

2004

Utah Copper Company v. Elias A. Smith : Response to Petition for Rehearing

Utah Supreme Court

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IN THE
Supreme Court
of the
STATE OF UTAH

UTAH COPPER COMPANY,
a corporation,
Respondent,

vs.

ELIAS A. SMITH and FRANCIS B.
CRITCHLOW, Trustees, and
MONTANA-BINGHAM CON-
SOLIDATED MINING COM-
PANY, a Corporation,

Appellants.

**NO.
4372**

Respondent's Reply to Appellants' Petition
for Rehearing

DICKSON, ELLIS, PARSONS & ADAMSON,
Attorneys for Respondent.

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Upon the oral argument as well as in its printed brief plaintiff took the position that the copper solution was plaintiff's property while in the dump and so continued until plaintiff had abandoned it, that the institution of this suit by plaintiff was for the purpose of

preserving this solution and preventing its running to waste, or, which is the same thing, passing into the hands of strangers. It was plaintiff's position that this court's determination of title to the solutions while in the dump would conclude the controversy. Defendants' contention was, that whether or not title to the solutions while in the dump was in plaintiff was of no consequence because the moment the solutions reached the surface beneath the dump—and there they must of necessity ultimately arrive—title would vest in the defendants no matter where it had been prior to that time. Defendants, however, directed a substantial part of their argument to the easement or grant to the plaintiff, choosing to treat the plaintiff as to these meteoric waters and solutions somewhat a trespasser, from which status the plaintiff could acquire no interest or title to the meteoric waters accumulated within the dump. They argued that the grant to plaintiff was so limited in its scope that while plaintiff must permit the rain and snow to fall upon the dump, seep into and percolate through it, yet plaintiff had acquired no right to take, remove or appropriate the valuable solutions after they had reached the surface beneath. Nature's action being, as they contended, beyond the grant, not only these worthless meteoric waters belonged to the defendants but the valuable mineral content, admittedly the property of plaintiff, picked up by those waters as they passed through the dump, became defendants' property upon its reaching the surface beneath, a sit-

uation that plaintiff was powerless to avoid because of a claimed natural right in the defendants as owners of the fee to have these meteoric waters come to their surface. It is not our intention now to re-argue this case and we of necessity conclude from a number of expressions in the opinion of this court that it has finally disposed of that issue, is clearly of the opinion and has decided that "the waters containing copper or other minerals in solution so long as they are in the dump and thus a part of it * * * are like the dump itself, the property of the plaintiff." But to that portion of the petition and argument that is a criticism of the opinion as uncertain in expression, ambiguous and calculated to provoke disputes as to the meaning thereof and the purport intended, we direct this reply.

For ready reference we set out the portion of the opinion with which we are here concerned, as follows:

" * * * The plaintiff thus commenced this action to condemn a right of way and easements over the defendant's claims, the surface of which had not theretofore been conveyed to the plaintiff, to excavate a tunnel and lay a pipe line on the surface of the defendant's claim or claims to collect and divert the waters in the dump so carrying copper and other minerals in solution and to convey them to tanks of its own where the copper and other minerals may be precipitated and saved for its own use and benefit.

" * * *

"It is not contended that the plaintiff, under the statute, was not entitled to exercise the right

of eminent domain, provided the waters carrying copper in solution and by the plaintiff sought to be collected and diverted belonged to it. * * * Confessedly, the determination of the case depends largely upon the question of whether the waters carrying copper in solution, so long as they are still in the dump, are the property of the plaintiff or of the defendant. It may be conceded that the waters, though they carry copper in solution picked up from the dump as they seep through it, after they were suffered and permitted to flow out of the dump and seep and percolate through soil and earth on the claim or claims of the defendant, *not conveyed to the plaintiff* became a part of such soil and earth and the property of the defendant, and thus lost to the plaintiff. But how does the matter stand so long as the waters seeping and percolating through the dump are still in the dump and a part of it? * * * It is conceded that the dump or deposit itself is personal property and is the property of the plaintiff with the right at any time to remove it or any part thereof. That the dump contains copper of commercial value is not disputed. The gulch in which the dump is deposited is on the side of a mountain and is of funnel shape with the toe at the bottom or lower end of the dump and gulch. As described, it represents a somewhat inclined hopper in which material was deposited first on the lower and narrow part of it and then on higher levels along the upper portion of it. As the rain and snow fell on the dump the waters, as they seeped through it, picked up copper and other minerals in solution * * * What the plaintiff proposes to do is to construct a tunnel through the fill and on the surface of the defendant's claim * * * and extend two open trenches about five or six feet long at right angles to the face of its tunnel, and by such

means gather and collect the waters in and at the bottom of the dump and convey them by a pipe line to its precipitating tanks below. * * * It is not contemplated by the plaintiff to take waters not in the dump, and, as made to appear, the proposed plan will not collect or take any other waters. It also is made to appear without any substantial conflict that before the material was deposited in the dump all waters flowing from the gulch were waters from freshets or high waters and that at greater portions of the year there was no water flowing from the gulch, and what waters did flow from it contained no minerals and partially were used by others for culinary and domestic purposes. And it also is made to appear that the waters which, at the time of the commencement of this action, were collected and conveyed by the defendant, were waters coming directly from the dump carrying copper in solution picked up as the waters seeped and passed through the dump.

“Thus, under the circumstances, we are of the opinion that the waters carrying copper or other minerals in solution, so long as they are in the dump and thus a part of it, *and before they leave it and percolate through the soil and earth on the claim or claims of the defendant not conveyed to the plaintiff*, are, like the dump itself, the property of the plaintiff; that it is as lawful for the plaintiff, so long as the waters are in the dump, to collect and remove them as it is to remove the dump itself; and that the grant which gave the plaintiff the right at any time to remove the dump or any part thereof also gave it the right to remove the waters carrying copper or other minerals of commercial value in solution.

“ * * * the defendant makes no claim to any of the ore or other material deposited on the

dump; and since the copper in solution is from the dump and from the ore and material deposited thereon and therein and not otherwise, it would seem that the defendant has no better claim to the mineral in solution, so long as it is in the dump, than to the ore or other material in the dump.

“ * * * the rain and snow falling on the dump did not fall on the surface of the defendant's ground. *The surface of that ground and upon which the dump rests was conveyed to the plaintiff.* True, it was conveyed for dumping purposes, but so long as the surface is occupied by the dump, it, as surface ground, is not susceptible of any other use; and waters falling on and flowing or seeping through the dump, so long as they are in the dump, do not fall on or seep or percolate through soil of the defendant or on or through any surface right owned by it but on a surface right and material, ore, rock, and earth owned by the plaintiff. * * *

“ * * * no waters percolating through the soil of the defendant are here involved and are not sought or attempted to be taken by the plaintiff. What it proposes to do is to collect and take the waters carrying copper in solution while yet in the dump and before they reach the soil or ground of the defendant. Were the plaintiff attempting to follow, collect, and divert waters, though they carry copper in solution, after they have left the dump and percolating in and through the soil and ground of the defendant *not conveyed to the plaintiff*, the cited cases would be applicable, but that is not what the plaintiff seeks to do. It may readily be conceded that waters, though they carry copper or other minerals in solution, which are suffered and permitted to flow and escape from the dump and seep and per-

colate through the soil and earth of the defendant's claims *not conveyed to the plaintiff* and on or in which it has no surface or other rights, are lost to the plaintiff and become the property of the defendant and may not be pursued or reclaimed or taken by the plaintiff.

“ * * * do the waters carrying copper in solution, as long as they are and remain in the dump *and before they leave it and percolate through the soil and ground of the defendant not conveyed to the plaintiff*, belong to the plaintiff or to the defendant? We have no hesitancy in answering that question in favor of the plaintiff.

“ * * * counsel for defendant * * * offered to prove that the gulch, where it connected with the main canyon was narrow and steep, but as it extended up the side of the mountain it widened out and was less steep; that from the excavations made since the order of immediate possession it appeared that the soil on the side and the bottom of the gulch on the defendant's property and under the dump was from eight to thirty feet deep; that the waters resulting from rain and snow then and in the past percolated through such soil as they reached the bottom of the gulch; that such soil prior to the deposits retarded the waters falling from the rain and snow and that the dump further retarded them as they fell on and seeped through the dump; that in the defendant's mining operations a tunnel, excavated on and in its claim or claims, intercepted and gathered the waters below the actual surface soil which waters had been intercepted and diverted by a pipe line of the defendant,' and that such tunnel waters are a part of the waters used by the defendant in precipitating therefrom the copper content taken into solution from the

surface dump and in copper rock in place; and that 'The effect of the proposed tunnel and diverting works and pipe line of the plaintiff, if the same were constructed, will be to necessarily divert and impound and take away from the defendant the tunnel waters aforesaid.'

“ * * *

“ * * * We are of the opinion that portions of the offered testimony were material, especially that part of the offer where it was offered to prove that among the waters collected and diverted by the defendant by means of its tunnel were waters seeping and percolating through the soil and collecting copper in solution from rock in place on the defendant's claims and that the proposed tunnel, diverting works, and pipe line of the plaintiff would divert, impound, and take such waters from the defendant's tunnel. However, since the judgment does not give the plaintiff any such waters, we think the ruling harmless. We have already indicated that the plaintiff is entitled to collect, divert, and take the waters carrying copper and other minerals in solution as long as such waters are in and a part of the dump, but that the plaintiff is not entitled to pursue and reclaim or take such or any waters after they have left the dump and seep and percolate through the soil or earth on the defendant's claim or claims *not conveyed to the plaintiff*. Of course, as is seen, the plaintiff, by its proposed plan of collecting and diverting the waters in the dump, to a large extent at least, will deprive the defendant of such waters; but the plaintiff has the undoubted right to do that. It is not required to suffer or permit such waters in the dump laden with copper or other minerals in solution to flow out and seep and percolate in and through the soil of the defendant's claim or

claims *not conveyed to the plaintiff* for the defendant's use and benefit. The defendant has an interest in and to such waters *only* after they are suffered and permitted to flow and leave the dump *and percolate through the soil and earth and become a part of its ground not conveyed to the plaintiff*. If the plaintiff in collecting and diverting waters shall take waters which are not in the dump or a part of it, but are seeping and percolating through the earth and soil of the defendant's ground *not conveyed to the plaintiff*, the defendant is not without remedy and by this action is not precluded from asserting its right to such waters.

“The findings and the judgment of the court are in harmony with these views, except in one of the conclusions stated by the court wherein the court stated a conclusion that ‘although such water and solutions in said dump or deposit should percolate through the natural surface soil beneath said dump and upon the mining claims of the defendants before plaintiff should have collected, conserved, or diverted the same, plaintiff would not be thereby divested of said title, but on the contrary plaintiff would continue throughout such percolation until, upon and subsequent to plaintiff's collection and diversion of said waters and solutions, the absolute owner thereof, with the untrammelled right in plaintiff to dispose of said waters and solutions as plaintiff's advantage might dictate.’ Such a statement would imply that the plaintiff has the right to follow the waters after they leave the dump and seep and percolate through the soil and earth on the defendants' ground or claims *not conveyed to the plaintiff*. But not anything of that kind is contained in the findings or in the judgment. The findings and the judgment give the plaintiff the right to take the waters carrying copper or other min-

erals in solution only so long as they are in the dump and a part of it and give the plaintiff no right to pursue waters seeping and percolating through the soil and earth on the defendant's ground *not conveyed to the plaintiff*. We therefore think that the ruling refusing the defendant's offer was harmless. However, since conclusions may to some extent be considered as amplifying or reflecting findings and a judgment, that portion of the conclusions just referred to is disapproved and ordered stricken and the district court directed to recast its conclusions in such respect, and if there be any such or similar provisions either in the findings or in the judgment which have escaped our attention, to likewise in such respect recast those. In all other particulars the findings are approved and the judgment affirmed, with costs to respondent." (Italics ours).

It is said in that opinion that "the surface of that ground and upon which the dump rests was conveyed to the plaintiff." And in the course of the opinion this court defines the balance of defendants' property as that "not conveyed to the plaintiff". This definition so phrased occurs no less than eleven times in this opinion and cannot be said to have been an inadvertence. This opinion cannot be reasonably construed otherwise than as holding that the grant by the defendants' predecessors to plaintiff was a conveyance of the surface upon which the dump rests for the purposes stated in the grant "and that the grant which gave to plaintiff the right at any time to remove the dump or any part thereof also gave it the right to remove the

waters carrying copper or other minerals of commercial value in solution'. Whether this grant be denominated a conveyance of the fee in the surface or an easement for these purposes is of very little importance. If an easement merely, that easement is imposed upon the fee, and the purport of the decision is that plaintiff by that grant acquired the right at any time to remove the mineral solutions from the dump by any reasonable or practical method, using therein the fee upon which this easement was imposed for that purpose. There is only one method possible whereby these solutions may be removed, and that is the method plaintiff has adopted. It is perfectly obvious that the solutions cannot be removed from the dump before they reach the surface beneath, but the right to use that surface "upon which the dump rests" as a collecting medium and conduit this court has clearly held within the terms of the grant or easement. It is difficult to express that thought more clearly than this court has itself done. Just note the following:

"It is not contemplated by the plaintiff to take waters not in the dump, and, as made to appear, the proposed plan will not collect or take any other waters. * * * And it also is made to appear that the waters which, at the time of the commencement of this action, were collected and conveyed by the defendant, were waters coming directly from the dump carrying copper in solution picked up as the waters seeped and passed through the dump.

"Thus, under the circumstances, we are of

the opinion that the waters carrying copper or other minerals in solution, so long as they are in the dump and thus a part of it, *and before they leave it and percolate through the soil and earth on the claim or claims of the defendant not conveyed to the plaintiff*, are, like the dump itself, the property of the plaintiff; that it is as lawful for the plaintiff, so long as the waters are in the dump, to collect and remove them as it is to remove the dump itself; and that the grant which gave the plaintiff the right at any time to remove the dump or any part thereof also gave it the right to remove the waters carrying copper or other minerals of commercial value in solution.

* * * * *

“ * * * It may readily be conceded that waters, though they carry copper or other minerals in solution, which are suffered and permitted to flow and escape from the dump and seep and percolate through the soil and earth of the defendant's claims *not conveyed to the plaintiff* and on or in which it has no surface or other rights, are lost to the plaintiff and become the property of the defendant and may not be pursued or reclaimed or taken by the plaintiff.

“ * * * do the waters carrying copper in solution, as long as they are and remain in the dump *and before they leave it and percolate through the soil and ground of the defendant not conveyed to the plaintiff*, belong to the plaintiff or to the defendant? We have no hesitancy in answering that question in favor of the plaintiff.

* * * * *

“ * * * Of course, as is seen, the plaintiff, by its proposed plan of collecting and diverting the waters in the dump, to a large extent at

least, will deprive the defendant of such waters; but the plaintiff has the undoubted right to do that. It is not required to suffer or permit such waters in the dump laden with copper or other minerals in solution to flow out and seep and percolate in and through the soil of the defendant's claim or claims *not conveyed to the plaintiff* for the defendant's use and benefit. The defendant has an interest in and to such waters *only* after they are suffered and permitted to flow and leave the dump *and percolate through the soil and earth and become a part of its ground not conveyed to the plaintiff.* * * * ” (Italics ours).

It is said in the petition for rehearing that “the court's opinion assumes that the dump is at bed rock”, which is contrary to the fact because there is soil upon bed rock. What difference can it make that there be soil on bed rock beneath the dump? If there were no soil, counsel would continue consistent with their theory that the moment the mineral solutions of the plaintiff touch bed rock, by some magic plaintiff would be forthwith divested of its title to the solutions and they would thereupon become the property of defendants. The solutions must be collected somewhere before plaintiff can take them, just as the dump when deposited must have found some place upon this surface upon which to repose. Both rights are included within the grant or easement, as this court so clearly stated in its opinion. To say that this court has found title in plaintiff to the solutions while in the dump up to but not after they have reached the surface upon which the dump rests and that title passes immediately to de-

fendant when those solutions shall have reached such surface, thereby depriving plaintiff of any way of gaining possession of property pursuant to the provisions of that grant of which plaintiff is the decreed owner, while at the same time affirming a judgment in condemnation for the purpose of collecting, diverting and appropriating that property, is to put an absurd construction upon the opinion of this court and is a statement that indicates defendants' refusal to read the opinion fairly—none so blind as they who *will* not see. Defendants indeed take the Shylock incident seriously. We have never held a very high regard for it as legal authority, although we think there have been some thousands of other occasions when it has been cited by lawyers suffering from a dearth of legal precedent. Of course the plaintiff wants nothing but the solutions in its dump, which this court has decided are its property and which plaintiff has the right to remove and keep as its own, and, of course, the defendants want nothing but the very same solutions, which this court has decided they do not own and of which they have no right to deprive the plaintiff.

The petition for rehearing in so far as it is an attempt to re-argue this case is met squarely by the decision of this court. The opinion of this court is plain and it is not subject to hair-splitting criticism. It gives to plaintiff the untrammelled right to remove the copper-laden waters contained in plaintiff's dump by

any practical method or means and holds by the method plaintiff proposes, plaintiff has not encroached upon the property rights of defendants beyond the scope of this eminent domain proceeding; that should further encroachment ever become necessary plaintiff may resort to the eminent domain statutes whereby to secure such rights, just as it has done in the instant case.

We can find nothing in this petition to justify a reargument of the case. There is nothing ambiguous in this opinion and the petition for rehearing should be denied.

Respectfully submitted,

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