2007

West Union Canal Company, a corporation v. Provo Bench Canal and Irrigation Company, a corporation, et al : Petition for Rehearing

Utah Supreme Court

In the Supreme Court of the State of Utah

WEST UNION CANAL COMPANY, a corporation,
Plaintiff and Respondent,

vs.

PROVO BENCH CANAL AND IRRIGATION COMPANY, a corporation, et al,
Defendant and Appellant.

CASE NO. 7190

PETITION FOR REHEARING AND BRIEF OF APPELLANT IN SUPPORT THEREOF

CHRISTENSON & CHRISTENSON
Attorneys for Petitioner and Appellant.

NEW CENTURY PRINTING CO., PROVO, UTAH

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AUTHORITIES CITED

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Implicit in the opinion of the Court is the doctrine that canal companies are insurors against damage by reason of non-use of water by stockholders on independent sub-laterals; or in the alternative, that such companies must cut off their stockholders' water if by reason of rain an individual user might not use his turn. It is believed that such opinion, if not modified will so handicap scores of compa-

nies throughout the State, and so place an unmerited and impractical burden upon them, as to seriously interfere with the orderly distribution and beneficial use of the waters of this State, and, on the other hand, encourage individual users to disregard their own reasonable responsibilities.

It is for these reasons that appellant, Provo Bench Canal and Irrigation Company, without re-arguing the sufficiency of the evidence concerning proximate cause on which it believes this Honorable Court also erred, but addressing itself squarely to the propositions of law necessarily involved in the above mentioned serious implications and their claimed factual basis, has filed the following:

PETITION FOR REHEARING

(Title of Court and Cause)

The petitioner, Provo Bench Canal and Irrigation Company, one of the defendants, and appellant herein, respectfully petitions for a rehearing before the Supreme Court of the State of Utah, in this cause; that the cause be re-examined, and further argument be heard, and that upon such reconsideration, that the decision of the Court be modified and the judgment of the lower Court reversed, for the following reasons and upon the following grounds:

I. That the assumed factual basis of the decision is not adequately supported by the record and contrary to the undisputed evidence. The Court erroneously assumed without support in the evidence, but contrary thereto, that the "Southeast Ditch" and the water therein, and, by the same token, the North Union Canal Company lateral and numerous other laterals and ditches, were under the control of the Provo Bench

Canal and Irrigation Company, and that such company was responsible for any flooding or non-use of water in these laterals and ditches.

II. That the decision announces an erroneous and impractical rule of law, departing from the well established rules of canal companies, based upon an assumed duty to shut off water flowing in laterals during rain storms on its own responsibility, which is contrary to practical irrigation methods and necessities as shown by the evidence and of which the Court should take judicial notice; that the effect of such decision would require such companies to deprive the great majority of their stockholders of necessary water for irrigation during periods when needed, would invite numerous lawsuits for failure to furnish water during rainstorms, and would, without adequate justification, shift responsibility to canal companies from individuals directly responsible.

III. That a modification of the decision is essential to the public interest, as well as in justice to appellant. The decision should be clarified and modified, not only in justice to the appellant, but in the public interest, so as not to depart from the fundamental principles governing the liability of canal companies and so as not to place unwarranted burdens upon canal companies and, at the same time, encourage irresponsibility in the utilization of water by individual users.

WHEREFORE, believing that a re-examination of the opinion and the record on which the case was decided after further oral argument will result in a clarification and modification of the decision in the public interest, your petitioner prays that a rehearing be granted, the present decision modified and the judgment of the lower Court reversed.

/s/ CHRISTENSON & CHRISTENSON

Attorneys for Provo Bench Canal and
Irrigation Company
Appellant and Petitioner.

STATE OF UTAH }
County of Utah } ss.

The undersigned hereby certifies that they are attorneys for the petitioner herein and that in their opinion, the petition for rehearing is meritorious.

/s/ A. H. Christenson
/s/ A. Sherman Christenson

Argument in support of the grounds stated in the foregoing Petition will be presented in order:

ARGUMENT

I. The assumed factual basis of the decision is not adequately supported by the record and is contrary to the record.

The Southeast Ditch and the water therein were not under the control of Provo Bench Canal and Irrigation Company, and its responsibility for unused water passing to the ends of branch laterals of that ditch was no greater than for any other water under the control of individuals requiring their water delivered to particular laterals .

The opinion states that defendant "concedes that it brings the water from the river to the head of the Southeast Ditch and determines the amount of water which is turned into that ditch at its head and has control over the headgates, both at the river and at the heads of lateral."

It is true that the appellant had control of the headgate where the water is turned into the Provo Bench canal from the river. Thus, when its officers reduced the flow of water in the canal as mentioned in the opinion, this had the effect of proportionately reducing the water in all the main laterals. The other conclusions mentioned by the opinion not only were not conceded, but are at variance with the record, and particularly does the record show that the Southeast Ditch and the waters therein are not under the control of the company.

On this point we take the liberty of citing the portions of the record which it appears were not sufficiently considered by the Court in arriving at the conclusion it did:

The stock of the Provo Bench Canal and Irrigation Company is divided into 1954 shares (326), entitling the respective stockholders to their proportionate part of the waters of the canal. The company adds the shares together and gives each lateral its proportion of the measurement in the weir according to the share on that lateral (330). Six hundred ninety-one shares are owned by the North Union Irrigation Company, a separate corporation (327). The water is diverted into the head of the North Union Canal, which has three branches: the Loveridge Lateral, the Stratton Lateral and the Knight Lateral (327-328). Below the North Union diversion on the Provo Bench Canal is the Nickle Ditch, dividing into the Davis Lateral, the North Spencer Lateral, the South Spencer Lateral and the Curtis Lateral (329); at about the same point, the Southeast Ditch diverts from the canal (330). These laterals serve the stockholders of the Provo Bench Canal and Irrigation Company and the stockholders of certain other

canal companies flowing water through the Provo Bench Canal.

The secretary of the canal company receives orders from the stockholders for change from one lateral to another, if desired, and causes their water to be delivered into the new laterals for them (330-331); but the canal company has nothing to do with the administration of laterals or in designating their officers (333-334).

There is no such thing as the Southeast Ditch Company, except as that refers to a group of farmers using waters from the so-called Southeast Ditch (104). They simply get together for the ticketing of their water and sometimes for mutual ditch cleaning (118). The Southeast Ditch has two main branches and numerous sub-laterals, one serving forty-eight users and the one leading to the Roy Davis corner serving fifty users (365-366). Christenson is the lowest user on the latter branch (124; 365). This is his own ditch (124) and it terminates at his fence line on the east side of Main Street about 500 feet north of the West Union Canal bridge across Main Street, near the so-called Davis Corner, at which point it is very small (123). The Southeast Ditch, however, does not run to the road, but ends at the Christenson farm, which is the last place served by that particular branch of the ditch (112; 124). The ditch is about 2½ miles from its head to the head of the north branch (372).

Besides the two main branches mentioned, various other laterals take off on either side of the Southeast Ditch to serve water users in the general vicinity; some ditches serve only one water user, and others a large number. There are a total of about seventy individual users on the Southeast Ditch (117). This ditch has been substantially in

the same position and has been operated in substantially the same way for at least forty years (124; 121).

An arrangement has been made by stockholders getting their water in the Southeast Ditch to care for any unused or surplus water in the ditch. A steel gate has been placed near the head, so that people who do not want to use their turns can notify Roy Olsen, who shuts the water off for their own protection. All stockholders know this (112-113; 368; 374). The canal company has no control over this gate (368). Surplus water also can be turned down the north branch of the ditch, from which it is impossible for water to get into the West Union Canal (375).

Stockholders on each of the main laterals leading from the Provo Bench Canal, for the purpose of cleaning the canal and providing for the distribution of water between them, appoint a ditch secretary, and some have a board or committee for the purpose of determining the period of water turn per share which is to be allowed in the ditch (109).

The Provo Bench Canal and Irrigation Company has nothing to do with this (110). The secretary of the ditch is notified by the secretary of the Provo Bench Canal and Irrigation Company each year how many shares of water are being distributed to the ditch in accordance with the request of the stockholders (119; 342). The ditch then allocates the turns among the stockholders on the ditch in accordance with their stock holdings (110). Except for certifying the number of shares on the ditch, including the number of shares of Provo Reservoir Corporation stock and Tanner stock flowed through the canal in an arrangement with the Provo Bench Canal and Irrigation Company (126-127), the canal company has never assumed anything to do with the distribution of the water of the respective lat-

erals or ditches (110; 128; 352-353), simply diverting into the head of the respective laterals the amount of water called for by the total number of shares represented on the lateral (123). The individual stockholders have the right to use the flow of water through the ditch (120). The canal company delivers water at the head of the Southeast Ditch to the seventy users on the ditch entitled thereto (123). The Provo Reservoir Company, a separate corporation, rents water to various people using such water through the Southeast Ditch also. They have both Provo Bench and Provo Reservoir water in the ditch (126) and also Tanner water (128).

The evidence further discloses that all of the water turned into each lateral during every period of the irrigation season, has been allocated by the stockholders on the lateral into turns, there being no period when someone has not been assignd the use of the water (369).

The opinion further concludes that it "is uncontradicted that in the Spring before the water was turned into the ditches, the plaintiff notified the defendant at a meeting of its Board of Directors that in the past water has escaped from the Southeast Ditch through the road at Main Street and into plaintiff's canal, thereby causing damage." The opinion does not seem to recognize the evidence that this complaint was relayed to the users on the various laterals with information as to their responsibility for the water delivered in accordance with their orders to the head of the laterals. It does not seem to follow that merely by making complaint, the West Union Canal Company could hold the appellant company as a virtual insuror when the responsibility did not rest in fact or law upon the latter canal company.

The fact remains that appellant had been operating in the same manner and the Southeast Ditch and the water users thereon had been assuming indpendent control in the same manner for more than forty years, and the record does not show any difficulty on, or from, the Southeast Ditch previous to the year in question.

The times and order of use and application of water by several landowners under the same lateral to their respective tracts of land are matters of no concern to the water company, where the several users, by agreement among themselves, distribute and use the water at the times and in the manner agreeable to them, and the company has no duty but that of seeing that the requested quantity of water flows through the headgate into the consumers' ditch. Helphery, et al v. Perrault, et al (Idaho) 86 Pac. 417; Long on Irrigation, Second Ed., para. 172, page 307.

II. The decision announces an erroneous and impractical rule of law.

The opinion as to responsibility of canal companies in the event of rain, and otherwise, would furnish a dangerous precedent without legal justification, making impractical the administration of canal companies, and encouraging irresponsibility on the part of users.

Under this division of the argument, perhaps we can best express the natural concern of appellant and others in its position by mentioning two concrete illustrations based upon the record, and related matters of common knowledge:

(a) A canal company, in accordance with the order of its respective stockholders, delivers water into five, ten or fifty different laterals, for the most part by means of dividers in its canal, dividing the water equitably during

the irrigation season. Each one of these laterals is again divided into few or numerous sub-laterals or ditches, serving verying numbers of users under a system worked out by the users on the laterals and ditches. Each sub-ditch, served by ditches which in turn are served by such laterals, must have an end on someone's farm somewhere, because in most cases, it would be impossible for them to lead back again to the source of supply.

Query: Is it the responsibility of the canal company to follow through each lateral, through each ditch and down each sub-ditch, the latter of which may total literally hundreds, and to insist that each end of each sub-ditch is so extended past the last user's land and into a natural or other water course, so that if this lower user or some one of the users up above does not use his turn, and does not make arrangements for someone else to use it, the water will not flood off the lower user's land and do the lower user, or someone else, damage?

(b) In view of the same system, which is typical of practically every irrigation company in the State, assuming that the duty devolves upon the canal company, as the opinion indicates, in the event of rain, to anticipate that some irrigators on laterals, sub-laterals or ditches at points remote from the canal may not use their allotted turns and to therefore turn the water out of the lateral, how can such canal company so predict the prospective amount of rainfall to determine how much water should be turned out, or, if all water should be turned out, for what period?

We have heretofore referred to the claimed facts on which the opinion is founded, and have pointed out that some of the facts therein assumed are not supported by the record and are contrary to the record.

Based upon such incorrect assumptions, the opinion in the brief paragraph containing the ruling to which we except, approves a doctrine which could only lead to great mischief when its says:

> "Under these circumstances, defendant should have realized that to allow a substantial stream of water to continue to course into the Southeast Ditch during that night, it was apt to cause damage to plaintiff's canal ,as it did. It should have been clear that in such a night few, if any, persons would be using the water in that ditch and that if it was allowed to run to the end of the ditch it would eventually flow into the road at Christenson's farm and from there into the plaintiff's canal. Its failure to use reasonable care in properly regulating the flow of water in the Southeast Ditch was therefore the proximate cause of plaintiff's damage."

Such a determination is fallacious and laden with danger, because:

(A) It places a wholly unrealistic and impractical burden upon canal companies to check with every variant development of weather as to the desires of hundreds of water users without any possibility of performance.

(B) It assumes that farmers do not use irrigation water during rainy periods. As a matter of fact, as shown by the record, and as a matter of common knowledge of which the Court should take judicial notice, irrigation during rain storms is a most beneficial practice. Many practical irrigators are even more anxious to utilize their water during rain than at any other time, as the water can cover the ground with loss at a minimum, thereby fully saturating the soil to the desired depth in a manner in which heavy rains seldom do.

(C) It places upon the canal company the burden of being infallible prophets as to the extent of the rain, both as to quantity and area, and as to whether stockholders would desire or need water, and as to the amount. The area covered by laterals and sub-laterals extending from the Provo Bench Canal extends north and south about ten miles and east and west more than three miles, comprising canals and irrigation ditches hundreds of miles in length.

(D) It confronts canal companies with the insupportable legal dilemna of either permitting water during rains to run into the heads of the numerous laterals in accordance with the orders of the users served by them and thereby inviting liability under the decision for any damage that might result from the non-use by a single user, or to cut the water out of the laterals and thereby invite liability for damages suffered by the numerous users thereunder who require and desire their turns.

Failure to deliver water to which a stockholder is entitled in accordance with his order is a breach of legal duty for which damages lie; and the company may be compelled by mandamus to deliver such water. Long on Irrigation, Second Edition, para. 290, p. 505. Kinney on Irrigation and Water Rights, Second Edition, Vol. 3, para. 1487, pp. 2673-4. See also Baird vs. Upper Canal & Irrigation Co., 70 Utah 57, 257 Pac. 1060.

By turning the water out of the Southeast Ditch or any one or more of the numerous laterals to which the company is obligated to deliver water in accordance with the orders of its stockholders, the company would be depriving numerous users in such laterals of their water. It would seem no defense that the company thought it might rain or might continue to rain, and that some one or more of

the users might not use his water. The obvious answer would be that irrigation is beneficial and most often highly necessary during rainy periods.

Once the water were turned out, it would be impossible to get the water back in, particularly in the lower areas, within several hours, as the new stream might have to travel several miles, and indeed in the Southeast Ditch might have to travel three or four miles to get to the user whose turn might be interrupted.

The opinion assumed that the company should have known that if the water were permitted to run in the Southeast Ditch during rains, it would cause damage, and yet the evidence shows the system of not turning the water out during the irrigation season and of assuming no control on the Southeast Ditch, but leaving such control to the users thereon, had been employed for more than forty years, with only one instance of previous damage, and that upon attention being called to such damage, the canal company promptly notified the ditch committees in charge of the distribution on the laterals of their responsibility.

(E) There being no standard by which the duty of the canal company could be measured under the opinion, the conclusion of the Court that the appellant was negligent for "its failure to use reasonable care in properly regulating the flow . . . . " simply places responsibility upon it as an insuror, making the furnishing of water to laterals at its peril in any event. This is at variance with the great weight of authority. This would make the administration of canal companies so impractical and speculative as to seriously handicap all users.

(F) It approves the irresponsibility of users having control of their own water on laterals, sub-laterals and

branch ditches, and invites them to let their water run at random with the assurance that they may shift responsibility to the canal company.

In the instant case, there was no proof whatsoever that any individual user failed to use his turn. It was the contention of the defendants throughout the trial that the water running on the road came from another source. If the respondent relied upon the non-use of his turn by some stockholder, it should have proved it. It did not do so, and it is most probable that flood waters from rain in the area of the lower ditch were responsible for the washing at the Davis Corner. Be this as it may, the opinion will encourage non-use and irresponsibility on the part of individual users and ditch committees in the future. We are concerned here not with the sufficiency of evidence, but with the dangerous legal precedent involved.

In the first volume of the Pacific Reporter appears a case basing recovery for damage upon the principles of control and negligence. Levy v. Salt Lake City, 3 Utah 63, 1 Pac. 160 (1881). In that case it was held that since the city had under its control and management the ditch in question, and there was evidence of negligence proximately resulting in plaintiff's damage, the granting of a non-suit was error. There the city having control of the ditch had failed to allocate one turn of water, and it was during this period that the damage occurred. In the instant case appellant had no control of the ditch or the allocation of turns, but the water users on the Southeast Ditch had themselves allocated every minute of the flow.

In the second appeal of the same case, reported in 5 Utah 302, 16 Pac. 598 (1887), the Supreme Court reiterated the above generally accepted basis of liability and reiter-

ated the determinative effect of the issue as to whether the ditches in question were under the control of the city (p. 603). The Court added, however, (p. 604) that "We do not mean to say that property owners may not so interfere or assume control over a ditch as to release the city from its duty . . . ."

In the case of Jensen v. Davis and Weber Counties Canal Company, 44 Utah 10, 137 Pac. 635 (1913), reference was made to the statutes requiring the owners of any canal to maintain the same, it being held that the owners were required to exercise ordinary care in this respect. In the cases of Chipman, et al v. American Fork City, et al, 46 Utah 134, 148 Pac. 1103 (1915) and 54 Utah 93, 179 Pac. 742 (1919), involved a ditch constructed by the defendant and over which it had assumed control. In Burtenshaw v. Bountiful Irr. Co., 90 Utah 196, 61 P. 2d 312 (1936), the distribution system of the defendant company and its negligence in respect thereof were involved, and in disapproving a proposed construction, the court recognized the difference between the actual duty of delivering water to a common point and the claimed duty of delivering it to the individual user. Finally, in Briant v. Freemont Irr. Co., _____Utah_____, 186 P. 2d 588 (1947), a complaint against an irrigation company was held insufficient on demurrer because no breach of duty was shown, it being commented that it was the duty of the user of water to return surplus water to the stream. Even in Lisonbee vs. Monroe Irr. Co., 18 Utah 343, 54 Pac. 1009, upon which respondent mainly relied, the control and ownership of the ditch were admitted, and it was recognized that the canal company was responsible only for its own negligence.

All through the adjudicated cases in this and other jurisdictions from the earliest decisions to the present time, liability has been premised, if found to exist at all, on proof of ownership and/or control of the ditch in question and upon generally accepted principles of liability for negligence. The decision in this case represents a dangerous departure, fastening liability without proof of ownership, control or negligence.

III. That a modification of the decision is essential in the public interest, as well as in justice to the appellant.

Apart from the insufficiency of the evidence and other matters of importance mainly in this case, the decision should be modified and clarified so as not to harrass canal companies by impractical and onerous standards, invite false liabilities and shift responsibility merely because claimants in the position of respondents cannot show, or fail to show, any delict by water users themselves.

The import of this decision cannot be overestimated. If it is permitted to stand, an injustice will be done to appellant in requiring it to pay a judgment which it not supported by the commonly accepted standards of liability. The amount involved is not too important. The ruling of the Court on sufficiency of the evidence, even in view of the wholly speculative nature of such evidence may not be considered of supreme importance, but the erroneous principle of law as to the liability of canal companies announced by the Court is of great significance. The effect upon appellant's future operations and upon those of all similar companies in the State will be far-reaching and serious. Its effect upon the individual water users themselves will be burdensome, because it will make difficult the expeditious

and proper delivery of their water to the laterals which serve them without onerous restrictions and conditions.

The cause should be re-heard, further oral arguments permitted, and upon such re-hearing, the decision modified to reverse the judgment of the lower Court.

Respectfully submitted,

CHRISTENSON & CHRISTENSON,
Attorneys for Petitioner and
Appellant.