of whether or not the diversion dam diverts water that would otherwise flow over plaintiffs' property is not involved. Under the Utah Power decision where this Court said:

"To argue, however, that without an agreement among the parties or without application to the court having and retaining jurisdiction of the waters of a stream under a valid and subsisting decree, that a party to such decree may proceed to acquire right adverse to the other parties to the decree by an *alleged development*, or by

making a use or claiming a right without first having made an appeal to the court to be heard upon the basis of fundamental equities, may not be done."

If the defendants are permitted to prevail in this case, we predict the next step will be an enlargement of the district and the construction of additional new drains. This was disposed of also in the Utah Power case:

"A contempt proceeding for the purpose of maintaining the validity, purposes, and sanctity of the decrees of the court may not by answer attacking the decree under the guise of a *subsequently acquired right in violation* of the decree transform the proceedings into an equity proceeding to escape the consequences of a deliberate violation. Rights once determined by a valid decree of the court, accepted and in force, must be respected. Courts of equity have always had a ready disposition to attend and hear a petitioner who comes with clean hands and a righteous cause."

The construction of the amended decree sought by the defendants would amount to a modification of the decree, and a decree may not be modified by a construction as was said in the case of Salt Lake City vs Salt Lake Water & Electric Power Company, (Utah) 174 Pacific 1134, the same problem was encountered, and the Court said:

"Where, however, as here, the language of the decree by which all parties are bound is free from ambiguity and doubt, then the rule is ele-

of the North boundary of the Ethel Rigby property, and flowed generally in a southwesterly direction, and connected with the drains which flowed out through "Outfall No. 2". The company then constructed a dam in the drain which runs due West from the point where the last described new open drain connects at the head with the old drain system. This dam was to divert some of the drain waters from the Northern division (outfall No. 1), into the Southern division (outfall No. 2). The dam was an earth fill and the spring it was put in, the high run-off water took it out, and at the time of the trial it had not been replaced.

With reference to the tile drains placed by Mr. Pitcher, these were no part of the drainage system of the company as it existed on April 8, 1947 (p. 957).

The defendants consulted their attorneys prior to the installation of the Pitcher drains, and their attorneys advised them that such installation was not contrary to the terms of the Amended Decree, and in the construction thereof, they acted upon the advice of counsel.

The defendants claim a perpetual easement over the lands of the plaintiffs to drain all of the lands within the Northern Division of the District, and the plaintiffs claim that the construction of the Pitcher tile drains constitutes contempt of Court.

No petition for modification or other change in the Amended Decree was applied for prior to the construc-

tion of the Pitcher drains.

STATEMENT OF POINTS RELIED ON BY THE APPELLANTS

The Court erred in the following respects:

1. By making and entering its Decree in favor of the defendants and against the plaintiffs and dated the 30th day of October, 1952.

2. By making and entering its following findings of fact: Nos. 4, 6, 8, 10, 12, and 13.

3. By making and entering its following conclusions of law: Nos. 1, 2, 3, 4, & 5.

ARGUMENT

POINT I

This point goes to the matter of the error of the Court in entering its Decree adjudging the defendants not guilty of contempt and in holding in paragraph 2, thereof, that the defendants by the Amended Decree, which was dated the 10th day of December, 1951, are permitted to extend and construct any drains within the limits of the drainage district so long as said new drains do not increase the burdens on plaintiffs' lands.

In discussing the case with Mr. Charles P. Olson, one of counsel for defendant, we feel that this is the only issue to be presented by this appeal and the statement of points relied upon as to the appellant's objections to the Courts findings as set forth in the State-

mentary that extraneous circumstances and conditions may not be resorted to if to do that makes the meaning of the language ambiguous. Extraneous matters may be invoked to clear up uncertainty and doubts, but not to create them. Neither is this a case where it is necessary or proper to expand or restrict the meaning of words or phrases to create harmony between conflicting provisions. There is no reason whatever why the natural, obvious, and ordinary meaning of the language used in the decree should not be followed. If, under such circumstances, the ordinary meaning of the language used is departed from, there is really no limit to which a Court could not go. The exigencies of the particular case would perhaps suggest a limit, but even that could not prove a deterrent in all cases. The only safe and rational rule, therefore, is to abide by the natural and ordinary meaning of the language used, and such rule we feel is duty bound to follow in this as in all other cases. . . . If, however, conditions requiring it have arisen that can be established by proper evidence, the lower court has ample power to modify the decree so as to reflect equity and justice under all circumstances to all water users. The decree cannot, however, *be modified by construction.*" (mine).

It is helpful to refer to the conclusion of law No. 3 made by the court in this case (p. 16).

"That the plaintiffs are entitled to an injunction against defendant forever enjoining defendant from coursing or running any water from any new, additional or enlarged drains of whatever name or nature through plaintiffs' premises."

The amended decree does not change that conclusion of law. The defendants were permitted in the decree (p. 847) to improve the drainage system but these improvements were restricted as follows:

“Nothing contained in this injunction shall be construed to prevent or enjoin the defendant, its officers, agents, and employees from making any improvements to or maintenance of its drainage system as it existed on April 8, 1947.” See *Huber vs. Newman*, (Utah) 145 P. 2d. 780.

It is interesting to note that in the amended decree, which incidently was drawn by Mr. Young and on his stationery, that the plaintiff was given damages for the construction of, “the new drain north of and outside of the district.” That was apparently because it was not a part of the drainage system as it existed on April 8, 1947.

Now, because Mr. Pitcher has constructed 1,480 feet of new drains within the boundary lines of the district, the defendants claim they are simply a part of the system as it existed on April 8, 1947. This we believe is a construction strained to the breaking point. When the amended decree was entered there was no thought given by any of the parties to the diversion of part of the waters through Outfall No. 2; and therefore, no construction can be placed upon the decree which was not contemplated nor contended for at the time of the entry of the decree.

Gunnison Irrigation vs Gunnison Highland Canal

Company, (Utah) 174 P. 852. In that case the court said:

“To sustain the position of respondent upon this appeal, it would be necessary to hold that the trial court in its decision departed from the path marked out by the pleadings. The record does not justify such a conclusion. But even if the trial court had so departed from the issues, the legal effect of its decree would be limited to the issues raised by the pleadings.”

POINT II

Finding No. 4 (p. 869) was in error because the lower court decided that the constructions of the new 1,480 feet of drain did not violate the terms of the amended decree; and while the defendants acted on advice of counsel, they must do so at their own peril. And they cannot escape the effect of the decree by this conduct because such a course would make a lawyer's opinion paramount to the sanctity of a decree in equity.

Finding No. 6 (p. 869) is in error because there is no evidence to sustain the same.

Finding No. 8 (p. 869) is in error because of the matters pointed out in the argument on Point I, namely that the construction of the barrier dam to cause waters to flow through Outfall No. 2 could only reduce the flow through Outfall No. 1, if the defendants have abandoned their easement to drain waters from all of the district, northern section, through Outfall No. 1. They

refuse to abandon the said easement or a part of it, and we openly ask them now in this appeal if they, by the construction of the barrier dam, intend to abandon a portion of the easement.

Finding No. 10 (p. 870) is in error because there is no evidence to support the same, and for the further reason that plaintiffs' witness testified (p. 889) that there was 1,480 feet of excavation made for the two drains in question and Mr. Young stipulated (p. 890) as follows:

“If the Court please, may I make this observation. The answer in this case admits that the drains were dug. I didn't think there would be any issue about that.”

and the work was done with the assistance of the United States Department of Agriculture, which has a ruling as follows:

“No assistance will be given for repairing or maintaining existing drains.” (p. 892)

The lower court felt that this evidence was immaterial; but we submit in view of the finding of the court in its No. 10, that it is highly material or that the court should not have made finding No. 10.

Finding No. 12 is in error because the question of damages in this kind of a case is absolutely immaterial. In the pretrial order (p. 857) we find the following:

“The parties having stipulated in open court, the court determines that the plaintiff may be

entitled to relief as a matter of law without proving any damage.”

POINT III

The conclusions of law entered by the court from 1 to 5, inclusive, are in error for the same reasons as pointed out above relative to the finding of fact.

The history of this case shows the plaintiffs have been forced to protect themselves over a great many years, and it is to protect against future encroachments that this appeal is brought.

The map (p. 1) which defendants had prepared, shows that the district has been once enlarged; it also shows that a drain was constructed outside the district. The evidence shows (p. 981-982) that a Mr. Hyer, whose land adjoins Mr. Pitcher's, is awaiting the outcome of this action, and that he consulted Judge Jones with relation to the meaning of the decree in question. And the evidence further shows at the above pages that all of the Lewiston territory needs more drainage. Mr. Hyer refused to answer the direct question as to whether or not he intended to install more drains. He was asked this question:

Q. “If Mr. Pitcher is permitted to retain the operation of the two tile drains involved in this action, it is your intention to do the same thing on your property, isn't it?”

A. “I don't know.”

Q. "Will you say that you don't want to?"

A. "No."

Q. "Will you say that your property needs it?"

A. "Yes."

In short, that is the crux of this whole case. If the defendants are permitted to retain the new Pitcher drains, there is nothing to prevent them from enlarging the district again and thus perpetuate a continual round of law suits which a court of equity is designed to prevent. The mistake which we believe the defendants are operating under is that they have an easement to drain a certain quantity of water off plaintiffs' lands. This is a falacy because their easement perpetuated by the amended decree is as follows: (p. 847)

"For the purpose of discharging therein and conveying across the premises of the plaintiffs, through said channel, from its artificial ditches and drains, all of the water as created, conducted and conveyed by said ditches and drains from its system IN THE MANNER OF OPERATION AS THE SAME EXISTED ON APRIL 8, 1947."
(Caps Mine)

DATED this 26th day of March, 1953.

Respectfully submitted,

GEO. D. PRESTON

Attorney for Appellants