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Utah Supreme Court

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IN THE SUPREME
OF THE STATE

WARREN IRRIGATION
COMPANY, a corporation,
Appellant,
vs.
MILTON T. BROWN and
FLORENCE H. BROWN, his wife,
Respondents

RESPONDENT

Appeal from District
District in and for Weber
Honorable Ronald

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Sal

SKEEN & SKEEN
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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

RESPONDENTS' BRIEF

NATURE OF THE CASE

One would logically assume from the fact that the Warren Irrigation Company (Appellant) filed the complaint, that its water rights are in dispute. However, this is not the case. The Respondents acquired 80 acres of land and the water rights therefor by a deed dated October 23, 1939. (Ex. 9) Respondents receive their water through the canal system of the appellant company, and for the next 30 years (until 1969) they received their full decreed water every year without problem or protest, and paid the assessment made therefor, all in accordance with the terms of a decree between their predecessor, Lyman Skeen, and the Appellant here.

On June 5, 1969, the board of directors of the appellant company considered the question of limiting Respondents to no more than one-half of their decreed water right, due to the fact that part of the land owned by Respondents' predecessor had been sold. (See the minutes of June 5, 1969 meeting, Ex. 8). The Company did withhold delivery of one-half of the water, and Respondents, in July of 1970, filed a petition for an order requiring Appellant to deliver water to them in accordance with the 1914 decree. (Ex. L, File 4677).

The predecessors in interest of the Respondents had twice litigated these same water rights with the Warren Irrigation Co. The first litigation resulted in the decree, which is dated November 10, 1914. (Ex. L, File 4677). As we shall presently demonstrate, Lyman Skeen, who was the plaintiff in this 1914 action, and his immediate successors in interest, Mary E. Brown and David A. Skeen, received the water and paid the assessments in accordance with this 1914 decree, without any problem until 1937.

In 1937 the Warren Irrigation Co. again refused to deliver the water, and Mary E. Brown and David A. Skeen filed a petition in Civil No. 4677 (Ex. L) for an order directing the Appellant to deliver the water, as provided for in the 1914 decree. This petition also resulted in an order dated February 5, 1938, which as we shall later note in more detail, expressly confirmed that the petitioners were the owners of all rights decreed to Lyman Skeen in 1914, and directed the Ap-

pellant to deliver the water in accordance with that decree. However, although the petition, which was filed August 9, 1937, and the answer and other pleadings were properly filed in Civil No. 4677, (Ex. L) for some reason, the order itself, which was entered February 5, 1938, was filed in another case between the same parties, in Civil No. 4201, and that order is the last document in Ex. L. in the part of the file which is Civil No. 4201.

When Respondents filed their petition for an order to show cause in July, 1970, they gave it the number of the civil file where the 1938 order was filed. Attached to the petition were copies of both the 1914 decree, in Civil 4677, and the order entered in 1938, on the petition filed in Civil 4677, but as noted, the order was filed in Civil No. 4201. The order to show cause issued, there were some discovery procedures, and the matter finally came on for trial. At the trial, counsel for the Appellant raised for the first time the objection that the petition and order to show cause used Civil No. 4201 (which was the file where the 1938 order was filed) rather than Civil No. 4677 (which is the file where the 1914 decree was entered.) While we didn't agree that this was a problem, it could be readily cured by refiling the petition for the order to show cause in Civil No. 4677, and the trial did not proceed. Before Respondents could refile their petition, the Appellant filed its complaint in this action, and thereby attempted to collaterally attack the earlier decrees.

The trial court, in its Finding No. 1, correctly noted "that the water rights of the appellant company are not in dispute," and that the issue between the parties involved the right of the Respondents to receive the water decreed to Lyman Skeen on November 10, 1914. (R. 82). The board of directors of the appellant company, by refusing to deliver this decreed water to the Respondents, caused the lawsuit. The only reason they gave in their minutes for refusing to deliver the water was that part of the land owned by Lyman Skeen had been sold. (Ex. 8). As we shall presently see, this sale took place in 1922, and for 47 years thereafter the water was delivered to the Respondents and their predecessors. This litigation was filed because of this refusal to deliver the water, and the right of Respondents to receive this water is the issue the parties litigated, and it is the primary issue here.

STATEMENT OF FACTS

The Respondents' predecessor in interest, Lyman Skeen, acquired the water right, which is now in litigation, from Utah Power & Light Company, by a deed dated February 11, 1903. (Ex. H.) The Warren Irrigation Co., the Appellant here, succeeded to the rights of the power company, and thereafter in 1913 failed to deliver the water to Lyman Skeen in accordance with the 1903 deed. He filed a complaint in the District Court of Weber County, naming the Warren Irrigation Co. as the defendant. (Ex. L, Civil 4677). This litigation resulted in the entry of a decree, which is

dated November 10, 1914. The water was delivered by the Warren Irrigation Co. to Lyman Skeen and his successors in interest, in accordance with the terms of this decree for 55 years. The only problem the parties ever had during this 55 year period occurred in 1937 when the Appellant erroneously thought that it only had to furnish water when it was available in Four Mile Creek. (Tr. 55). When the company refused to deliver the water, Mary E. Brown and David A. Skeen, who were successors in interest to Lyman Skeen, (Ex. 10) filed a petition in 1937 to compel the delivery. They expressly alleged in paragraph 1 of their petition that they:

> ". . are the successors in interest of the plaintiff above named, Lyman Skeen, and now are the owners *of all rights* given and granted to the plaintiff Lyman Skeen by a decree of this court, entered on or about November 10, 1914."

The Warren Irrigation Co. (the appellant here) did not contravert that allegation, but to the contrary, in paragraph 1 of its answer, it admitted this allegation of ownership. (Ex. L Civil 4677). Mr. East, who was the president of the appellant company, for 36 years, said that the dispute in 1937 was over the source of the water. (Tr. 55). During the trial he and the attorney for the appellant company, Mr. David Wilson, went to the courthouse, and obtained the 1914 decree. Mr. Wilson said:

> "We just as well go back, we're beat," (Tr. 54).

They stopped the trial at that point, and Judge Wade entered the order of February 5, 1938, which we think

clearly found and determined that Mary E. Brown and David A. Skeen were the successors in interest to Lyman Skeen, and

> ". . . are now the owners of all rights given and granted to the plaintiff (Lyman Skeen) by the decree of this court entered herein on November 10, 1914." (Ex. L. Civil 420.)

The decree ordered the delivery of the water exactly as the 1914 decree had, to-wit, it ordered the appellant company to deliver the water to the petitioners for 48 hours out of every fourteen days. It assessed damages against the defendant for failure to deliver the water. There is not one single issue which was raised in the court below, nor which is raised here that could not have been raised in 1937. We will discuss this in more detail below. We note here only that the trial court in this case, in its Memorandum Decision, concluded:

> "The rights and obligations between the parties have been determined by previous decrees, which are res judicata. After living with these decrees for nearly fifty years, plaintiff is not in a position to raise issues which were or could have been previously settled." (R. 81)

There really is no dispute in the evidence. The water has been delivered to Lyman Skeen and his successors in interest in accordance with the 1914 decree at all times, except during the Summer of 1937. When the company refused to deliver the water in 1937, the matter was taken to court, as noted above,

and the court ordered the delivery of the water. Mary E. Brown, who was one of the petitioners in the 1937 litigation, was married to the father of Respondent Milton Brown in 1931 or 1932. (Tr. 61). Milton Brown resided in their home, and worked on the farm. He was familiar with the use of water from 1933 forward. He received the deed to his property (Ex. 9) in October of 1939.

No one at all denied that the water was delivered to Lyman Skeen and his said successors in interest in accordance with the 1914 decree, as above set forth. Harold M. Thompson, who was an officer and director of the appellant company, has been familiar with Milton Brown's farm for fifty years, and on cross-examination he testified, unequivocally, that for fifty years this decreed water has been used on the farm now owned by Milton Brown. (Tr. 21).

Elwood F. Skeen, who was called as a witness by the Appellant, was the son of Lyman Skeen. He was born in 1908, and at that time his father was living on this property. (Tr. 37). He would have been about 14 years of age in 1922 (Tr. 37). When he first remembers the farm of his father, Lyman Skeen, Lyman owned about 160 acres. (Tr. 40). He remembers the sale to his brothers, Wilford and Blaine, in 1922. (Tr. 40). He testified unequivocally on cross-examination that after the sale of the two 40-acre tracts to Wilford and Blaine (Ex. K) the decreed water was used on the 80 acres that Lyman had left after the sale. (Tr. 41). He also testified that Wilford and Blaine did not use

the decreed water. (Tr. 41). The witness said he had worked on his father's place, and had later leased it, and he irrigated the land which is now owned by Milton Brown, and which is shown on Ex. C. (Tr. 39). Milton Brown lived on the place since about 1933, and from 1933 to 1937 the only water that was available to irrigate the 80 acres now owned by Respondents was this decreed water. (Tr. 62). See also testimony of Morris Skeen. (Tr. 33). The Respondent, as noted above, acquired the property in 1939, and he received all of the decreed water for this land until 1969. (Tr. 62). A survey made for Respondents indicated that there are 79 acres in Respondents' tract, but they always called it 80 acres. (Tr. 66). The 1903 deed from Utah Power & Light Company contained a limitation on the place of use. It expressly said that the water could be used on 110 acres out of the 147 acre tract, and not otherwise. (Ex. H). Exhibit C shows the land in the Milton Brown farm, and the acreage shaded in dark blue is not within the permitted acreage under the 1903 deed. However, this place of use limitation is not carried forward in the 1914 decree, and the trial court expressly so found. (Finding No. 3, R. 84). Of course, this can be confirmed by examining the 1914 decree, which is in evidence. (Ex. L, Civil 4677). The evidence does not show when or for what reason Lyman Skeen started using water in violation of this restriction in the 1903 deed, nor does it show whether he did so, because of the 1914 decree. However, the uncontraverted evidence is that for at least fifty years, which goes back to the earliest memory

of the witnesses called, this decreed water right has been used on the 80 acres now owned by Milton Brown, and the witnesses all specifically stated that the land outside the 1903 deed was being irrigated. Harold M. Thompson, a witness for the Appellant, and an officer and director of appellant company, said that he could remember the use of the water on the Milton Brown farm for at least fifty years, and he expressly testified that the water was being used on land outside the 1903 deed. (Tr. 21, 22). Appellant's witness, Elwood F. Skeen, who was born on the Lyman Skeen place in 1908, also expressly so testified. (Tr. 38, 39). He also could remember back to 1922. Respondent Milton Brown, who can remember since 1933, also expressly so testified. (Tr. 67). No one testified to the contrary.

The trial court, in Finding 10 (R. 87) found that since 1922 the water has been used on the 80 acres owned by Respondents, that the water has been assessed against the defendants and their predecessors in interest; that no complaint has ever been made about the place of use, and that plaintiff is now barred, by its own conduct, by its laches, and its long acquiescence in the place of use from complaining that some of the water is used outside the 147 acre tract described in the 1903 deed.

Harold M. Thompson expressly admitted that for at least fifty years, the water was so used without protest from the company, (Tr. 22) and Milton Brown testified that he never had any protest from the com-

pany. (Tr. 67). So the court disposed of the contention that only 50 acres of the Milton Brown land could be irrigated on three bases: First, in Finding 3, R. 84, it found that the 1914 decree does not contain any limitations in regard to the place of use. Secondly, in Finding No. 9, the court found that the decreed water was being used on the 80 acres now owned by the Respondents in 1938 when the litigation occurred between Mary E. Brown and David Skeen, as petitioners, and the Warren Irrigation Company as Respondent, and that the appellant company could have raised any issues relating to the place of use in the 1938 litigation, but did not do so. (R. 87). Third, it found in Finding No. 10 that the water had been used on this 80 acres since at least 1922, without protest, and that the Appellant is barred by its own conduct, by its laches, and its long acquiescence in the place of use from now complaining that some of the water is used outside of the 147 acre tract.

ARGUMENT

POINT I

THE RIGHTS OF THE PARTIES HAVE ALREADY BEEN ADJUDICATED.

Before turning to the specific arguments of Appellant, we desire to note that this is an effort by the Appellant to collaterally attack the two earlier decrees entered against Appellant by the District Court for Weber County. The first litigation occurred in 1914, when Lyman Skeen filed his complaint in Civil No.

4677, alleging that Appellant was not delivering water to him in accordance with his rights under the 1903 deed. This litigation ended in a stipulated decree, which was very specific, and which the court quoted in its findings almost in full. (Finding No. 3, R. 83). It awarded Lyman Skeen 5 cubic feet of water for 48 hours out of every 14 days during the months of April, May and June, and 4 c.f.s. every 14 days for a period of 48 hours during the months of July, August and September. The water was to be supplied from Appellant's "natural sources of supply (exclusive of its pumping plant)." It further provided that if there was not sufficient water in the natural source of supply, the Warren Irrigation Co. "shall be required to deliver only such quantity as it may be able to divert and deliver from its said sources of supply." It fixed the annual payment "in full for the water supplied and furnished as aforesaid" at $33 per year, and it concluded by stating that if the rights of the plaintiff under the decree shall be terminated by the "foreclosure of any mortgage now existing on the property of the defendant, then and in that case, the rights of the parties hereto, as provided in those certain deeds and contracts set out as exhibits in the answer herein, shall revive and become in full force and effect." The two deeds which were attached to the answer are the 1903 deed from the power company to Lyman Skeen and the 1904 deed from Lyman Skeen and his wife to the power company.

There is nothing in the record to indicate any trouble or dispute over the administration of this decree until 1937. In 1937, the Appellant refused to deliver water to Mary E. Brown and David A. Skeen, who were the successors in interest to Lyman Skeen. (Ex. 10) Mary E. Brown and David A. Skeen filed a petition in Civil No. 4677 on August 9, 1937. In that petition they alleged that they were the successors in interest of Lyman Skeen "and *now are the owners of all rights* given and granted to the plaintiff Lyman Skeen by a decree of this court entered herein on or about November 10, 1914." This allegation is admitted by the Appellant in its answer. The petitioners alleged that the Appellant was refusing to deliver water, and asked for an order directing the company to deliver the water to the petitioners, in accordance with the 1914 decree.

As is noted above, the then president of the company, A. D. East, and the company attorney, David Wilson, after finding the 1914 decree, stopped the trial and permitted the order of February 5, 1938 to be entered (Ex. L. Note: The pleadings are in Civil No. 4677. The order is in Civil 4201.) This order expressly recited that the petitioners were the successors of Lyman Skeen, and that they "are now the owners of all rights" awarded to Lyman Skeen in the 1914 decrees. It directed the appellant company to deliver the water and assessed damages.

We won't labor this point further here, but we do desire to note that there is not one single issue raised on this appeal or in the trial court that is not related to things which had transpired before this 1937 litigation. The irrigation of land outside that permitted by the 1903 deed had started sometime at or before 1922. (Tr. 21, 38). The 40-acre tracts had been sold to Blaine and Wilford Skeen in 1922. (Ex. K). From 1922 until 1938, when the order was entered, 100 per cent of the Skeen decreed right was delivered to Lyman and his successors in interest. (Tr. 21, 31, 33, 38-40). None of it was delivered to Blaine or Wilford. (Tr. 31, 33, 38-40). The appellant company continued to assess 100 per cent of the water to Lyman Skeen and his successors. (Ex. 11, 12, 13). It did not assess any to Blaine or Wilford. (Ex. 11, 12, 13). If this transfer to Blaine and Wilford in any way affected the right of Lyman and his successors in interest to receive the water, that pattern had existed for more than fifteen years, and could have been and should have been raised in the 1937 litigation. The 1904 deed from Lyman Skeen and his wife to the power company, which has a reversion clause in it, had, of course, been in existence since 1904. If it automatically cancelled the rights of Lyman Skeen and his successors, whenever the Appellant withheld the water, this could have been and should have been raised as a defense in both the 1914 and the 1937 litigation. Any problems about the source of the water to supply the decreed right could have been raised in the 1937 litigation, which the court will note was only concerned with the problem of water sources.

The parties have lived by the 1914 decree for more than 55 years. The Appellant has twice litigated this right, and every issue it now raises in this action and on this appeal could have been raised in 1937. The defenses are all based on things which transpired before 1937, and the trial court correctly held that these previous decrees were res judicata.

It is elementary law that the principles of res judicata apply not only to the issues which were raised and litigated, but also to all issues which could have been raised. This matter is noted in *Wheadon v. Pearson,* 14 U. 2d 45, 376 P. 2d 946. There the court quoted from its earlier decision in *East Mill Creek Water Co. v. Salt Lake City,* 108 Ut. 315, 159 P. 2d 863, as follows:

> ". . . there are two kinds of cases where the doctrine of res judicata is applied: In the one the former action is an absolute bar to the maintenance of the second; it usually bars the successful party as well as the loser; it must be between the same parties or their privies; it applies not only to points and issues which are actually raised and decided therein but also to such as could have been therein adjudicated, but it only applies where the claim, demand or cause of action is the same in both cases. In such case the courts hold that the parties should litigate their entire claim, demand and cause of action, and every part, issue and ground thereof, and if one of the parties fails to raise any point or issue or to litigate any part of his claim, demand or cause of action and the matter goes to final judgment, such party may not again litigate that claim, demand or cause

> of action or any issue, point or part thereof which he could have but failed to litigate in the former action. . ."

See also *Wood v. Turner,* 19 Ut. 2d 133, 427 P. 2d 397.

The foregoing is also in accordance with the general law. See 46 Am. Jur. 2d, Judgments, Section 417.

The previous lawsuits, both in 1914 and 1937, were between the Warren Irrigation Company as the defendant and Lyman Skeen and his successors in interest as the petitioners. The water right with which we are concerned here is the same water right which was the subject matter of the two previous suits. This lawsuit, and both of the previous matters involved a failure on the part of the Appellant to deliver the water. In each of the two previous suits the Appellant retained an attorney and filed an answer. Many of the arguments now being made could have been made in 1914. This is particularly true of the claim that the 1904 deed automatically cancelled both deeds when the Appellant failed to deliver the water. Also, since the assessment for the joint use of the canal had been assessed at $33 per year, from at least 1907, that problem also could have been raised in 1914. Not one of the matters raised in Appellant's brief is based on anything that happened after 1937.

We thus submit that the matter is res judicata, and it should not be necessary to respond to these points, all of which could have been and should have been raised 30 to 55 years ago in previous litigation between the same parties over these same rights.

POINT II

THE COURT SHOULD NOT HAVE TERMINATED RESPONDENTS' WATER RIGHT, BECAUSE OF THE REVERSION CLAUSE IN THE 1904 DEED.

There are two reasons why the reversion clause in the 1904 deed will not operate as Appellant contends. First, this argument is barred by the two decrees already entered, and second, Appellant is misconstruing the reversion clause.

The 1904 deed was in existence when the Appellant and Lyman Skeen had their lawsuit in 1914. In fact, the deed was attached to the answer filed by the Appellant in that case. (Ex. L). The complaint of Lyman Skeen then is the same as the complaint of the Respondents now — to-wit, the Appellant had cut down the amount of water it was delivering to Lyman Skeen. If this refusal to deliver water automatically cancelled both the 1903 and the 1904 deeds, as Appellant now contends, Appellant should have raised that as a defense in the 1914 litigation. Apparently neither of the parties so construed the deeds. In his amended complaint, Lyman Skeen alleged that the parties had been making an exchange since 1896, and in paragraph 5 he alleged that the parties had mutually agreed that the arrangement should be permanent, and that deeds would be exchanged. The Appellant admitted the exchange, admitted the execution of the deeds, and attached copies of the deeds to its answer. It could have asserted the defense

which the Appellant is trying to assert now, but it didn't do so. Rather, it stipulated to a decree, and for 55 years the parties have administered the water in accordance with that decree.

Again in 1937 the Appellant refused to deliver water, and the successors of Lyman Skeen filed a petition to compel them to do so. Again, this defense that the 1904 deed wiped out both deeds and the 1914 decree could have been asserted as a defense. It was not so asserted, and the court affirmed the right of the petitioners in an order signed February 5, 1938, and for the next 30 years the parties abided by that decree, without protest or problem, and the trial court correctly held that this issue could not be raised at this late date.

Further, we submit that Appellant is misconstruing the terms of the deed. There is, as noted above, a deed from the power company, dated February 11, 1903, to Lyman Skeen. This was introduced as Ex. H, and a copy is attached to the answer of the Appellant in the 1914 suit. (Ex. L) Lyman Skeen and his wife, on February 16, 1904, gave an exchange deed to the power company. A copy of this deed is attached to Appellant's answer in Civil 4677. This 1904 deed contains the following language:

> "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."

We construe this provision to say that the power company and its successors are obligated to deliver water in accordance with the agreement which is contained in the 1903 deed, and if the power company and its successors wilfully fail to deliver the water, then the grant of the water right in "their deed", meaning the power companys' 1904 deed, shall cease and determine, "and the parties hereto of the first part" (meaning Lyman Skeen and his wife) "shall be restored to all of the right they had prior to the giving of *this deed.*" (The 1904 deed). It does not say that the party of the second part will be restored to its rights. What it does say is that Lyman Skeen and his wife shall be restored to the rights they had before they gave "this deed", the 1904 deed, and that the rights of the power company under the 1904 deed shall cease and determine.

In any event, we think this question is now moot. It is a problem which existed in 1913, when the company wilfully failed to deliver water. It could have been and should have been raised as a defense to that suit.

It was also available as a defense in 1937, when the Appellant again refused to deliver water and it could have been and should have been raised as a defense to that suit. But in was not. The trial court, in Finding No. 6, expressly found that this claim and any other claim and limitations contained in the deeds could have been raised by the plaintiff (appellant here) in the previous litigation, but they were not, and in 1914 the court issued an order which it says was in lieu of the deed, and in 1937 the court entered a further order that Respondents' predecessors owned all of the rights decreed to Lyman. The Appellant is more than 55 years late in raising this argument.

POINT III

THERE WAS NO ERROR IN THE COURT'S FINDING IN REGARD TO THE 1914 DECREE.

There isn't any finding by the trial court that the 1914 decree "entirely superseded the 1903 deed", as Appellant contends on page 14. This, in any event, is purely a collateral matter. Appellant does not tell us about anything that is in the 1903 deed which continues to control the rights of the parties, along with the 1914 decree.

The finding by the trial court that the decree was in lieu of the deed is in Finding No. 3, and the only thing the court does there is quote the language of the 1914 decree, which expressly says:

"That in lieu of the provision contained in that certain deed dated February 11, 1903," etc.

Lyman Skeen should receive certain water. Finding No. 3 in this case concludes by noting that the limitation in the 1903 deed prohibiting the use of water outside the 147-acre tract was not carried forward in the decree. (R. 83). This is a correct finding.

Appellant apparently wants this court to imply that the trial court placed its holding in regard to the place where the water could be used entirely on the fact that the limitation was not carried forward from the deed to the decree. It is clear, however, that this is not so.

The court, after correctly noting that this limitation was not carried forward into the decree, found in Finding No. 4 that for at least 50 years the water described in the 1914 decree has been used on the 80 acres which the Respondents now own. (R. 84). Then in Finding No. 10 (R. 87) the court found that since at least 1922 the decreed water had been used on Respondents' 80 acre-tract, that it had been assessed against the Respondents and their predecessors in interest, no complaint has ever been made about the place of use, and that the plaintiff is now barred by its own conduct, by its laches, and its long acquiescence in the place of use from now complaining that some of the water is used outside the 147 acre tract described in the 1903 deed.

The court also found in Finding No. 9 that the water was being used outside the 147 acre tract in 1937, when Mary E. Brown and David Skeen filed their petition against the Appellant, and the court expressly noted that the irrigation company could have raised any issues relating to the place of use in 1938 in that litigation, but did not do so. Appellant has not shown how it is damaged by the change in place of use. Appellant makes no effort to respond to the basis on which the court placed its decision. It merely makes the theoretic argument that the court wrongfully implied that every provision of the 1903 deed was superseded by the 1914 decree. The court made no such finding, and entered no such conclusion, and we don't know whether as an abstract matter the issue is genuine or moot. Certainly the finding that the limitation in the deed on the place of use was not carried forward into the decree is simply one detail in explanation of the fact that at least since 1922 the Appellant company and Lyman Skeen and his predecessors have ignored this provision of the deed and for the holding by the court that this is a matter that could have been and should have been raised in 1938. The court also found that the water right had been assessed to Respondents and their predecessors, that they have paid the assessment and based on all of these matters, the court held that this use outside the 147 acres described in the 1903 deed is not something the appellant can raise now.

We don't know what other provisions there are in the deed which Appellant contends have survived the decree. Certainly the schedule for delivering the water was expressly changed. Also, the deed provided that the water was to be furnished from the waters of the Weber River, Mill Creek and Four Mile. The decree provided that the water should be delivered from the company's natural sources of supply "exclusive of its pumping plant."

The deed provided that in the event of shortage, Skeen would have to pro-rate the use of water with water used by others on the same system. The decree provided that in case there is not sufficient water in the natural sources of supply exclusive of the pumping plant the company need only deliver the quantity which is available.

Both the decree and the deed provide for the payment of $33 per year for the use of the water. The language is different. The deed provides for payment of 30 cents per acre for each acre of water to which Lyman Skeen is entitled, and the decree converts this to $33 per year "in full for the water supplied and furnished." The first paragraph of the decree states, as quoted above, that "in lieu of the provisions contained" in the deed, water should be delivered according to the decree, and the last paragraph suggests that the deed was fully superseded. Apparently the irrigation company had mortgages on its canal system and water rights. If the mortgages were foreclosed, it would, of course, supersede the decree. The last

paragraph said that if these mortgages of the Appellant were foreclosed, thus terminating the decree,

> ". . . then and in that case, the rights of the parties hereto as provided in those certain deeds and contracts set out as exhibits in the answer herein *shall revive and become in full force and effect.*"

Thus, though the trial court made no finding that the decree totally superseded the deed, as Appellant asserts that it did, and although we don't know of any issue between the parties that makes this of any importance, it clearly would appear that the decree superseded the deed, because it is inconsistent with it in several particulars, including the schedule for the delivery of water, the source of water supply, administration in times of shortage, etc., as set forth above, and then the decree does use the words "in lieu of" in the first paragraph, and in the last paragraph talks of the deed being "revived," and "becoming in full force and effect" if the decree is terminated by the foreclosure of the mortgages. The decision of the court in regard to place of use and the rationale it used is correct. We don't believe that there is any other issue in this regard.

POINT IV

THE FINDINGS AND DECREE AS ENTERED ARE CORRECT.

Under its Point 3, Appellant raises five separate points. We now answer each of them.

The first point raised is whether Respondents are obligated to pay their share of the expenses of operating and maintaining the Appellant's canal system. The trial court dealt with this matter in its Finding No. 8, where it found that the decree of November 10, 1914, fixed the basis for annual assessments at 30 cents per acre, or $33 per year, that the assessments have been made on this basis for more than 58 years, that the $33 assessment was provided for in the original deed of 1903, and was carried forward into the decree, that this was the basis for the assessment in 1938, when further litigation was bad, and that the assessment against the water should be $33 per annum. Certainly, this finding is supported by the uncontraverted evidence. The deed (Ex. H) does provide for an assessment of 30 cents per acre for the 110 acres. The 1914 decree expressly provides that Lyman Skeen should pay each year "the sum of $33 in full for the water supplied and furnished as aforesaid." It goes on to say that the company doesn't have to deliver the water, unless the annual assessment is paid.

Exhibits 11, 12 and 13, which are xerox copies of the pages from the Appellant's books, show that since 1907 this is the way the parties have construed the deed and later the decree for the assessment throughout all of that time, and until the present dispute arose, has been on this basis. See also testimony of the Secretary of Appellant (Tr. 32). In 1922, Lyman Skeen apparently acquired two shares of stock, and the assessment made to him that year

shown in Ex. 13, is $33 for the Skeen water and $3.50 for the stock. In 1923 they are combined at $37, and they are combined in isolated years thereafter, but in 1924, 1925 and 1926 they are separated.

In Ex. 12, covering the period of 1929-1950, the top of the ledger shows: "Skeen Right 110 - 30 cents per share." During many of the years the $33 appears as a separate item. Ex. 11, covering 1951-1969, on the top of the sheet again appears "110 shares at 30 cents per share" and the water is separately assessed. So the deed provides for the $33. This is carried forward in different language in the decree. We have the books of the Appellant company since 1907, and they show that the parties themselves have so construed first the deed, and then the decree, and that the assessment since 1907 has been $33 per year. Part of the canal assessment is obviously for water rights and facilities acquired after the decree. See Tr. 27, where the witness is testifying about two pumps purchased for $4,400 and $4,800, and in 1945, and 1946, the construction of a dam in 1962 for $56,527, and reference is made to the purchase of water in the Echo Reservoir on page 28. See also testimony of Secretary of Appellant Tr. 31-33. The 1914 decree expressly gives Lyman Skeen no interest in the pumping plant. It says that the water is to be furnished from the natural sources of supply for the canal system "exclusive of its pumping plant" and as we stipulated on page 28, no claim is made to any water rights acquired after 1914. There is no rational basis for having Respondents pay the same price per share as do the

stockholders in the company, who have water masters, corporate officers and corporate expense, pumping plants and after-acquired water rights and facilities in which we have no interest. (Tr. 33). The parties themselves, for more than 62 years, have placed this construction on the 1903 deed and the 1914 decree, and the court correctly held that this is the correct assessment.

The next point raised by Appellant is the right of the defendants to irrigate land other than land from the 147 acres described in the 1903 deed. We have fully discussed this problem on page 20 of our brief, and will not repeat the arguments here.

As a part of Point B, however, the Appellant in one short paragraph discusses the alleged transfer of part of this water to Blaine and Wilford. (See page 22 of Appellant's brief). It was this alleged transfer which was the reason given by the company in its minutes on June 5, 1969 (Ex. 8) for refusing to deliver the water decreed to the Respondents. It was a major issue in the trial court, but is disposed of by a one sentence comment in the argument. We think we ought to give the court the details on it, and now do so.

Lyman Skeen had 160 acres of land in 1922 (Tr. 40). That year he sold 40 acres of the land to his son Blaine and 40 acres to his son Wilford. (Ex. K). The contention of the Appellant is that water was appurtenant to this 80 acres, and that under Section 73-1-11, U.C.A. 1953, the water passed with the land. The 1903

deed (Ex. H) fixed the place of use as being 110 acres out of a specifically described tract containing 147.37 acres. The deed does not describe the particular 110 acres to be irrigated. The statute on which Appellant relies expressly states that:

> "If a right has been exercised in irrigating different parcels of land at different times, the right shall pass to the grantee of any parcel of land on which the right was exercised next preceding" the conveyance.

Appellant did not show which part of Lyman's 160 acres were being irrigated in 1922 with the Skeen Right. Lyman Skeen's son, Elwood, was asked (Tr. 40) if he knew how the water was used before 1922, and he answered that he did not. So there is no showing that the water was appurtenant (used on) the two tracts sold to Wilford and Blaine.

It is, however, not contraverted that after the transfer to Wilford and Blaine, Lyman kept 80 acres, and that from 1922 until the date of this trial, the water in question was used on this land. We have discussed this above, and refer the court to the testimony of Harold M. Thompson, (Tr. 21, 22) and Elwood Skeen (Tr. 39-41), Milton Brown. (Tr. 61, 62) and Morris Skeen Tr. 33. During all of the time between 1922 and 1939, a water right could be acquired by seven years of continues, open and adverse use. See *Wellsville Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Ut. 448, 137 P. 2d 634. The uncontraverted evidence is that Ly-

man Skeen and his successors used the water on the remaining 80-acre tract, and the trial court so found. (Finding No. 5, R. 84).

Next, it is clear that neither Wilford nor Blaine claimed the water. The same year they acquired the land they gave a mortgage and they described their water rights as 25 shares in the Warren Irrigation Company (Ex. 4 and 5). It is equally clear that Lyman claimed it. Ex. 3 shows that Lyman Skeen pledged this water to the State of Utah. The pledge is noted on the Appellant's books. (Ex 3). The uncontraverted testimony is also to the effect that Blaine and Wilford never received any of the water (Tr. 33, 41, 21, 61-62, 46). Finally, this transaction took place in 1922. The Appellant had a law suit with Respondents' predecessors in interest, Mary E. Brown and David Skeen, in 1937. They filed a petition to compel the Appellant to deliver water to them in accordance with the 1914 decree. They expressly alleged in their petition that they were the owners of *"all the rights"* decreed to Lyman Skeen in 1914. The Warren Irrigation Company filed an answer in that suit, and it *admitted* this allegation. The litigation ended in an order dated February 5, 1938, confirming that the petitioners "are now the owners of all rights given and granted" to Lyman Skeen in 1914. If the transfer to Blaine and Wilford Skeen in 1922 was a legitimate issue, certainly it should have been raised as a defense to the 1937 petition. Not only did Appellant fail to raise the issue, it went beyond that and admitted in its pleadings, that Mary E. Brown and David Skeen were the owners "of

all rights" decreed to Lyman, and the trial court in 1938 so ordered, and for 30 years thereafter Appellant has delivered the water to Respondents. Certainly, the trial court was correct when it found in its Memorandum Decision that none of the water went to Wilford or Blaine; that they never claimed it; and that the Appellant is not in a position to claim it for them, and in its further notation that the parties have lived with the 1914 decree, which was strengthened by the 1938 decree, and the rights and obligations of the parties are res judicata. The court also found in detail the facts as recited above in regard to Wilford and Blaine in its finding No. 5. (R. 84).

The contention made under Point C is that the court should have made some finding or decree about relative priorities. This was not an issue, and it isn't one now. The issue was whether or not Respondents owned 100 per cent of the 1914 decreed right, and the court held that they did. It didn't modify that decree as to source, or in any other way. It simply settled that issue. The findings were served on the attorney for Appellant on the 8th day of July, 1971. The decree was not prepared at that time, and was not sent to the plaintiff's attorney until the 15th of July. They were then sent on to the court and entered on July 18th. During this period of time counsel made no objection to the form of the findings or to their failure to deal with additional issues, and no motions were made before the appeal was filed. The trial court committed no error in this regard.

The next point, which is raised on page 22 of Appellant's brief, is a fictitious claim that the water cannot be beneficially used. This argument ignores the holding of the court that for 50 years the 80 acre tract now owned by Milton Brown has been irrigated by this water, and for all the reasons noted above, the Appellant can't question the place of use now. The engineer called by the Appellant testified that in general, land in this area needs 3 acre feet of water per acre per year. (Tr. 10). On 80 acres this would require 240 acre feet. Appellant's expert also testified that if water were delivered strictly in accordance with the amounts required by the 1914 decree, Respondents would receive 252 acre feet during the irrigation season. (Tr. 9). This is only 12 feet more than the expert indicated would be needed under a three acre foot duty. On cross-examination he was asked if he had tried to make a precise determination for this particular 80-acre tract, and he said that he had not. He was asked if he might be in error as much as 10 or 15 per cent, and he said "Yes". (Tr. 11). Milton Brown, who has irrigated this tract since 1933, and makes his living as a farmer (Tr. 61, 62) testified that he needs all of the water for the 80 acre tract which he owns. (Tr. 63). Elwood Skeen, who was born on the ranch, had irrigated it, and finally leased it, was asked about the need for the water. (Tr. 38). He said that sometimes they had to skip some lucerne or something like that, to move it around to make enough water for the land until the grain matured, and then the Skeen right provided enough water. So again we assert that there is

no conflict in the evidence. The testimony of Respondent that he needed all of the water on the 80 acres is consistent with the testimony of the engineer of three acre feet (plus or minus 10-15%) is needed. The court made an express finding on this matter. (Finding 9, R. 87). It found that the water has been used on this 80 acre tract since 1922, and that "the entire 252 acre feet of water produced by said right can be and has been beneficially used on said 80 acres."

The final point on page 24 is also not an issue. We do not claim, the court did not rule, and there was no issue about water rights acquired after 1914. The 1914 decree gives us the right to receive a specified amount of water from the Appellant's natural sources of supply, exclusive of its pumping plant. All the trial court did here in that regard was to hold that Respondents own 100 per cent of that decreed right.

It is respectfully submitted that the judgment should be affirmed.

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