1972

Warren Irrigation Company, A Corporation v. Milton T. Brown and Florence H. Brown, His Wife : Reply Brief of Appellant

Utah Supreme Court

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

REPLY BRIEF OF APPELLANT

Appeal from a Judgment of the Second District Court for Weber County
Honorable Ronald O. Hyde, Judge

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ARGUMENT

The defendants seek affirmance of the judgment of the trial court principally on two grounds, (1) res judicata and (2) lapse of time has barred the plaintiff's right to relief. These points will be discussed in the order stated.

1. RES JUDICATA HAS NO APPLICATION TO THIS CASE.

The law relating to res judicata is only partially stated in the respondent's brief. It is pointed out that " . . . the principles of res judicata apply not only to issues which were raised and litigated, but also to all issues which could have been raised." (Res. br. p. 14)

The law is that where the causes of action differ, res judicata is a bar only to the extent that the earlier judgment actually raised and decided the same points and issues which were raised in the later case. We quote from the case of East Mill Creek Water Co. v. Salt Lake City, 108 Utah 315, 159 P2d 863, cited by defendants (Res. br. p. 14) continuing from the end of the portion of the opinion quoted by defendants:

> "On the other hand where the claim, demand or cause of action is different in the two cases then the former is res judicata of the latter only to the extent that the former actually raised and decided the same points and issues which are raised in the latter. Harding Company v. Harding, 352 Ill. 417 186 N.E. 152 (and other cases) . . . This distinction has been followed by this court although not expressly pointed out. (Citing many cases)"

This is in accord with the general law.

> 50 CJS, p. 174
>
> Matters which have not been expressly, impliedly, or necessarily determined are not con-

cluded by the judgment in a prior suit between the parties, and where the second case is on a different cause of action the prior judgment is res judicata or operates as an estoppel only as to matters actually litigated and determined.

The true test of the conclusiveness of a former judgment with respect to particular matters is the identity of issues. The adjudication of an issue in the first case is not conclusive of an entirely different and distinct issue arising in the second.

50 CJS pp. 198-200

Matters not in issue or necessarily involved in an action, particularly matters which involve facts or rights accruing after rendition of the judgment are not concluded in a subsequent suit on a different cause of action.

50 CJS p. 218

An adjudication as to the construction of a contract is conclusive in a subsequent action between the parties, provided the particular question was actually or necessarily determined.

50 CJS p. 237

We shall apply the principles discussed above to the facts of this case. The defendants claim that the issues framed by the pleadings in this case were, or might have been, determined in the case of Lyman Skeen v. Warren Irrigation o., No. 4677, which resulted in the stipulated decree dated November 10, 1914 and

by an order dated February 5, 1938 after a hearing on an order to show cause.

A review of the file in Case No. 4677 and the 1914 decree indicates that although, (as in the East Mill Creek case, supra,) the same instruments were involved in No. 4677 as in the present case, the causes of action were different and the issues decided were different. See the Amended Complaint in Exhibit L., *Case No.* 4677, which is a suit by Lyman Skeen to restrain the Warren Irrigation Company from cutting down the period of use of water due Lyman Skeen under the exchange agreement evidenced by the 1903 and 1904 deeds from 110 hours of water to 48 hours of water.

The only issues determined by the stipulation and decree based thereon were:

1. That 5 second feet of water would be delivered under the 1903 deed every 14 days for a period of 48 hours during the months of April, May and June, beginning in 1915 in lieu of delivery as provided by the decree (which was for a delivery of a constant flow for 110 acres on the basis of one second foot for 150 acres), and for reduction of the flow right to 4 second feet during the months of July, August and September.

,2. That the sources of the Lyman Skeen Water were " . . . the natural sources of supply exclusive of its said pumping plant."

3. The sum of $33.00 shall be paid each year " . . . in full *for the water* supplied and furnished." (Emphasis added).

The order to show cause which resulted in the 1938 order presented the issue as to whether on August 9, 1937 there was water available from natural sources of supply for delivery to the petitioner of four second feet of waetr as provided by the 1914 decree. The court found that the water was so availabile, that the defendant and its officers were mistaken in their belief that the water was not available and that they were acting in good faith and were not wilfully intending to violate tht 1914 decree. The only judgment entered was for $54.30 which represented the cost of measuring the water and costs of the court.

The issues in the present case include:

(1) Whether the exchange of water rights was terminated by the happening in 1969 of the condition subsequent in the 1904 deed.

(2) Whether the defendants were obligated to pay their share of expenses of operation and maintenance of the canal.

(3) Whether the defendants can irrigate land outside of the area described in the 1903 deed.

(4) Whether the defendants' water right has a priority superior to the plaintiff's right.

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

(6) Whether the defendants can have the benefit without cost to them of diversion, storage and distri-

bution facilities constructed by the plaintiff at great expense since February 11, 1903.

It is apparent from the above summary that this suit states a different cause of action and raises issues which were not litigated or decided by either the 1914 decree or the 1938 order. The 1914 decree simply changed the method of delivery of water from a constant flow of less than one second foot to a much larger flow for 48 hours every 14 days and restricted the source of water to "natural sources of supply" exclusive of pumped water. The 1969 willful refusal to deliver water under the 1903 deed had not happened in 1914 and 1938 and could not have been litigated. There was no issue before the court in either case, (1) as to payment of operation and maintenance costs in addition to $33.00 for the water, (2) as to whether the restriction as to place of use described in the 1903 deed could be enforced, (3) as to the relative priorities of the water rights of the plaintiff and defendants, and (4) as to whether the defendants were entitled, without cost, or expense to the benefit of improvements constructed by the plaintiff since 1945 at costs, exceeding $80,000.00. This latter issue obviously could not have been litigated many years before the expenditures were made.

The 1938 order based on the findings of fact recited therein determined that the petitioners were successors to Lyman Skeen; that they were entitled to water deliveries in accordance with the 1914 decree and that when the petition was filed in August, 1937, they were entitled to water from the natural supply, but there

were no issues pleaded or decided as to events which involved the construction of the 1903 and 1904 deeds, or the other issues pleaded in the present case.

It is clear under the rules of law stated above that the court erred in finding and decreeing that all issues raised in the present case were adjudicated in the 1914 and 1938 proceedings.

2. LAPSE OF TIME HAS NOT BARRED THE PLAINTIFF'S RIGHT TO RELIEF.

It was found by the trial court and argued at length in the respondent's brief that because of the long period of time since the 1903 and 1904 deeds, the 1914 decree and the 1938 order, the rights of the parties as to the amount of annual assessments, the place of use of water, and the sources of water delivered, the rights of the parties have become fixed and cannot now be disturbed.

This argument completely ignores the language in the 1904 deed, " . . . and no length of time shall vary their part of this agreement." (See p. 33, App's. br.), which follows the provision that " . . . in case the Utah Light & Ra ilway Company or its grantor, the Pioneer Electric Power Company or any of its or their assigns or successors in interest, shall willfully refuse to carry out the agreement—then the grant of the water right shall cease and determine . . . "

The law is that where the language of a condition subsequent is clear and specific it will be enforced.

Boughton v. Socony Oil Co., 231 CA 2d 188, 41 Cal. Rptr. 714

Alamo School District v. Jones, 182 CA 2d 180, 6 Cal. Rptr. 272

Rosecrans v. Pacific Electric Ry. Co., 21 Cal. 2d 602, 134 P2d 245.

Without waiving our position that the enforcement of the provisions in the 1904 deed restores the parties to their original positions, we wish to discuss further reasons why the lapse of time has had no significance.

The law relating to changes of place of use as set out in Section 8, Chapter 67, Laws of Utah, 1919 requiring changes only after filing an application with the state engineer, is perfectly clear and the fact that it has been violated for many years does not legalize such violation. The trial court completely ignored this statute.

As pointed out in the appellant's brief (p. 6) since 1945 the plaintiff spent more than $80,000.00 improving its distribution system of which more than $73,000.00 has been spent since 1962. The defendants' argument that circumstances have not changed with reference to annual assessments for the last 62 years is simply contrary to the facts. If the defendants' argument that the 1914 decree supersedes the 1903 deed which provided,

> "Said water to be furnished from now existing rights . . . ",

that the only restriction now is from "natural sources of supply" (except pumping), and that the annual

assessment is $33.00 which by long lapse of time is binding regardless of circumstances, is sustained, it is obvious that there has been and will be a gross injustice. The defendants will succeed in getting for practically nothing the great benefit of payment of assessments of from $2.00 to $7.00 per share since 1929. The defendants if they had been carrying their share of the load would have been paying $220.00 to $770.00 annually since that date.

The issues relating to the question as to whether the defendants should pay operation and maintenance expenses if they are to get the full benefit of the great improvements in the distribution system in the 1960's are new issues, and there has obviously been no long lapse of time before raising them.

It should be pointed out that on page 28 of the transcript the defendants, through their attorney, stipulated that they had no interest in water which has become available after 1903 by purchase or improvements or otherwise. This stipulation is acknowledged in the respondents' brief, pages 25-26, but is not incorporated into the findings and decree in this case. This was manifest error.

It is respectfully submitted that the decree in this case should be reversed and the trial court should be directed to enter a decree for the plaintiffs restoring the parties to the water rights as they existed before the 1903-1904 exchange of water rights. 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 as prayed.

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