

1971

Warren Irrigation Company, A Corporation v. Milton T. Brown and Florence H. Brown, His Wife : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WARREN IRRIGATION
COMPANY, a corporation,

Appellant,

vs.

MILTON T. BROWN and
FLORENCE H. BROWN, his wife,

Respondents.

Case No.
12620

APPELLANT'S BRIEF

Appeal from District Court of The Second Judicial District in and
for Weber County, State of Utah, Honorable Ronald O. Hyde,
Judge

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Clerk, Supreme Court, Utah

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APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

Suit to quiet title to plaintiff's water rights and for a decree declaring an exchange of water rights terminated or, if such relief is not granted, for a decree restricting the defendants' water right, herein referred to as the "Lyman Skeen" right as to the water source, as to the quantity of water reasonably required to irrigate the defendants' land and requiring the defendants to pay their pro rata share of the cost of construction, operation

and maintenance of water diversion, storage and distribution facilities.

DISPOSITION IN LOWER COURT

The trial court decreed that the defendants are the owners of the Lyman Skeen water right as described in a decree, hereinafter referred to as the "1914 decree," declared that such right could be used on certain land owned by the defendants, determined the annual amount to be paid by the defendant for the water right, and awarded damages against the plaintiff.

RELIEF SOUGHT ON APPEAL

The plaintiff and appellant seeks reversal of the decree and the entry of a decree declaring that the Lyman Skeen water right was terminated by a condition subsequent contained in the deed exchanged for the deed which created the right and restoring to the parties the rights originally owned by their predecessors or if such relief is not granted, the entry of a decree declaring that the Lyman Skeen right is limited to the land to which it was originally made appurtenant, and to the quantity of water that can be beneficially used thereon, that it is limited as to the water source, and that its owners are obligated to pay their pro rata share of the cost of construction, operation and maintenance of irrigation facilities.

STATEMENT OF FACTS

The appellant, Warren Irrigation Company, will be referred to in this brief as the "plaintiff" and the respondents, Milton T. and Florence H. Brown, will be referred to as the "defendants."

The plaintiff is a nonprofit corporation engaged in distributing water to its stockholders by means of the Warren Canal and other facilities. The canal formerly owned by the Utah Light & Power Company and Utah Light & Railway Company, diverts water from the Weber River near 12th Street, West of Ogden, and at points below from Four Mile and Mill Creeks. The main canal is 30 to 40 miles long, has a capacity of 90 second feet (Tr. 14), and carries water for the irrigation of land in and around Warren, Utah. The Skeen ditch with a capacity of 8 or 9 second feet, diverts water under the Lyman Skeen right from the Warren Canal and carries it to the defendants' property shown on Exhibit C. (Tr. 15).

The facts which relate to the creation of the Lyman Skeen water right are not in dispute. The right is the result of the exchange of deeds, one dated February 11, 1903, (Exhibit H) from Utah Light & Power Company to Lyman Skeen and the other dated February 16, 1904 (R. 47, 48) from Lyman Skeen and wife to Utah Light & Railway Company (successor to Utah Light & Power Company). For the convenience of the Court, a copy of each deed is appended hereto. (Appendix pp. 27-35). They will be referred to as the "1903 deed" and the "1904 deed."

The defendants, as successors of Lyman Skeen, claim ownership of the Lyman Skeen water right, not as it is described and limited in the 1903 deed, but as it is described in a decree in the case of Lyman Skeen v. Warren Irrigation Company, dated, February 10, 1914, and enforced by an order of the District Court of Weber County, dated, February 5, 1938, in a case entitled, Lyman Skeen and D. A. Skeen, Plaintiff, v. Warren Irrigation Co., and Utah Light & Railway Company, Defendants, dated August 22, 1913, No. 4201 which relates to conveyance rights in a canal.

The parties construe the documents mentioned above and their legal effect differently, the plaintiff contending that (1) the rights of the parties are determined by the 1903 and 1904 deeds, (2) the plaintiff has by denying water to the defendants, terminated the exchange of water rights as set out in the 1904 deed, (3) the 1914 decree and the 1938 order are not pertinent to the issue of termination, and (4) in the alternative, if the court should hold that the exchange is not terminated, by the condition subsequent in the 1904 deed, then the 1914 decree should be construed as merely substituting one provision, a method of delivery of water and not superseding the 1903 deed as contended by the defendants. The defendants on the other hand contend that the 1914 decree entirely superseded the 1903 and 1904 deeds that the plaintiff's predecessor and the plaintiff have already had their day in court, that the 1914 decree and the 1938 order are res judicata and there are no issues of fact or law before the court.

To avoid repetition, the language of the documents mentioned above will not be quoted and discussed in the statement of facts, but only in the argument.

The plaintiff has pleaded facts which raise equitable issues which must be considered only if the court holds that the happening of the condition subsequent did not terminate and restore to the parties the water rights as they existed prior to 1903. Evidence was offered and received in support thereof.

The full flow of water under the Lyman Skeen right, as fixed by the 1903 deed and the 1914 decree, greatly exceeds the quantity of water which can be beneficially used on the defendant's land. A civil engineer, Lew A. Wangsgaard, testified that the quantity of water provided by the flow of water set out in the 1914 decree would annually total 252 acre feet and that the land owned by the defendants originally described in the 1903 deed, comprised only 50.26 acres and reasonably required only 150 acre feet of water for irrigation. (Tr. 8-10). No other expert testimony was introduced on this issue. It was countered by the testimony of the defendant Milton T. Brown, that he needed all the water provided by the Lyman Skeen right. (Tr. 63).

In 1922, Lyman Skeen deeded to his sons, Blaine and Wilford, a total of 80 acres which included some 67.5 acres of the land described in the 1903 deed to which the Lyman Skeen water right was appurtenant. (See the map, Exhibit C and the deeds, Exhibit K.) The deed contained no reservation of the water right. The defend-

ants own only 50.26 irrigable acres which were described in the 1903 deed. (See Exhibit C and Tr. 16-18.)

The 1903 deed by its terms provides in paragraph (2) that the water to be furnished Lyman Skeen was to be "... from the *now existing rights* of the Utah Light & Power Company in the waters of Weber River, Mill Creek and Four Mile." The 1914 decree limits the source of water ... "to natural sources of supply (exclusive of its pumping plant) ..."

Testimony was given by J. Maurice Skeen that the sources of water in the Warren Canal are the Weber River, Four Mile Creek and Mill Creek and that in 1945 and 1954, pumps were installed at a cost of \$9,200.00, and in 1962, a dam was constructed in Weber River at a cost of \$56,527.00. In 1967, a diversion dam was constructed at a cost of \$16,800.00. Some of the costs were repaid by the ASCS. About 1932, the plaintiff purchased 1,500 acre feet of storage water in Echo Reservoir. (Tr. 27). Water from all sources has gone to Mr. Brown. (Tr. 27, 28). Following this testimony, an objection was made to the question as to whether there was any difference in the delivery of water as to the source of water. (Tr. 28). We quote from the record:

MR. SKEEN: We take the position under these documents Mr. Brown was entitled only to the water or water from the water source available on the date of the original indenture in 1903 and that he has no interest in the water that the companies purchased since or acquired by purchase, or otherwise.

MR. CLYDE: There is no issue on that. We don't deny that. I mean we are entitled to the four and five feet exactly as that deed says, and purchases they have made from Echo or improvements they have made in their pumping system to get other or different waters we have no interest.

MR. SKEEN: If you admit you have no interest, I will withdraw the question.

MR. CLYDE: All right. (Tr. 28)

It is alleged in paragraph 5 of the complaint that, "The defendants further claim the right to the benefit, without cost to them of all water diversion, storage and distribution facilities constructed at great expense to the plaintiff and its stockholders since February 11, 1903." (R. 2) The defendants claim that the payment of the sum of 30 cents per acre for 110 acres or \$33.00 meets all of the obligations of the defendants to pay for the water and the cost of operation and maintenance of the diversion and distribution system of the Warren Irrigation Company. The evidence is uncontradicted that the stock of plaintiff corporation has been assessed annually from 1929 to 1970 in amounts varying from \$2.00 to \$7.00 per share to pay for the maintenance of the canal, the diversion dam, pumping expense, water master and the "total expense." (Tr. 33). The Lyman Skeen right is shown on the books of the irrigation company, sometimes as 110 shares and sometimes as 110 acres, but it has always been assessed \$33.00 a year. (Tr. 32).

The trial court found that the 1914 decree superseded the 1903 deed and contained no limitations as to

the place of use (R. 83, 84) ; that the water has been delivered to Lyman Skeen and his successors from 1914 to 1968 and that the defendants now own 80 acres formerly owned by Lyman Skeen and that for at least 50 years, the Skeen Ditch water has been used on the 80 acres (R. 84). The court further found that the deeds from Lyman Skeen to Blaine and Wilford Skeen of 80 acres, did not carry any water and that all of the Lyman Skeen right was retained by Lyman Skeen and passed by mesne conveyances to the defendant. (R. 84, 85).

Finding of fact No. 6 provides in part as follows:

6. That the 1914 decree refers specifically to the deed from Utah Light & Power Company, dated in 1903, but does not make any reference to a 1904 deed on which plaintiff relies. That any claims or limitations provided for by the deeds could have been raised by plaintiff in the 1914 litigation. That the rights of the parties in regard to this water were settled by the 1914 decree, and the parties have abided by that decree at all times until about 1937.

In paragraph 7 of the findings, the court found that in 1968, the plaintiff company wrongfully elected to withhold half the Lyman Skeen water from the defendants, and the defendants had to lease 24 shares at a cost of \$7.75 a share in 1969 and \$8.50 in 1970. (R. 87).

The court found that the restriction on the place of use of the Lyman Skeen water was “. . . not carried forward into the decree . . .”; that the water had been used on land outside the 147 acre tract described in the 1903

deed since 1922 and that the entire 252 acre feet of water produced by the Lyman Skeen right can be beneficially used on the defendants' 80 acres of land (R. 87). The \$33.00 a year assessment as provided in the 1903 deed and carried forward to the 1914 decree was a payment in full for the water supplied. (R. 87).

The court below decreed that the defendants are the owners of the Lyman Skeen right as decreed in 1914 and that the plaintiff is hereby

“ . . . ORDERED to deliver the water to said defendants, measured over a weir constructed at or near the headgate of that certain lateral upon the north branch of defendants' canal system known as the Skeen Ditch, in strict accordance with the terms of said decree, and the plaintiff is hereby enjoined from claiming any right, title, estate or interest in said water or any part or portion thereof.”

It is further ordered that the Skeen right may be used on the 80 acres of land now owned by the defendants “ . . . and that the annual assessment for said water right to be paid by the defendant, is \$33.00 per year. Judgment for \$390.00 for the rental water was awarded to the defendants.

STATEMENT OF POINTS

1. The court should have enforced the termination provision in the 1904 deed.

2. The court erred in finding that the 1914 decree entirely superseded the 1903 deed and in failing to enforce the covenants in that deed.

3. The court erred in failing to include in the decree the restrictions imposed by the 1914 decree, by the 1903 deed, by the stipulations of defendant as to the source of water for the Lyman Skeen right, and by the law.

ARGUMENT

1. THE COURT SHOULD HAVE ENFORCED THE TERMINATION PROVISION IN THE 1904 DEED.

The 1903 deed from Utah Light & Power Company, party of the first part, to Lyman Skeen, Exhibit H — Appendix p. 27, conveyed to him a water right subject to conditions spelled out in detail. These are summarized as follows:

1. Subject to *all prior rights* on the basis of one second foot flowing continuously for each 150 acres of land the right to have delivered to Lyman Skeen water for use on 110 acres out of 147.37 acres specifically described "*and not otherwise.*"
2. The water to be furnished from the "now existing rights of the Utah Light & Power Company in the waters of the Weber River, Mill Creek, and Four Mile; provided that when the water commences to fail or is low or insufficient in said canal for any cause, or in the sources from which the water is obtained by the party of the first part

(Power Company) the grantee *shall have his proportion and pro-rata* of the water with others now and hereafter, on the same system."

3. The second party shall pay to the power company 30c "for each *acre of water* to which he is entitled" There follows a significant statement to the effect that, "And in default of the payment of said sums of money by the party of the second part, or its successors and assigns, *for water used* by the party of the second part, or his heirs and assigns, on said land or any part of them or otherwise said claim *for payment of water* shall at all times constitute a first lien of the party of the first part on all of said water and water rights hereby conveyed . . ." Emphasis and parenthetical statement added.

The 1904 deed from Lyman Skeen and wife, "parties of the first part" to the Utah Light & Railway Company, "party of the second part" recites that the parties of the first part are the owners of a water right amounting to 307.20—1046.95 of the whole of Salt Creek or Four Mile and are the owners ". . . of other interests in water rights including canals and water ditches, and

"Whereas the party of the second part is about *to make an exchange* of said water rights from the said Lyman Skeen and his wife Anna Skeen, and *in exchange therefor* to transfer to them certain water rights in the Utah Light & Railway Company's canals and reservoirs, hereinafter referred to." (Emphasis added.)

The next paragraph provides that in consideration of one dollar ". . . and also in consideration of a certain deed for water and water rights given by the Utah Light

& Power Company, predecessor of the Utah Light & Railway Company in favor of said Lyman Skeen, which said deed is dated the 11th day of February, 1903 . . .” the first parties grant, bargain, sell and transfer to the second party the water rights in Salt Creek and Four Mile Creek mentioned in the recitations quoted above.

The next provision of the deed contains a condition subsequent as follows:

“Provided always, and the above grant, by the party of the first part is made for the express consideration that in case the Utah Light & Railway Company, or its grantor, the Pioneer Electric Power Company, or any of its or their assigns, or successors in interest, shall wilfully refuse to carry out the agreement to deliver water which is contained in the deed, to the party of the first part hereto, which deed is dated in the caption 11th of February, 1903, then the grant of the water right in their deed shall cease and determine, and the parties hereto of the first part shall be restored to all the right they had prior to the giving of this deed, and no length of time shall vary their part of this agreement.

It is an elementary rule of construction that when two deeds are between the same parties related to the same subject matter or are parts of the same transaction, they will be construed together.

26 C.J.S., Sec. 91 Deeds, pp. 840-842

The rule is especially applicable where as in this case the 1904 deed specifically refers to the 1903 deed by date!

The two deeds when construed together clearly constitute an agreement for exchange of water rights. Lyman Skeen got the water right described in the 1903 deed and the Utah Light & Railway Company got the water right described in the 1904 deed. The exchange agreement contained the condition subsequent quoted above to the effect that upon the wilful refusal to carry out the agreement to deliver water under the 1903 deed “ . . . *the grant of the water right in their deed shall cease and determine*, and the parties hereto of the first part shall be restored to all the right they had prior to the giving of this deed . . .” (Emphasis added.)

The defendants have pleaded and proved that the plaintiff refused to deliver water to them in 1969 and 1970. Under the plain language of the 1904 indenture the “grant of the water right ceased and determined.” It is clear that the effect of this provision is automatic. There is no requirement of notice and by the plain terms of the instrument the defendants’ right has ceased and their right is restored to 307.20/1046.95 of the water of Salt Creek. No contention can successfully be made that there was laches because the indenture provides: “. . . and no length of time shall vary their part of this agreement.”

The agreement between the parties was made by the exchange of the indentures. The language of the deeds is clear and unambiguous, and the provision for termination of the exchange must be enforced. This disposes of the case.

The following argument on the other points shall not constitute a waiver of Point No. 1.

2. THE COURT ERRED IN FINDING THAT THE 1914 DECREE ENTIRELY SUPERSEDED THE 1903 DEED AND IN FAILING TO ENFORCE THE COVENANTS IN THAT DEED.

The trial court found (Findings Nos. 2, 6, 9 and 10; R. 83, 84, 85, 87, 88) in substance and effect that the 1914 decree superseded the 1903 and 1904 deeds and decreed that the defendants “. . . are now the owners of 100 per cent of the water right decreed to Lyman Skeen . . .” by the 1914 decree and ordered delivery of water in strict accordance with the terms of the decree. The findings and decree are the result of an erroneous construction of the decree.

The 1914 decree recites “. . . and the said parties having adjusted the differences between them in this action, and by stipulation made in open court, adjusted a settlement thereof, in which it was agreed that the terms of said settlement shall be entered as the decree in this action, . . .”

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that in lieu of the provision contained in that certain deed dated February 11th, 1903, from the Utah Light & Power Company to Lyman Skeen, the plaintiff, providing for the delivery to him of certain waters for irrigation purposes, that the said defendant as successor in interest of the said Utah Light & Power Company, beginning with the irrigation season

for the year 1915, and during each and every year thereafter, deliver to the plaintiff, his heirs, administrators and assigns, five second feet of water measured over a weir, to be constructed at or near the headgate of that certain lateral upon the north branch of defendant's canal system, known as the "Skeen Ditch," every fourteen days for a period of forty-eight hours, during the months of April, May and June, and for second feet every fourteen days for a period of forty-eight hours during the months of July, August and September, and the said plaintiff, his heirs, administrators and assigns, are hereby adjudged and decreed to have the right to the use of said five second feet of water for a period of forty-eight hours every fourteen days during the months of April, May and June, and four second feet of water for a period of forty-eight hours every fourteen days during the months of July, August and September, during the year 1915 and each and every year thereafter.

The next paragraph in the decree relates to failure to deliver water by reason of unavoidable accident to the canal, the following paragraph relates to the payment of \$33.00 for the water supplied and furnished and the final paragraph relates to the rights of the parties in the event of foreclosure of the rights of Lyman Skeen.

Assuming for the sake of argument only, that the exchange of water rights is still in effect, the vital question arises as to whether the language of the decree, "... that in lieu of the provision contained in that certain deed dated February 11, 1903 ..." means that the decree was intended to entirely supersede the deed or whether

the decree was intended to supersede only that provision of the deed which is modified by the decree, to-wit, the provision relating to the method of delivery of water.

The language of the decree indicates an intent to substitute only the water delivery provision in the decree for the water delivery provision in the deed. It will be noted that the decree uses the singular of the word "provision" as it relates to the deed. It says, "It is hereby ordered, adjudged, and decreed that in lieu of the provision contained in that certain deed . . .". The deed contains three pages of provisions but the modification by the decree points only at the ". . . *provision*—providing for the delivery to him of certain waters . . .".

We think the decree clearly states that the "in lieu language" refers only to the provisions relating to delivery of water and that except for the modification to give the grantee a large useable stream of 4 or 5 second feet for irrigation every 14 days instead of a constant flow of 110/150 of a second foot the parties intended to leave the 1903 deed in force as written. There is not a word in the decree indicating an intent to supersede all provisions of the deed. If such was the intent the word provision would have been in the plural, and many other important provisions would have been added to the decree.

Considering the obvious importance to the grantor of such conditions as the place of use (which determines the point of delivery) the furnishing of water from "now existing rights," the penalty of \$2.00 per acre for each additional acre or part of an acre of water used by the

grantee, the priority of the rights of the parties in time of drowth, and the imposition of a lien on and the right to sell the water right to enforce payment of the annual assessment, it seems clear that the parties did not intend the decree to be a substitute for the deed.

If we assume for the sake of argument only that the decree is ambiguous, the court may properly consider not only all provisions of the judgment but the entire record.

The law is well stated in *Corpus Juris Secundum* as follows:

As a general rule, the meaning, effect and legal consequences of a judgment must be ascertained from its own provisions and language, if possible. If, however, the judgment is ambiguous or obscure, or a satisfactory interpretation cannot be determined from the judgment itself, the entire judgment roll or record may be looked to, examined, and considered for the purpose of interpreting the judgment and determining its operation and effect.

49 C. J. S., Sec. 436, pp. 867, 868

The court may look to the pleadings to determine the meaning of an ambiguous judgment.

Lipsitz v. First National Bank, 293 S.W. 563 (Texas)

Miller v. Madigan, 90 Okl. 17, 215 P 742

The pleadings disclose that the only issue in Case No. 4677 (Exhibit L) was as to the delivery of water. See the amended complaint filed July 14, 1914 in the

folder marked 4677 and the answer filed October 31, 1914. The file indicates that during the trial judgment was entered "... as per stipulation filed in open court." The written stipulation was filed November 10, 1914, a copy of which is appended. Appendix p. 33. It states:

That is lieu of the delivery by the defendant to the plaintiff of water from its canal system as provided in that certain deed from the plaintiff Lyman Skeen and wife to the Utah Light and Railway Company, dated February 16th, 1904, and that certain deed from the Utah Light and Power Company to Lyman Skeen dated February 11th, 1903, by *turns and periods* as in said last mentioned deed contained, that beginning with the irrigation season for the year 1915 and for each and every year thereafter that the said defendant will deliver to the plaintiff, his heirs and assigns, measured at the headgate of that certain lateral upon the north branch of defendant's canal system known as the Skeen Ditch, every fourteen days, beginning with the irrigation season of each year, five second feet of water to be used upon each delivery for a period of forty eight hours during the months of April, May, and June, and four second feet of water to be used for a period of forty eight hours delivered every fourteen days as aforesaid in the months of July, August, and September.

The stipulation ties the two deeds together and makes it abundantly clear that it relates only to the water delivery provision in the 1903 deed and does not supersede either or both deeds.

3. THE COURT ERRED IN FAILING TO INCLUDE IN THE DECREE THE RESTRICTIONS IMPOSED BY THE 1914 DECREE, BY THE 1903 DEED, BY THE STIPULATION OF DEFENDANT AS TO THE WATER SOURCE FOR THE LYMAN SKEEN RIGHT AND BY LAW.

The trial court entered a decree which either does not settle at all or erroneously decides the issues between the parties as framed by the pleadings. The complaint and answer raise the following issues:

A. Whether the defendants are obligated to pay their share of expenses of operation and maintenance of the plaintiff's canal system.

B. Whether the defendants can irrigate land other than that described in the 1903 decree.

C. Whether the defendants' water right has a priority superior to plaintiff's water right.

D. Whether all water awarded by the 1903 deed as modified by the 1914 decree can be beneficially used on defendants' 50 acres of land.

E. Whether the defendants can have the benefit without cost to them of diversion, storage and distribution facilities constructed by the plaintiff since February 11, 1903.

These issues will be discussed in the order stated.

A. With respect to issue A above, the court found that it was the obligation of the defendants to pay "... \$33.00 per year" in full for the water supplied. (Finding No. 8; R. 87). The decree provides "... and the annual assessment for said water right to be paid by the defendants to plaintiff is \$33.00 per year." (R. 90). It will be noted that nowhere in the 1903 deed, the 1914 decree or the decree from which this appeal is taken does there appear a provision that the defendants are not required to pay their reasonable share of the expense of operation and maintenance. The \$33.00 per year is for the "*water*" (see finding of fact No. 8) (R. 86) and "for said *water right*" (see the next to last paragraph of the decree) (R. 90). The 1903 deed states that the thirty cents per acre is "... for each acre of water." This document is entirely silent as to the expense of operation and maintenance.

Section 73-1-9 provides:

"73-1-9. Contribution between joint owners of ditch or reservoir. — When two or more persons are associated in the use of any dam, canal, reservoir, ditch, lateral, flume or other means for conserving or conveying water for the irrigation of land or for other purposes, each of them shall be liable to the other for the reasonable expenses of maintaining, operating and controlling the same, in proportion to the share in the use or ownership of the water to which he is entitled."

The rule announced by the Supreme Court of Utah in *Gunnison-Fayette Canal Company v. Roberts*, 12

Utah 2d 153, 364 P2d 103 regarding obligations of joint users of a canal is as follows:

“In the absence of an enforceable agreement between joint users of a canal specifying the rights and obligations of the parties with respect to the payment of the canal’s expenses, the statute (section 73-1-9, U.C.A. 1953) is controlling.” 364 P2d 105

There being no agreement as to operation and maintenance expenses the rule in the GunnisonFayette Canal Co., supra, is applicable and the defendants are obligated to pay a fair proportion of such expenses pursuant to Section 73-1-9 U.C.A. 1953.

B. The Court erred in failing to limit the use of the Lyman Skeen water right to the 147 acres of land described in the 1903 deed. The court found (Finding No. 9; R. 87) that this restriction was not carried into the decree. The plaintiff contends, and has argued above, that the decree was in lieu of only one provision in the 1903 deed—that relating to the delivery of water. That argument, if sound, disposes of this point. However, there is another reason why the finding and decree are erroneous as to this issue. Once a water right becomes appurtenant to land, it cannot be changed to other land without filing an application with the State Engineer.

The law in effect in 1922 when Lyman Skeen conveyed land to his sons, Blaine and Wilford and used it on other land, is found in Section 8, Chapter 67, Laws of Utah, 1919 which provides:

Any person, corporation or association, entitled to the use of water, may change the place of diversion or place of use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made, if it impairs any vested right, without just compensation; no change of point of diversion, place or purpose of use shall be made except on the approval of an application of the owner by the State Engineer.

The record does not disclose any application for change of place of use of the Lyman Skeen right from the land described in the 1903 deed.

The record also shows that the conveyances to Blaine and Wilford reserved no water right and as a matter of law the water right appurtenant to some 67 acres of land described in the 1903 deed was transferred away by Lyman Skeen and never reconveyed. See Laws of Utah, 1919, Chapter 67, Section 15 (now 73-1-11 U.C.A., 1953).

C. The court made no finding nor decree as to the issue as to the relative priorities of the plaintiff's and defendants' water rights raised by the pleadings. See paragraph 5 of the complaint (R. 2) and paragraph 5 of the answer (R. 14). The 1903 deed expressly states that the Lyman Skeen right is, "subject to all prior rights .. ." (R. 4). The 1914 decree is silent on the subject. Again, this is an uncertainty of vital importance to the litigants and not resolved by the decree. This was error.

D. The Lyman Skeen right was made appurtenant by contract to 110 acres of land within a tract of 147

acres specifically described. The defendants now claim, and the trial court found, that the defendants were entitled to use this water on 80 acres, (of which 30 are outside of the 147 acre tract). There are only 50 acres on which the water can legally be used. See area colored in pink of the map, Exhibit C.

Laws of Utah, 1919 Chapter 67, Section 3 provides:

“Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State.” (Now Section 73-1-3)

The statutory provision quoted above modified existing case law in the western states and is one of the basic principles of the water law.

1 Wiel on Water Rights Section 478

Hutchins Selected Problems of Water Law in the West pp. 314-319.

“Beneficial use is not what is actually consumed, but what is reasonably necessary for the purpose to which the water is devoted, and an excessive diversion of water for any purpose cannot be regarded as a diversion for beneficial use, in so far as it is in excess of any reasonable requirement for that purpose.”

California P and A Co. v. Madero Canal & Irr. Co. 167 Cal. 78, 138 P 718.

In *Mt. Olivet C. Ass'n. v. Salt Lake City*, 65 Utah 193, 235 P 876, the court said:

“The extent of the rights of an appropriator is limited to his reasonable necessities. The diver-

sion and use of water creates a legal right only to the quantity necessary for the use.”

See also: *Hardy v. Beaver County Irr. Co.*, 65 Utah 28, 234 P 524; *Riordan v. Westwood*, 115 Utah 215, 203 P2d 922; *In re Water Rights of Escalante* 10 Utah 2d 77, 348 P2d 679.

In the case before this court the only expert evidence before the court was that the diversion by the defendants of 5 second feet for 48 hours every two weeks for the first three months of the irrigation season reduced to 4 second feet for the last three months of the season would deliver to the 50 acres of land owned by the defendants, 102 acre feet annually more than the quantity reasonably required. This results from the claim of the defendant that he is entitled to divert for use of 50 acres the water reasonably required for 110 acres as stated in the 1903 deed. This claim is not supported by, but is contrary to the written contract of the parties, the evidence and the basic law.

E. The question as to whether the defendants are entitled to the benefit of water made available by the pumping plant, storage and diversion dam, and Echo Reservoir water, all acquired and purchased since 1903 was in issue. See paragraph 5 of the complaint (R. 2).

The 1903 deed restricted the Lyman Skeen right to “. . . water to be furnished from the now existing rights of the Utah Light & Power Company in the waters of Weber River, Mill Creek and Four Mile.” (R. 5). The 1914 decree limited the Lyman Skeen right to water

“ . . . in the natural sources of supply (exclusive of its pumping plant).”

Counsel for the defendants stipulated in open court with respect to the source:

MR. CLYDE: There is no issue on that. We don't deny that. I mean we are entitled to the four and five feet exactly as the deed says, and purchases they have made from Echo or improvements they have made in their pumping system to get other or different waters we have no interest.

With all of the foregoing before the court, a findings and decree were made by the trial court without mention of this important restriction of the contract water right. This error defeats the purpose of the litigation and deprives the plaintiff of its right to have all material issues determined.

It is well settled that the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. *Piper v. Eakle*, 78 Utah 342, 2 P2d 909; *Pike v. Clark*, 95 Utah 235, 75 P2d 1010; *West v. Standard Fuel Co.*, 81 Utah 300, 17 P2d 292; *Gaddis Inv. Co. v. Morrison*, 3 Utah 2d 43, 278 P2d 284; *Simper v. Brown*, 74 Utah 178, 278 P 529.

CONCLUSION

The trial court refused to enforce the condition subsequent in the 1904 deed, which automatically terminated, because of the refusal of the plaintiff to deliver water in 1969 and 1970, the exchange of water rights evidenced

by the 1903 and 1904 deeds. The enforcement of the termination of the exchange would make the other issues tried entirely moot and would restore the parties to the position they were in before the deeds were exchanged.

Assuming for the sake of argument only that the exchange has not been terminated the trial court erred in holding that the 1914 decree entirely superseded the 1903 deed, that the defendants can irrigate land other than that described in the 1903 deed, and that all water made available by the Lyman Skeen right can be beneficially used on the defendants' 50 acres of land that are within the deed description. The court further erred in failing to make findings and a decree on the issues of priority, the obligation to pay expenses of operation and maintenance in addition to the 30 cents per acre for the water, and the restriction of the defendants' water source to water rights in existence in 1903.

The decree should be reversed and the trial court should be directed to make and enter a decree restoring to the parties the water rights as they existed prior to the exchange of deeds. If such relief is not granted, the present decree should be modified to enforce the provisions of the 1903 deed as changed by the 1914 decree, and to grant to the plaintiff the equitable relief mentioned above.

Respectfully Submitted,

SKEEN AND SKEEN
E. J. SKEEN

Attorneys for Appellant

APPENDIX

THIS INDENTURE, made this 11th day of February, 1903, between the *UTAH LIGHT AND POWER COMPANY*, a corporation of the State of Utah, of the first part, and *LYMAN SKEEN* of Plain City, Weber County, State of Utah, of the second part, WITNESSETH: That,

WHEREAS, the party of the first part is the owner of a canal and canal system that extends from a certain point on the Weber River, in and through the Precincts of Marriott, Slaterville, Plain City, and Warren, and have built and are operating said canal system for irrigation of the lands of Warren Precinct and vicinity; and

WHEREAS, said party of the second part agrees to comply with certain requirements, and has executed and delivered to the party of the first part a good and sufficient deed to certain water ways and water rights;

NOW, THEREFORE, the party of the first part, in consideration of the sum of one dollar (\$1.00) to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and in consideration of the agreements by the party of the second part to and in favor of the party of the first part hereinafter contained, does by these presents hereby promise and agree, subject to the conditions hereinafter named, to furnish and deliver to said party of the second part, his heirs and assigns forever, limited as hereinafter

designated during the season of each and every year, beginning April 15th, and ending October 15th except when prevented by unusual storms, floods, droughts, disasters and other causes over which it has no control, and,

(1) Subject to all prior rights to the use of water in the several streams and sources from which said party of the first part now or may hereafter obtain its water supply, a water right for said period for 110 acres of land, which said water right, except as hereinafter modified, is determined upon the basis of one cubic foot per second, flowing continuously, for each one hundred and fifty acres of land. The water to be furnished to said party of the second part is to be delivered to him at from and on the grade of the nearest canal owned by said party of the first part, and the said water so delivered to said party of the second part must be taken under the direction of the party of the first part, and under such reasonable regulations as to place, and kind of head gates to be placed in the canal, which are to be furnished by the party of the first part, and also as to time, turns, and periods the water is to be used, consistent with the rights of the other water takers from said system, and never to exceed the amount aforesaid in the aggregate; and said water so furnished shall be used by said party of the second part, his heirs and assigns, upon the following described land, and not otherwise, to-wit:

The east 1/2 of the northwest 1/4 of Section 31, in Township Seven (7) north, of Range Two (2) West,

Salt Lake Meridian U.S. Survey; also beginning at the centre of said Section Thirty-one (31), thence South 0 deg. 45 min. west 820 feet, to centre of creek thence Southerly along creek to centre of road, thence north 89 deg. 55 min. west along centre of road 2107.5 feet, thence north 1 deg. 30 min. west 1570 feet to north line of said $\frac{1}{4}$ Section, thence South 88 deg. 05 min. east 1777.25 feet to place of beginning, in all 147.37 acres, more or less.

(2) Said water to be furnished from the now existing rights of the Utah Light & Power Company in the waters of Weber River, Mill Creek and Four Mile;

Provided, that when the water commences to fail, or is low, or insufficient in said canal for any cause, or in the sources from which the water is obtained by the party of the first part, the grantee shall have his proportion and pro-rata of the water with others now and hereafter, on the same system.

The said party of the second part, his heirs and assigns, shall pay on or before the first day of November in each year to said party of the first part, its successors and assigns, the sum of Thirty Cents per acre, lawful money of the United States, for each acre of water to which he is entitled, but in no case shall he be entitled to exceeding the amount of water hereby promised to be furnished to said party of the second part. And in case it shall be found at any time during or at the end of the season that the party of the second part has used or is using more water than he is entitled to, or has

irrigated more acres of ground than called for in his deed, said party of the first part shall have the right to collect the sum of \$2.00 per acre for each additional acre or part of an acre of water so used. And in default of the payment of said sums of money by the party of the second part to the party of the first part, or its successors or assigns, for water used by the party of the second part, or his heirs or assigns, on said lands or any part of them, or otherwise, said claims for payment of water shall at all times be and constitute a first lien in favor of the party of the first part on all of said water and water rights hereby conveyed or intended to be conveyed; and the party of the first part shall have the power, and it shall be its right to sell said water right or such part thereof as may be sufficient for the payment of said claim or claims after giving to the party of the second part thirty days' notice of the time, terms and conditions of said sale, and said company, the party of the first part, may be a purchaser at said sale.

Provided, further, that the said party of the second part shall have the right to redeem his water or water right, so summarily sold within one year of the date of said sale, and by paying the amount for which the same was sold, together with the costs of said sale, and interest at the rate of ten per cent per annum.

IN WITNESS WHEREOF, said party of the first part has hereunto caused its name and seal to be

affixed by its President and Secretary this 11th day of February, A.D. 1903.

UTAH LIGHT AND POWER COMPANY,

By Jos. F. Smith President

R. S. Campbell Secretary

(Duly acknowledged)

THIS INDENTURE made the 16th day of February, 1904, between Lyman Skeen and his wife Anna Skeen, of Plain City, Weber County, Utah, parties of the first part, and the Utah Light & Railway Company, a corporation of the State of Utah, party of the second part, **WITNESSETH:**

That whereas the parties of the first part have been up to this date, and are now the owner of the water right amounting to 307.20—1046.95 of the whole of Salt Creek, or Four Mile, a stream of water that takes its rise south of Plain City, in the County of Weber and State of Utah, and said parties of the first part are the owner of other interest in water rights, including canals and water ditches, and,

Whereas the party of the second part is about to make an exchange of said water rights from the said Lyman Skeen and his wife Anna Skeen, and in exchange therefor to transfer to them certain water rights in the Utah Light & Railway Company's canals and reservoirs, hereinafter referred to,—

Now, therefore, the parties of the first part, in consideration of the premises and the sum of one dollar

to them in hand paid, the receipt whereof is hereby acknowledged, and also in consideration of a certain deed for water and water rights given by the Utah Light & Power Company, predecessor of the Utah Light & Railway Company, in favor of said Lyman Skeen, which said deed is dated the 11th day of February, 1903, do hereby grant, bargain, sell and transfer to the party of the second part, its successors and assigns forever all their right, of, in and to the water and canal system of the said Salt Creek and Four Mile streams, and all right of, in and to the Salt Creek irrigation, being 307.20 dollars, in what is known as Salt Creek Irrigation Company, the said amount 307.20—1046.95 of the whole of said Salt Creek Irrigation Company, an unincorporated association, together with and including all the canals, ditches, reservoir and high-water rights owned by the parties; provided, that this conveyance shall not be deemed to include the private or lateral ditches owned by the parties of the first part connected with the main canal, or otherwise.

Provided always, and the above grant, by the party of the first part is made for the express consideration that in case the Utah Light & Railway Company, or its grantor, the Pioneer Electric Power Company, or any of its or their assigns, or successors in interest, shall wilfully refuse to carry out the agreement to deliver water which is contained in the deed, to the party of the first part hereto, which deed is dated in the caption 11th of February, 1903, then the grant of the water right in their deed shall cease and determine, and the parties

hereto of the first part shall be restored to all the right they had prior to the giving of this deed, and no length of time shall vary their part of this agreement.

The party of the second part at its expense is to take all necessary steps to protect and maintain the water hereby conveyed from depletion or from being taken from outside parties; and the grantor in case of suit or suits at law to protect said right shall at his expense furnish the witnesses and evidence to establish and protect the right hereby conveyed.

Provided, the party of the first part may limit the amount of water he shall use during any one season by giving written notice to the Company of the amount of water he desires to take, which notice shall be served upon the Company not later than May 1st of each year, in the fault of such notice the grantee shall be deemed to have taken his full amount to which he is entitled.

Lyman Skeen
Anna Skeen

Witness

J.D. Skeen

(Duly acknowledged)

(Title of the Court & Cause)

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto that a judgment and decree shall be entered in this cause by consent as follows:

That in lieu of the delivery by the defendant to the plaintiff of water from its canal system as provided in that certain deed from the plaintiff Lyman Skeen and wife to the Utah Light and Railway Company, dated February 16th, 1904, and that certain deed from the Utah Light and Power Company to Lyman Skeen dated February 11th, 1903, by turns and periods as in said last mentioned deed contained, that beginning with the irrigation season for the year 1915 and for each and every year thereafter that the said defendant will deliver to the plaintiff, his heirs and assigns, measured at the headgate of that certain lateral upon the north branch of defendant's canal system known as the Skeen Ditch, every fourteen days, beginning with the irrigation season of each year, five second feet of water to be used upon each delivery for a period of forty eight hours during the months of April, May, and June, and four second feet of water to be used for a period of forty eight hours delivered every fourteen days as aforesaid in the months of July, August and September. Provided that the said defendant shall not be held to make delivery if unable to do so by reason of any unavoidable accident to its canal system during the period required for its repair, or in case that there shall not be a sufficient quantity at the natural sources of supply, exclusive of its said pumping plant, of said canal system to make delivery of the full amounts herein provided for, in which case it shall be required to deliver only such quantity as it may be able to divert and deliver from its said natural sources of supply.

It is further agreed that the said plaintiff shall pay to the said defendant on or before the 1st day of November of each year the sum of thirty three dollars in full for the water supplied and furnished as aforesaid; provided however that the said defendant shall not be required thereafter to make delivery as hereinbefore provided until such payment shall have been made with legal interest thereon.

It is further stipulated that each party shall pay his own costs.