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Tooele City v. Settlement Canyon Irrigation Co. : Brief of Appellant

Utah Supreme Court

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Case No. 8395

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corporation,

Plaintiff and Respondent,

vs.

SETTLEMENT CANYON IRRIGA-
TION COMPANY, a corporation,

Defendant and Appellant.

BRIEF OF APPELLANT

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IN THE SUPREME COURT of the STATE OF UTAH

TOOELE CITY, a municipal
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TION COMPANY, a corporation,

Defendant and Appellant.

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Throughout this brief Tooele City, a municipal corporation, Plaintiff in the District Court and Respondent in the Supreme Court, will be referred to as “City,” and Settlement Canyon Irrigation Company, a corporation, Defendant in the lower court and Appellant in the Supreme Court will be referred to as “Irrigation Company.”

All italics are ours.

Words in brackets are added by us.

STATEMENT OF FACTS

City brought this action in the District Court for Tooele County under the Declaratory Judgment Act for the purpose of having the District Court construe the meaning of two written agreements entered into between Thomas DeLaMare and Annie DeLaMare, his wife, as alleged predecessors in interest to City as one of the contracting parties and Irrigation Company as the other contracting party.

The City, contending that under the terms of the two contracts, Exhibits "A" and "B" attached to Plaintiff's Complaint, it is entitled to a continuous perpetual flow of 260 gallons per minute of water from the Rench tunnel otherwise described in the agreement as "that certain tunnel, situated in the Southwest $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section 34, Township 3 South, Range 4 West of Salt Lake Meridian" in Tooele County, Utah.

The Irrigation Company contends that under the agreements City is entitled to recover from the Rench tunnel only so much water as it places into the Settlement Canyon stream from the City's DeLaMare tunnel.

Settlement Canyon is a canyon in Tooele County, east of Tooele City. A stream of water flowing down Settlement Canyon was appropriated and put to beneficial use by the early farm owners and settlers of Tooele County. These appropriators of the waters of Settlement Canyon formed the Settlement Canyon Irrigation Com-

pany, a corporation, appellant herein, and transferred their water rights in Settlement Canyon to the said corporation for water stock in the said corporation. Irrigation Company owned the larger part of the flow of water from the Rench tunnel; the City owning a smaller portion of the water from Rench tunnel. The Irrigation Company's water from Rench tunnel was permitted to flow in the Settlement Canyon stream for use below by its stockholders.

The City diverted its portion of its water from the Rench tunnel at a point near the tunnel, for use by the City.

Subsequently, Thomas DeLaMare drove a tunnel into the side of the mountain in Settlement Canyon at a point below the Rench tunnel and by so doing developed a flow of 260 gallons of water per minute. This newly developed water flowed into the Settlement Canyon stream. As the water of the DeLaMare tunnel was below the Rench tunnel and was below the City's point or place of diversion and DeLaMare had sold or was about to sell his water from the DeLaMare tunnel to the City in order for the City to use the water without pumping or other expense, DeLaMare and his wife entered into two agreements with Irrigation Company which agreements are Exhibits "A" and "B" attached to Respondent's Petition for Declaratory Judgment. Exhibit "A" provided for the change of diversion and recovery of

100 gallons per minute and Exhibit "B" provides for the recovery of 160 gallons of water per minute, both recoveries to be made at the Rench tunnel.

During the years 1954 and 1955, the DeLaMare tunnel went dry and there was little or no water added to Settlement Canyon stream from this tunnel. The water of the Rench tunnel also was greatly diminished so that in 1954 and 1955 there was not even 260 gallons per minute of flow, whereas in previous years the flow was far greater than 260 gallons per minute.

The only consideration given to Irrigation Company for granting the change of place of diversion and permitting recovery of water by the DeLaMares or their successor, the City, at the Rench tunnel was "the sum of one dollar by each of the parties to the other paid" as recited in the agreements.

Assignment of Error

The court erred in entering Judgment on the pleadings wherein it decreed:

"* * * the plaintiff Tooele City, a municipal corporation, as the successor in interest to said DeLaMares, is vested with, and entitled always to take, a continuous flow of two hundred sixty (260) gallons of water per minute of the water belonging to defendant flowing out of that certain tunnel situated in the Southwest Quarter of the Southwest Quarter of Section 34, Township 3 South, Range 4 West, Salt Lake Meridian, and from which the Tooele City Water Company took

water for the inhabitants of Tooele City at the time said contracts were executed; that the right so vested in plaintiff to take said quantity of water and to take at said point of diversion, is a fixed and perpetual right, regardless of and without reference to the quantity of water at any time flowing into Settlement Canyon Creek out of or from the tunneling works referred to in said contracts as having been made by said Thomas and Annie L. DeLaMare.

2. That the defendant, its officers, servants and agents, be and they hereby are, enjoined and restrained from in any wise preventing or hindering plaintiff from taking for its use said perpetual and continuous flow of 260 gallons of water per minute, and the whole thereof, from the water flowing from said tunnel referred to in paragraph 1 hereof at the diversion point fixed therein and by said contracts.

3. That plaintiff have judgment for its costs herein incurred, taxed in the sum of \$.....”

Summary of Argument

The agreements Exhibits “A” and “B,” the interpretation of which this case involves, are very similar in their terms and are both somewhat ambiguous. The interpretation placed on the agreements by Irrigation Company (appellant herein) is the only reasonable interpretation to place on the agreements:

(a) The agreements establish that Irrigation Company is “the owner of the right to use the larger part of said Settlement Canyon Creek water.”

(b) That DeLaMares (now City) has the right to recover from Settlement Canyon Creek, water (which was in October 10, 1910, 260 gallons per minute) “in lieu of the water developed and added to the natural flow of said creek by them.” (See par. 1, p. 2, Exhibit “B”).

(c) Said right of recovery of the DeLaMares’ increase to stream flow was granted to DeLaMares (City) and their assigns “out of that certain tunnel, situated in the Southwest Quarter of the Southwest Quarter of Section 34, Township 3 South, Range 4 West, of the Salt Lake Meridian, and from which the Tooele City Water Company now takes its water for supplying the inhabitants of Tooele City” (commonly known as the Rench tunnel). (See par. 2, p. 2, Exhibit “B.”)

(d) DeLaMares (City) is entitled to recover from said creek (at the above described location) “the water belonging to the party of the first part (Irrigation Company) in lieu of the water so developed and added to the natural flow of said creek by the party of the second part (DeLaMares).”

(e) At the time of entering into the agreements, Exhibits “A” and “B,” the added flow to Settlement Canyon Creek from the DeLaMares’ tunnel totaled 260 gallon per minute.

ARGUMENT

The agreement, Exhibit "A," attached to City's Petition for Declaratory Judgment on page 1, states that DeLaMares (City) by means of a tunnel in Settlement Canyon developed certain water in Settlement Canyon Creek. That the larger part of the waters in Settlement Canyon Creek is owned by Irrigation Company. That at the date of entering into said agreement, April 8, 1910, the increase of flow from DeLaMare tunnel was 100 gallons per minute. As the DeLaMare tunnel was below City's intake and as the Rench tunnel was above the City's intake to its culinary water system, Irrigation Company recognized and granted to the DeLaMares the right to "recover" the water that they are "entitled to recover," which at that time was 100 gallons per minute, from the Rench tunnel and granted to the DeLaMares and their successor the right to perpetually so recover the water to which they were entitled from the waters of the Rench tunnel. This right of recovery was merely a right to change the place of diversion and granted to DeLaMares the right to recover above in lieu of recovery of their water below the City's intake to its culinary water system. It never was intended to grant to DeLaMares any of the water owned by the Irrigation Company but merely the right to divert their newly developed water upstream for the convenience of the City.

Prior to entering into agreement Exhibit "B," it was thought that the DeLaMares would develop 450

gallons of water per minute to add to the natural flow of Settlement Canyon Creek (see the last paragraph on page 1 of Exhibit "B"). DeLaMares actually developed 260 gallons per minute of which 100 gallons per minute was covered by Exhibit "A" (see par. 2, p. 2, Exhibit "B") and the agreement Exhibit "B" of 160 gallons per minute was based on the amount of new water developed by the DeLaMares on October 4, 1910.

The agreement Exhibit "B," similar to agreement Exhibit "A," recognizes the right of DeLaMares to recover the "water belonging to the party of the first part, (Irrigation Company) in lieu of the water so developed and added to the natural flow of said Creek by the parties of the second part (DeLaMares)" and the agreement recognizes the right to always or perpetually to take at the Rench tunnel, the water to which they are entitled which is the water developed at the DeLaMare tunnel.

Both agreements recite that the DeLaMares have the right to recover water. Webster's Unabridged Dictionary defines the word recover: "To get or obtain again; to get renewed possession of; to win back; to regain; as lost property, territory, appetite, health, courage." Hence, to apply the meaning of the word as used in the contract, it means to regain or get renewed possession of the water it has at DeLaMare tunnel which at the time of entering into the contracts, October 4, 1910, was 260 gallons per minute. If DeLaMares or its suc-

cessor in interest, City, does not have 260 gallons per minute of water it cannot recover or regain something it never had.

The agreements both provide that DeLaMares (City) recover its water "in lieu of the water so developed and added to the natural flow of said creek by parties of the second part." Webster defines in lieu as follows: "In place; room; stead of — used chiefly in the phrase in lieu of, that is, in stead of * * * as since he could not get this, he took that in lieu." The agreements provide that City take Rench tunnel water in place of or in lieu of water developed at the DeLaMare tunnel and added to the stream flow. If no water is developed at the DeLaMare tunnel and so no water added to the stream flow, there is no water either to recover or to replace or to give in lieu of.

The agreements also state that DeLaMares (City) take at the Rench tunnel water "to which the parties of the second part, (DeLaMares), are entitled as aforesaid, may always be diverted by them." It naturally follows that if City at the DeLaMare tunnel adds no water to the stream flow of Settlement Canyon Creek, then City has no water to replace or recover and is entitled to no water at the Rench tunnel or elsewhere in so far as these agreements, Exhibits "A" and "B," are concerned.

The confusion in the construction of the agreements arises because of the use of the words “continuous and perpetual flow.” This merely means that the City’s right to take water from the Rench tunnel shall not be interfered with so long as City has water to recover and the amount of 260 gallons per minute as combined in the two agreements merely designates the amount of water to which the DeLaMares (City) was entitled at the time of entering into the contract.

The DeLaMares, or their successors in interest, (City), never owned any of the water involved in this action at the Rench tunnel. They did own (using that term in a sense of right to use) water at the DeLaMare tunnel (see par. 3 and 4 of City’s Petition for Declaration Judgment). They sought and received a place upstream to recover the water they owned. They received this right of recovery of their water by and through the agreements “A” and “B.” All that they acquired was a right to divert their water upstream at the Rench tunnel and when City has no water to recover it should not be permitted to take water of others merely because of an ambiguity or misconstruction of the agreements which recited in the terms of gallons per minute the amount of water owned by the DeLaMares (City) at their tunnel downstream, at the time the agreements were entered into. That City owned no water in the Rench tunnel is clearly set forth in City’s Petition for

Declaratory Judgment, par. 3 and 4. Their water at the DeLaMare tunnel was never conveyed to Irrigation Company in exchange for Rench tunnel water. City merely acquired the right of recovery of their water upstream and when their water failed at the DeLaMare tunnel they had no water to recover and therefore, should not be permitted to take the water belonging to Irrigation Company. City's right under Exhibits "A" and "B" was merely a right of diversion of their water and now as their tunnel is dry, they have no DeLaMare tunnel water to divert.

CONCLUSION

Appellant, Irrigation Company, respectfully submits that the District Court erred in rendering judgment on the pleadings in favor of the Respondent, City, for an amount or quantity of water greater than the quantity of water added to Settlement Canyon Creek from City's DeLaMare tunnel. That the judgment should have been that City have the perpetual and continuous right to take from the waters of the Rench tunnel an amount equal to the amount by which it augmented the Settlement Canyon Creek from its waters flowing from the DeLaMare tunnel.

As the judgment if so rendered would have interpreted the rights of both parties to the action and deter-

mined their water rights in the DeLaMare tunnel as transferred for diversion to the Rench tunnel, both parties would benefit by the decision and each party to the action should bear its court costs incurred therein.

Respectfully submitted,

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RECEIVED copies of the within Brief
of Appellant this day of
A.D., 1955.

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Counsel for Respondent