

1957

Walter W. Cook v. Joseph M. Tracy : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

FILED

1957

Utah Supreme Court, Utah

IN THE MATTER OF THE
GENERAL DETERMINATION
OF RIGHTS TO THE USE OF
ALL WATER, BOTH SURFACE
AND UNDERGROUND, IN THE
ESCALANTE VALLEY DRAIN-
AGE AREA,

In re: Water User's Claim No. 483,
Underground Water Claim No. 7664,
Walter W. Cook, Claimant.

No. 8625

WALTER W. COOK,
Plaintiff and Appellant

vs.

JOSEPH M. TRACY, State
Engineer of the State of Utah,
Defendant and Respondent

APPELLANT'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF
UTAH, IN AND FOR IRON COUNTY

HON. WILL L. HOYT, Judge

SAM CLINE,
Attorney for Appellant

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Engineer of the State of Utah,
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APPELLANT'S BRIEF

STATEMENT OF THE BRIEF

This cause is before this Court as an intermediate appeal or an appeal from an interlocutory order made and entered by the Fifth Judicial District Court of the State of Utah, in and for Iron County, involving a well and underground water right of the appellant, Walter W. Cook.

As indicated by the title of the case, a proceeding was originally initiated as a general adjudication of all of the rights to the use of water in the Escalante Valley Drainage Area in Utah, which includes the Milford Underground water basin immediately south of the City of Milford in Beaver County.

After complying with the provisions of *Chapter 4 of Title 73, Utah Code Annotated, 1953*, and after completion of a hydrographic survey of the area, the State Engineer on or about the 1st day of April, 1949, served and filed in the District Court of Iron County his Proposed Determination of Water in said area.

In the due course of said general adjudication proceedings, and on or about the 6th day of October, 1943, this appellant, then the owner of said premises, filed a statement of water user's claim in this proceeding as provided by statute, and said statement of claim was by the Clerk of the District Court assigned a number, to-wit, No. 483; and thereafter by the said proposed determination the claim was wholly disallowed by the State Engineer. Thereupon the claimant filed his objection and protest to the disallowance of his well and underground water right claiming that he was the owner of a forty acre tract of land; that in the month of April, 1924, his predecessor in interest commenced to drill and sink a well on the said premises and during the month of May, 1924, completed the said well; that the well was afterwards equipped with

proper pumping equipment and in May of said year water from the well beneficially used in the irrigation of forty acres of land and that such beneficial use of the waters from the said well continued during the irrigation season of said year; that the flow from said well was one second foot of water.

Thereafter a hearing was duly held by the District Court on the said protest, after which the Court made and entered its findings of fact and conclusions of law and an interlocutory order (Tr. 12-14), denying the claim and protest of the appellant.

A petition for interlocutory appeal from said orders was filed in accordance with and as provided by the Utah Rules of Civil Procedure (Tr. 1-6) and which appeal was duly allowed and granted by order of said Court (Tr. 15-17).

STATEMENT OF FACTS

In the following statement of facts it is not deemed necessary to re-state those which are incorporated in the foregoing statement of the case, many of which are taken almost bodily from the trial court's findings and conclusions (Tr. 12-13).

While the State Engineer and the claimant and appellant herein differ as to the correctness of the court's conclusions of law and the interlocutory order based thereon, there is no controversy whatsoever concerning

the facts.

The said findings of fact, the pertinent portions of which, insofar as this controversy is concerned, are briefly as follows :

1. That on or about the 6th day of October, 1943, the claimant, Walter W. Cook, filed a statement of water user's claim in the general adjudication proceedings and the statement of claim was assigned No. 483, and by the proposed determination of the claim was wholly disallowed by the State Engineer (Tr. 12-13).

2. That the claim was based upon underground water claim No. 7664, which claim, as filed on March 12, 1936 by Theodore Kronholm (predecessor in interest to appellant), showed that a well was drilled on the property involved in April and May of the year 1924 and that water from the well was used to irrigate forty acres in the year 1924, with a flow of one second foot of water. (Tr. 13).

3. That there was no use of water from the well during the year 1930 or at any time subsequent thereto prior to March 22, 1935, the effective date of the 1935 act dealing with underground water. (Tr. 13).

4. That no contention is made by either party, including the State Engineer, that the appellant intended to abandon the use of the water from the well and no finding was made as to abandonment. (Tr. 13).

From the foregoing findings of facts the trial court concluded:

1. That failure to use water from the well during the years 1930 to 1934, both inclusive, constituted non-use for a continuance period of five years and resulted in forfeiture of the right under the provisions of the laws of Utah then in full force and effect. (Tr. 13).

2. That the action of the State Engineer in disallowing the claim of appellant should be approved and confirmed (Tr. 13).

Thereupon the interlocutory orders appealed from was made and entered by the trial court (Tr. 14). disallowing the claim of appellant thus leaving him without the right to use any water whatsoever from his well.

A very short hearing was had before the trial court on June 9, 1954, and a transcript thereof is made a part of the record on this appeal (Tr. 1-5).

The testimony given at the hearing is fairly reflected in the findings. The claimant testified that he is the owner of the premises formerly a part of a tract owned by Theodore Kronholm; he acquired the title to the premises around 1938 or 1939; that Kronholm used water from the well to irrigate forty acres for some time after the well was drilled in 1924 and that there was no irrigation from the well in 1930 or subsequent thereto, but that all of the irrigation was prior to 1930. (Tr. 2-4).

It was agreed at the hearing that the State Engineer made no issue to the acreage previously irrigated (Tr. 4), and that there was presented to the court the legal problem of as whether the well right was lost through non-user (Tr. 4).

The findings (Findings No. 7, Abs. 13) removes from the problem before the Court any issue as to voluntary abandonment, since the State Engineer did not claim and does not now claim any loss of the well right because of abandonment.

The proposed determination disallowing the claim of appellant was first filed in the District Court and served upon water users in April of 1949. (See notation thereof in the exhibit which is a copy of the proposed determination).

STATEMENT OF ERRORS RELIED ON

1. The trial court erred in concluding that failure to use water from appellant's well during the years 1930 to 1934, both inclusive, constituted a loss of the well right through non-use.

2. The trial court erred in making and entering its interlocutory order denying the claim and protest of appellant, which order has the effect of depriving the appellant of the right to use the water from said well for any purpose whatsoever.

ARGUMENT

The above statement specifies two errors which in substance and effect are but one; and the sole question to be decided by this Honorable Court is simply this:

Was a well right prior to the enactment of the underground water act of 1935 considered as subject to the non-user statute in effect prior thereto; or, put another way, did the enactment of the underground water act have the effect of foreclosing a well owner from the use of his well through a previous five-year non-use thereof?

Appellant contends not.

Prior to the underground water act of 1935 the non-user statute provided as follows:

When *an appropriator* or his successor in interest abandons *or ceases to use water* for a period of five years the right ceases, and thereupon such water *reverts to the public*, and may be *again appropriated* as provided in this title. §100-1-4 R.S.U. 1933.

The underground water statute of 1935 amended the above section, (Ch. 104, Session Laws of 1935), and the amendment became effective during March of 1935, before the commencement of the irrigation season of that year. The amendment incorporated the provisions of §100-1-4 R.S.U. 1933, and added a provision, with appropriate procedure, whereby *before the expiration of such five-year period* the appropriator or his successor in interest might

apply for an application for an extension of time up to five years within which to resume the use of such water. This amended act concludes with the clause “provided, that nothing in this section shall apply to underground or subterranean waters”.

The Court will observe that we do not pose the question: Did the non-user statute in effect prior to the effective date of the amendment thereof apply, to underground water? We pose the question which we deem decisive: Was a well right prior to the effective date of the amendment of the non-user statute *considered* as subject to the provisions of such statutes?

When the office of State Engineer was created and the general water act of 1903 was passed (Ch. 100, Session Laws of Utah, 1903), Section 48 thereof was a non-user statute substantially as carried forward into Section 190-1-4, R.S.U. 1933, excepting that the early statute provided for a seven year non-use period in lieu of the present five-year non-use period.

In January of 1935, in the cases of *Wrathall vs Johnson*, 86 Utah 50, 40 Pac. 2nd 755, and *Justesen vs. Olsen*, 86 Utah 158, 40 Pac. 2nd 802, it was held that the law of appropriation applies to the waters of subterranean and artesian basins. Thereafter the Legislature of 1935, largely on account of the holdings in the above two cases, made substantial changes in the water act of 1903, and added

other sections regulating the appropriation and use of the waters of subterranean and artesian basins.

The early statute (§47, Ch. 100, Session Laws of Utah, 1903) provided as follows:

The waters of all streams and other sources in this State, whether flowing above or underground, in known or defined channels, is hereby declared to be the property of the public subject to all existing rights to the use thereof.

The 1935 statute (§100-1-1 Session Laws of Utah, 1935) as amended provides as follows:

All waters in this State, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.

Again we emphasize the language of the non-user statute from 1903 up to and including the 1935 amendment. The statute provides "when an *appropriator* ceases to use water for a period of five years the right ceases and the water may be *again appropriated* as provided in this title."

The question then is - Until the 1935 enactment, or until the Wrathall case was decided in 1935, did the courts, legislature, bar and the public in general understand that the law of 1903 and the procedure to be followed applied to underground water basins? And as a corollary, - Prior to the 1935 enactment was it *considered* that a well right, acquired without the necessity of appropriating the water

therefrom, could be subject to the non-user statute, when the owner of the well right was not considered an “*appropriator*.” Further, was it considered that water not subject to appropriation would revert to the public to be again *appropriated*?

The answer to the above queries is found in the several solemn pronouncements of this Honorable Court.

This court *throughout its history* has recognized that percolating waters are not public waters but belong to the soil through which they pass and are the property of the owner thereof, *and are not the subject of appropriation*. (Citing a long line of Utah cases). * * * *

Our concept of what was and what was not percolating waters has changed greatly since that term was used in the early cases. In those cases we described percolating waters as not “naturally flowing in a stream with a well defined channel, banks and course.” Again percolating waters were defined as “percolating through the soil, or flowing in a subterranean stream, having no defined or known channels, courses or banks.” * * * * Until 1935 the decisions of this Court treated the waters of artesian basins as percolating waters, and as such the *ownership went with the owners of the ground* where such waters were located and were *not* considered to be subject to appropriation. *Riordan vs. Westwood*, 115 Utah 215, 203 Pac. 2nd 922, decided in 1949.

In *Riordan vs. Westwood*, *supra*, we noted that this court has *always* recognized that percolating waters are *not* public waters but are a part of the

ground through which they pass and belong to the owner thereof, with well recognized exceptions to such rule none of which have a bearing on our problem in this case. We also noted that in recent years our concept of what are percolating waters have undergone great change. *Weber Basin Water Conservancy District vs. Gailey*, Utah, 303 Pac. 2nd 271, at page 274.

In the case of *Hanson vs Salt Lake City*, 115 Utah 404, 205 Pac. 2nd 255, Justice Wade has very fully and ably discussed the history of water rights in Utah and in pointing out wherein the Session Laws of Utah, 1935, brought underground water under the jurisdiction of The State Engineer and the reasons therefore. Quoting from page 258 of 205 Pac. 2nd:

“From the earliest times this court has recognized that percolating waters were *not* subject to appropriation as a part of the *public* waters of the state. Such waters were said to be a part of the ground through which they passed and belonged to the owner thereof the same as the rocks, soil and other materials thereof to the lowest depth, *and the owner thereof could use such water as he saw fit.*
* * * * In 1935 the cases of *Wrathall vs. Johnson* and *Justesen vs. Olsen* held that the law of appropriation applies to the waters of subterranean and artesian basins.”

Quoting from page 260 of 205 Pac. 2nd, Justice Wade states:

“As previously pointed out prior to the *Wrathall* case, the courts, legislature, bar and the public

in general apparently understood that the law of 1903 prescribing the procedure to be followed in order to acquire the right to use unappropriated *public water did not apply to underground water basins.* * * * * It is clear that the legislature did not intend, at the time of these enactments (statutes of 1903) that these statutory provisions should govern the appropriation of underground waters such as are involved in this case *because it did not understand that such water could be appropriated.* So it made no provision for such a procedure. Later this court held that such waters were subject to appropriation and then the legislature amended the provisions so as to provide for the appropriation of such waters. In the meantime many persons had appropriated such waters to a beneficial use and no doubt such persons would have complied with the statutory regulations had the legislature made it clear that such was its intention. It would be a great injustice to hold that these people acquired no right to the use of such waters by appropriating them to a beneficial use because they had failed to comply with statutory regulations which the legislature at that time did not intend they should comply with and the courts have held were not applicable to their case. No one has been harmed by their failure to comply with these regulations."

It is true that in the Hanson case the problem before the court was whether a well right could be forfeited and deemed lost when the water therefrom had not been appropriated. But the principle remains the same. In the instant case, if the courts, bar, legislature and general public understand that the law of 1903, including the

non-user statute, did not apply to underground water basins, and understood that percolating waters were *not* public waters but belonged to the owner of the soil, then it would be a great injustice to hold that the well owners were "appropriators" and that by a non-use of their own "private" as distinguished from "public" water it could revert to the public to be again appropriated.

In all seriousness we might ask: What purpose could possibly be subserved by a well owner losing a right to the use of his own water through non-user, when he could immediately thereafter resume the use of his water because it was not public water and subject to appropriation?

And if, prior to the enactment of the 1935 act, a member of the bar should be consulted regarding the effect of the non-user statute concerning underground water, how could such lawyer be expected to advise his client that a well right was subject to the non-user statute in the light of the decisions and pronouncements of this court prior to the Wrathall case.

It must be remembered that the 1935 legislative enactment was passed and became effective *prior* to the commencement of the irrigation season of 1935. In other words, prior to March, 1935, well owners had been led "by the courts, legislature, bar and general public" to believe their water was not public water and therefore

could not be subject to the non-user statute. If the disallowance of the appellant's well right, both by the State Engineer and the trial court, shall stand, then the appellant's well right was taken away from him and forever lost through no fault of his own and without any notice whatsoever, and without being given any opportunity to protect his right by resuming the use of the well.

At this point it is appropriate to comment on the fact that the legislature of 1935 did not intend the non-user statute to apply to underground or subterranean waters because it expressly exempted the same from that statute in their amendment to the old non-user statute, and provided that as to other waters extensions of time to use the water could be obtained by application therefor. If we can credit the legislature with intending to invoke the non-user statute as to underground waters, then this inconsistent and absurd situation would be the net result:

Well owners who had drilled their wells and equipped the same at large expense and who had established a good right but had not used the water for the years of 1930, 1931, 1932, 1933 and 1934, would be summarily wiped out. But well owners who had used water during the year 1930, but who had failed to use the water for the years 1931, 1932, 1933 and 1934 would not lose the right to the use of the water and could continue the non-

use thereof for any number of years thereafter without losing the same because the 1935 amendment expressly exempted underground and subterranean waters from the non-user statute. Moreover, well owners whose rights were established by appropriation after 1935 would be given the benefit of the exemption from non-use, while well owners with many years of priority were wiped out without notice of any kind after being led to believe their water was not public water, was not subject to appropriation, but belonged to the owner of the soil. Thus, giving a distinct advantage to a later appropriator as against an early one is contrary to every concept of our water law.

Since the 1945 legislature amended §100-1-4 U.C.A. 1945 (Ch. 134, Session Laws of Utah, 1945) by striking out the last sentence: "provided, however, that nothing in this section shall apply to underground or subterranean waters," underground and artesian waters are now subject to the non-user statute. However, after the enactment of the 1945 amendment, the State Engineer has taken the position, and correctly so, that well owners had five years thereafter within which to resume the use of water before he could invoke the non-user statute, and at any time before the expiration of such five-year period the well owner could apply for an extension of time within which to resume the use of his water.

The question now before this court, therefore, is one

that affects the well rights of the appellant and a very few other well rights that were similarly disallowed because of a five-year non-use prior to 1935. After that and for a period of ten years non-use of underground water was exempted from the effect of the statute, and since 1945 there is no question about the loss of an underground right through non-use for five years unless an extension of time within which to resume use has been applied for and approved. Therefore, as to all well rights excepting those few which were disallowed because of a five-year non-use prior to 1935, the question before this court is moot.

The problem here presented seems to be one of first impression in this state. The State Engineer, in urging upon the trial court the correctness of his position that the non-user statute applied to underground water prior to 1935, leaned heavily upon the case of *Fairfield Irrigation Company vs. Carson*, Utah, 247 Pac. 2nd 1004. The factual situation in the Fairfield case is far different than the situation in the instant case. In the Fairfield case the ground on which the wells had been drilled was acquired by one Thomas through purchase from the county, which had acquired the title because of non-payment of taxes. That initiated a new title and the successor in interest of Thomas commenced the use of the water in 1933 before the effective date of the 1935 enactment. This court held that "under our concept

prior to the 1935 change, they had the right to use those waters as they saw fit without filing an application to appropriate them * * * and came squarely within the exception recognized in the Hanson case.” The statement concerning the loss through abandonment and non-user of the original right by the driller of the wells was therefore not necessary to the ultimate decision and the same result would have obtained had this court never mentioned or commented on the non-user statute. We believe it is a fair statement when we say this court did not have in mind when deciding the Fairfield case any situation such as now presented.

As a matter of fact, although the word “non-user” is used in the Fairfield case, the water right was lost through voluntary abandonment rather than non-user, excepting as a five-year non-use in that case was necessarily included in the abandonment period of seven years from 1905 to 1912. The pumping operation was discontinued in the year 1905 by the original owner of the land on which the wells were located and the water company allowed the taxes assessed against the land to become delinquent and to be sold to the county for taxes and the pump and pipe line were dismantled. The words “abandonment” and “non-user” appear to be used together wherever mentioned and nowhere in the opinion is the question of non-user ever discussed separately or otherwise than in connection with the actual voluntary

abandonment. Moreover, the matter of abandonment and non-user are discussed only in the light of the dispute as between two parties and as to which had a better right and the express issue of whether non-user could apply to underground water in the sense that it would revert to the public as public water, was not before the court.

The court in the Fairfield case adhered to its prior holding in the Hanson case that prior to 1935 underground waters were considered to belong to the owner of the ground on which they were located as a part thereof and not public waters or subject to appropriation. The court also stressed the fact that in the Hanson case there was recognized an exception to the rule that all water must be appropriated after 1903, and again reiterated the reason for the exception, which was to prevent hardship and injustice to underground water users who were misled into not filing an application for appropriation and neither the legislature, courts, engineer's office, bar nor the general public prior to 1935 intended to require such an application in underground or well cases.

Under the exception noted in the Hanson case and recognized both before and thereafter, a well owner was justified in believing that he owned the water underlying his premises and that it was not public and not subject to appropriation. Therefore, he could use or not use the water as he saw fit without placing it in any jeop-

ardy. This situation prevailed until the moment the 1935 enactment became effective. In other words, he could resume the use of his water up to the day, or in fact up to the very moment the 1935 act went into effect. The very next moment — when the act was effective it expressly provided that there could be no loss of underground water. Then at exactly what point does the non-user apply and come into operation. Appellant contends it is not possible to evade the proposition that as to underground water there could be no application of the non-user, as distinguished from a voluntary abandonment.

There appears to be another reason why this Court should determine that the appellant has not forfeited his well right through non-user, and that the legislature did not intend by the 1935 enactment to invoke the non-user or forfeiture statute as to underground water rights acquired prior thereto. It is not necessary to cite any authority for the fact that a water right of any kind, whether acquired through appropriation or otherwise, and the priority thereof, is a valuable vested property right. It also is elementary that such property right is entitled to the same consideration and protection against the impairment and/or loss thereof as any other property.

The legislature is without power to impair or destroy the obligations of contractual or vested rights and any statute which affects a vested right cannot be given retrospective operation. In re

Thramm's Estate, 183 Pac. 2nd 97, at Page 103 (Cal).

In the absence of a clearly expressed legislative intent to the contrary, every statute will be construed to operate prospectively, and will not be construed to affect pending proceedings unless such intention is expressly declared or necessarily implied from its language (Citing cases). Here there is no such declaration nor is the intention necessarily implied from the language of the amendment. The construction contended for by appellant would work an injustice to parties to the pending litigation, a result which cannot be presumed the legislature intended. The amendment should not be given retroactive operation. In re *Thramm's Estate*, supra.

While the factual situation is entirely different in the case of *Toronto vs. Sheffield*, 118 Utah 460, 222 Pac. 2nd 594, the principle of law involved is the same. In the Toronto case this court held unenforceable a statute which barred a defense upon the effective date of an amendment to a limitation statute without allowing any time thereafter within which to bring an action. In our case, if the State Engineer's position can be sustained, the amendment of 1935 as to underground water would not only impair but would strike down entirely a valuable property right without according the property owner any time within which to protect his right by resuming use of the water. In the Toronto case this court stated: "The legislature may bar a claim within a reasonable time within the effective date of the statute."

In the case of *Western Holding Co. vs. North-Western Land and Loan Company*, 120 Pac. 2nd 557 (Mont.), cited in the Toronto case, the court said:

The legislature may establish a limitation applying to a cause of action as to which none existed before and may change existing statutes and shorten period of limitation, but provisions must be made allowing reasonable time for actions to be brought that otherwise would be instantly barred.

The above legal principles are so well established that it is not deemed necessary to multiply the authorities.

However, we believe this case can and should be decided upon the principle that the legislature never did intend, when it enacted the 1935 amendment, to declare (retroactively) that an underground water right should be wiped out instantly by the non-user when the legislature was well aware, as expressed by this Court in several cases, that the courts, the state engineer, the bar and the general public were led to believe and did believe that underground water was not public water, not subject to appropriation and belonged to the owner of the soil.

We apprehend that the respondent may urge upon this Court that immediately after the effective date of the 1935 amendment, the appellant could have filed an application to appropriate water from the well. If such position should be urged then the court should bear in

mind that (a) there is nothing in the amendment which even squints at the fact it was intended to invoke the five-year non-user statute as against underground water, but (b) by the amendment underground water was exempted from the effect of the five-year non-user statute; (c) that the proposed determination disallowing such water right was not issued by the State Engineer until 1949, some fourteen years after 1935, which was the first notice appellant or any well owner similarly situated had of knowing the position taken by the State Engineer; (d) the predecessor in interest of the appellant in March, 1936, took every precaution to protect his well right by filing with the State Engineer the statutory underground claim; (e) the well owner relied on the pronouncements of the Court that his underground water right was not public water and belonged to him as the owner of the soil.

Plaintiff and claimant herein respectfully submit that the interlocutory order of the trial court sustaining the State Engineer should be reversed and set aside and the well right held not forfeited and lost by reason of the 1935 amendment.

Respectfully submitted,

SAM CLINE,
Attorney for Appellant.