1972

Fairfield Irrigation Company, Et Al v. M. Kenneth White and Ralph M. Smith : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FAIRFIELD IRRIGATION COMPANY, et al,
Plaintiffs and Appellants,

vs.

M. KENNETH WHITE and RALPH M. SMITH,
Defendants and Respondents

Case No. 12817

BRIEF OF APPELLANT

Appeal from Order of the Fourth District Court for Utah County
Hon. Joseph E. Nelson, Judge

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CASES CITED

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NATURE OF THE CASE

The appellant Fairfield is the owner of the right to use *"all"* of the water issuing from the Fairfield Springs near Fairfield, Utah. Respondent White owns large irrigation wells located near the springs. When Respondent's wells are pumped, they interfere with (reduce) the flow of the Fairfield Springs. Plaintiff's ownership of the Fairfield Springs and the relationship between the springs and respondent's wells were adjudicated by a decree entered by the District Court of Utah County on June 1, 1965. Defendant White appealed from that decree, but it was affirmed. *Fairfield Irrigation Co. v. White, et al,* 18 Ut. 2d 93, 416 P. 2d 641.

This proceeding was initiated by Fairfield's petition for an order to show cause. Fairfield asserted that Respondent was operating his wells without replacing water to the spring area, and that this violated Fairfield's rights as adjudicated in the 1965 decree.

DISPOSITION IN THE LOWER COURT

An order to show cause issued, and a hearing was held thereon on October 30, 1970. On January 28, 1972, the court entered its order dismissing the petition. Appellant requested entry of Findings of Fact and Conclusions of Law, but none was entered. (R. 17) The court did, however, in its order dismissing the petition, make a conclusionary finding that Respondent "did not violate the provisions of" the 1965 decree. (R. 16).

RELIEF SOUGHT ON APPEAL

Appellant seeks to have this court determine that the manner in which the Respondent is operating his wells violates the rights of the Appellant as fixed by the 1965 Decree.

STATEMENT OF FACTS

While the trial court did not enter any findings of fact or conclusions of law, and we, therefore, cannot direct our comments to the court's findings, we do not believe that there is any material dispute in the evidence.

As we shall presently note in detail, the trial court, in 1965, expressly found in its Finding No. 1 (R. 3) and expressly decreed in paragraph 1 of the decree (R. 4) that

Appellant Fairfield was the owner of the right to use *"all"* of the water issuing from the Fairfield Springs. The court also found in Finding No. 13 and decreed in Paragraph 3 of the decree, that the Respondent's irrigation wells and the Fairfield Springs are interconnected, and that the pumping of the irrigation wells "directly and immediately causes the flow of water from the Fairfield Springs to reduce in flow." (para. 3 of the decree)

In 1964 Respondent White drilled a replacement well near the springs for the purpose of replacing water "which was otherwise being taken from the Fairfield Springs by the pumping of defendant White's wells." The court found that this replacement well is also "directly connected to the spring, and when it is pumped, the flow of the spring decreases." (Finding No. 14) The amount flowing from the Fairfield Springs is not constant, even if it were not disturbed by Respondent's pumping, and thus the court in Finding No. 2, entered in 1965, found:

> ". . . the flow of water from the Fairfield Springs varied from a low of 4.10 c.f.s. to a high of 6 c.f.s., plus the quantity of water which has flowed through a one-inch hole in the headgate located one foot below the water surface, and also plus the water utilized through a four-inch pipeline to supply domestic water for the homes in Fairfield." (Finding No. 2)

As we will note in more detail below, Respondent White appealed from this 1965 decision, but it was affirmed.

Since the evidence shows, without dispute, that Respondent White has pumped one of his wells hundreds of hours, and that he has not operated his replacement well at all. The replacement well leaks 0.12 c.f.s. of water into the plaintiff's ditches, but other than for this leak there has been no replacement. The evidence in regard to this matter is found in Respondent's answers to Interrogatories. (R. 12) Answer 1 shows the hours each month, that Respondent White has operated one of his irrigation wells, and then in answer to question No. 2, he states that the replacement well "has not been pumped, but has flowed .12 c.f.s." into plaintiff's ditches. (R. 12)

The yield of the spring has been periodically measured since 1967, and the measurements are shown in Ex. 1 (Tr. 13). An engineer, Mr. George A. Lawrence, then platted these measurements on graphs (Tr. 19) (Ex. 2-5). Ex. 2 consists of six sheets, and shows in graph form the periodic measurements from January 15, 1967, until about August 10, 1970, which is shortly before the hearing.

We will not here endeavor to note all of the measurements for all of the years. We think we can get to the crux of the matter by looking at the irrigation season of 1969. This is shown on Ex. 3. Across the bottom of Ex. 3 are the number of hours that Mr. White said in his answers to interrogatories he pumped during each month. Thus, he started to pump at 11:30 a.m. on April 30th, and pumped 641 hours to May 30th. He did not pump in June. He pumped 370 hours in July, 569 hours in August, 612 hours in September, and 70 hours in October. As a matter of mathematics, there are only 720 hours in a 30-day month,

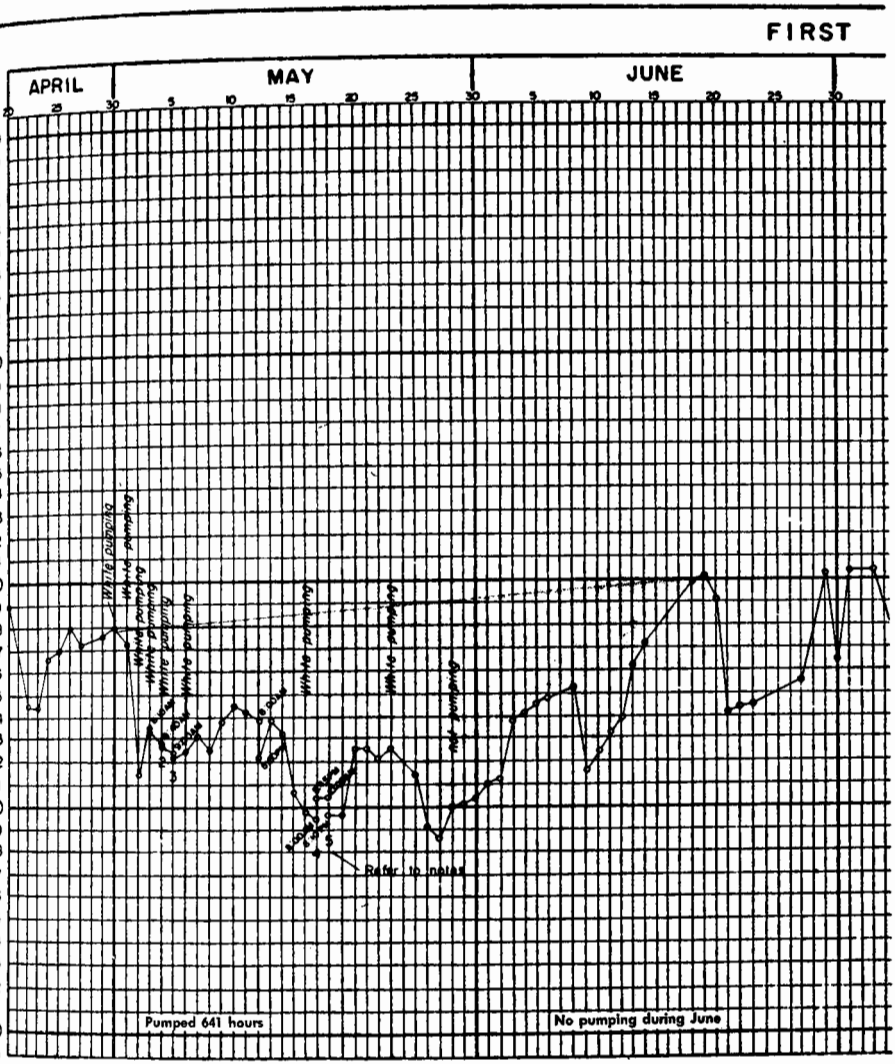
and thus during the irrigation season of 1969, the evidence, without dispute, shows that he pumped one well a majority of the time. The trial court found in 1965 that Mr. White has equipped his two irrigation wells to permit him to draw 5 c.f.s. from each well. (Finding No. 10.)

Ex. 3 shows that on April 30, 1969, when according to Mr. White's answers to interrogatories, he started to pump (R. 12) the springs were yielding 4.8 c.f.s. plus the 0.12 c.f.s. leaking from the replacement well. During the month of May, Mr. White pumped 641 hours, which would be more than 26 full (24-hour) days, and the measurements shown on the graph indicate that the spring was pulled down below 3.9 c.f.s. on June 26th (plus the 0.12 leaking from the replacement well). The measuring devices there are not so precise (Tr. 29-31) that we would contend for a technical violation of the decree in regard to a flow of 4.1 c.f.s., which is the minimum amount specified in the replacement order. (Par. 4 of the decree) What we do want to spotlight here is the fact that the spring plus the leakage from the replacement well, was nearly 5 c.f.s. when Mr. White turned on his pump on April 30, 1969, and the springs dropped in flow to or below their 4.1 c.f.s. minimum historic low flow, as found by the trial court, in 1965. Mr. White then shut off his pump, and did not pump at all in June. The springs gradually increased in flow, to more than 5 c.f.s. by the end of June. (Ex. 3) There are fluctuations up and down shown on the graph during the month of June, but when the water is changed from Fairfield's south ditch to its north ditch and back again, a problem exists in getting an accurate measurement. There is a pond which covers the spring area, and since the ditches

are different in elevation, there is always the possibility in switching the water from one ditch to another that water is either being impounded in the pond (and thus less than all the water is being measured) or water is being withdrawn from storage (and thus the measurements might reflect more than actual yield). (Tr. 30) It, nevertheless, is clear that the springs were producing (with the leak from the replacement well) 5 c.f.s. of water on April 30, 1969. Mr. White then pumped for 641 hours, and the flow of the spring dropped either to or below 4.1 c.f.s. He quit pumping, and the spring steadily increased in flow to more than 5 c.f.s.

We won't at this point dwell on the evidence on interference, because the trial court adjudicated in 1965 that the springs and Mr. White's wells produce water from the same source and that when his wells are pumped, the flow of the spring directly and immediately reduces. See paragraph 3 of the decree and paragraph 13 of the findings. It is thus adjudicated that while he was pumping his well 641 hours, he was taking water from the springs, and the graph simply confirms this. For the convenience of the court, we reproduce this part of the graph, and submit that the evidence conclusively shows that the water represented by the shaded part of the graph is water which the spring would naturally have yielded, but which Mr. White took by pumping his wells.

This poses the first question: When the spring is naturally flowing substantially in excess of its historic minimum flow of 4.1 c.f.s., can Mr. White at his sole discretion turn on his pumps and take the excess above 4.1 in a



NOTES:
1- Measurements 3 May, 1969 times being 8:10am, 12:00pm, and 3:00pm.
2- Measurements 4 May, 1969, 8:40am., 1:17pm., and 8:00pm.
3- Measurements 5 May, 1969, 9:00am., and 6:00pm.
4- Measurements 17 May, 1969, 8:00am., 8:40am., and 8:45pm.
5- Measurements 18 May, 1969, 10:00am., and 6:10pm.

critical growing month, like the month of June, and then have it replaced later on in the season, either through the natural yield of the spring itself of by operating his replacement facilities? We assert that replacement should be at the same time. If he takes 1 c.f.s. of our water on the 16th day of June, he should replace it on the 16th day of June, and not in October.

The evidence also conclusively shows that throughout the irrigation season of 1969, Mr. White pumped one well a total of 2262 hours. (Answers to Interrogatories, R. 12) The irrigation season is 183 days long. (See Finding 1) By dividing 24 hours into the total hours pumped, it is apparent that he pumped his well the equivalent of 94 days out of the 183-day season. By the end of the season, Ex. 6 shows that the spring had, nevertheless, yielded 1786 acre feet. Since he didn't pump his replacement well at all, it is obvious that but for his pumping, the total yield of the spring would have been very substantially higher. We cannot know how much, because while he is pumping, the equilibrium of the basin is destroyed, and as the Supreme Court noted in its opinion affirming the 1965 decree, it is impossible while he is pumping to determine with certainty what the springs would have yielded. (18 Ut. 2d 93, 98.)

This poses the second quesion: When it is clear, as we think the evidence is here, that the spring would yield substantially more water than 1600 acre feet, if Mr. White did not pump, can he, under a decree which awards to us all the water of the spring take all of the excess above 1600 acre feet and make no replacement at all?

ARGUMENT

POINT I

THE FOLLOWING PROVISIONS OF THE FINDINGS AND DECREE NEED TO BE CONSTRUED TOGETHER AS A HARMONIOUS WHOLE.

The findings, the decree entered in 1965 and the Supreme Court's opinion affirming them are in the file. For the convenience of the court, we next set forth some of the parts thereof which we think relate to the problem before us.

Finding No. 1 finds that the appellant has appropriated *"all"* of the water from the springs. It describes the winter rights, the livestock watering rights and the domestic rights. The material part is as follows:

> "1. That through usage prior to 1903, the predecessors in interest of the Fairfield Irrigation Company have appropriated and acquired the right to use for irrigation, livestock watering and domestic purposes all of the water flowing from the Fairfield Springs and spring area located immediately west from the Town of Fairfield, State of Utah. . . ." (Finding No. 1, R. 3)

Finding No. 2 is the finding about the yield of the spring in cubic feet per second and is as follows:

> "2. That prior to the drilling of large irrigation wells by the defendant M. Kenneth White . . . the flow of water from the Fairfield Springs varied from a low of 4.10 c.f.s. to a high of 6 c.f.s., plus the quantity of water, which has flowed through a one-inch hole in the headgate located one foot below the water surface, and also plus the water utilized through a four-inch pipeline to supply domestic water for the homes in Fairfield. . . ." (Finding No. 2 R. 131)

The court then makes some findings as to how many acre feet the springs would yield at particular flows, and states that a flow of 4.1 c.f.s. would produce more than 1400 feet per season, a flow of 4.5 c.f.s. would produce more than 1600 acre feet per season, and that a flow of 5 c.f.s. would produce more than 1800 acre feet per season, in addition to the town supply and livestock water through the one-inch hole.

The court then in the next several findings, finds that several of the individual plaintiffs were the owners of individual wells, and makes findings concerning the domestic springs.

In Finding No. 9 the court finds that the defendant White drilled two wells, one for 4 c.f.s. and one for 5 c.f.s.; that he equipped the wells with pumps and that on August 27, 1964, appellant was producing 10 c.f.s. from the two irrigation wells, plus a stock watering well. The court found that each well has been equipped to permit Mr. White to draw 5 c.f.s. from it. (Finding No. 10)

The court then found (R. 135, 136):

> "13. That when the defendant M. Kenneth White commenced pumping his two large irrigation wells in 1962, the pumping caused the flow of the Fairfield Springs to drop. That when the White wells were turned off toward the end of July, 1962, the flow of the spring started *in* increase, and in 1963, under a program of testing undertaken by the State Engineer's office the White irrigation wells were kept

off until a date near the middle of July. That both wells were then turned on, and again it was demonstrated that the wells immediately caused the flow of water from the Fairfield Springs to decrease substantially. The wells were shut off, and the flow from the springs again increased. The same direct connection was again demonstrated through the pumping of Mr. White's wells in October of 1963, and throughout the season of 1964."

"14. That in 1964 the defendant M. Kenneth White, with permission from the State Engineer, drilled a replacement well for the purpose of replacing water which was otherwise being taken from the Fairfield Springs by the pumping of defendant White's wells. That said replacement well is also directly connected to the spring, and when it is pumped, the flow of the spring decreases."

In Finding No. 16 the court found that by reason of the pumping of the wells by the appellant in 1964,

". . . the flow of the Fairfield Springs dropped substantially. That an effort was made to replace the water which was taken from the springs by defendant White's pumping, but the total yield of water from both the replacement well and the springs totalled only about 960 acre feet, whereas, the natural flow of the springs prior to the drilling of the large irrigation wells during the irrigation season would have varied between 1,400 and 1,700 acre feet. . . ." (R. 136)

The court found (Finding 17,) that as a direct result of the pumping by the appellant the particular Fairfield spring from which the town got its water supply was caused to go dry.

After thus expressly finding that appellant owned *"all"* of the water issuing from Fairfield Springs, and that the pumping by respondent of his wells directly interfered with the springs, the court then entered its Finding No. 26 as follows:

> "26. That the defendant White should also be enjoined from pumping his two large irrigation wells *at any time or during any season,* except upon the condition *that the water of the plaintiffs be fully replaced,* with the same quality of water, *with the same quantity of water,* and at the same point where each of the plaintiffs now gets his water. That said replacement order should specifically require (Emphasis added)
>
> "(a) That the irrigation water from Fairfield Springs be maintained at minimum flow of 4.10 cubic feet per second through April 20th to October 20th of each year, and that the average flow be such as to yield not less than 1600 acre feet during said season, and that at least 4.5 c.f.s. be maintained therein during the approximately 90 days when the ground is not frozen between October 20th and April 20th.
>
> "(c) That the town water pipeline have water replaced in it equal to the quantity it would yield or convey with a head of 18 inches of water above the top of the existing four inch line. That said water is in addition to the irrigation water.
>
> "(d) that sufficient additional water beyond the one-inch hole placed through the headgate be added to the natural channel to provide livestock water in the fields of all the plaintiffs which abut said channel. That said water shall be in addition to the irrigation and domestic water." (R. 141, 142)

Finding No. 29 then provides:

> "That if the White wells, including the replacement well, are pumped in the future to the extent they have been pumped in 1962, 1963 and 1964, there will be further reduction of ground water pressures and the flow of the spring will be further reduced." (R. 143)

The decree expressly confirmed the ownership of Fairfield to *all* of the waters issuing from Fairfield Spring. The language of paragraph 1 of the decree is in part as follows:

> "1. That the plaintiff Fairfield Irrigation Company is the owner, through a diligence appropriation, of the right to use, for the purposes noted below, *all* of the waters issuing from the Fairfield Springs area located immediately west from the town of Fairfield, and that said water has been since prior to 1903 used ***beneficially*** for irrigation, livestock watering and domestic use . . ."

Then follows specific findings about the livestock water, the winter use and the domestic use which are not presently involved. Paragraph 2 of the decree deals with individual wells of individual plaintiffs which are not here involved.

Paragraph 3 of the decree provides:

> "That the pumping of the three wells owned by the defendant M. Kenneth White . . . produces water from the same source and directly and immediately causes the flow of the water from the Fairfield Springs to reduce in flow. . . ."

After thus expressly finding that appellant owned *"all"* of the water issuing from Fairfield Springs, and that the pumping by respondent of his wells directly interfered with the springs, the court then entered its Finding No. 26 as follows:

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Then follows specific findings about the livestock water, the winter use and the domestic use which are not presently involved. Paragraph 2 of the decree deals with individual wells of individual plaintiffs which are not here involved.

Paragraph 3 of the decree provides:

> "That the pumping of the three wells owned by the defendant M. Kenneth White . . . produces water from the same source and directly and immediately causes the flow of the water from the Fairfield Springs to reduce in flow. . . ."

Paragraph 4 of the decree then enters the replacement order, which is quoted above in Finding 26, but the decree does not repeat part of the language of Finding 26 which found that White should be enjoined from pumping his two large irrigation wells *"at any time, or during any season."*, except upon condition that "the water of the plaintiffs be fully replaced . . . with the same quantity of water" at the same points where each of the plaintiffs now gets his water. The decree does contain the specific provisions of subparagraph (a) and (e) of Finding 26.

It is our position that subparagraphs (a) through (e) were not intended to give Mr. White any interest in the Fairfield Springs, nor to amend, subtract from, or limit the specific adjudication that Fairfield is the owner of *"all"* the water from the Fairfield Springs. It has been argued by Respondent that the 1600 acre feet figure in the replacement order was intended to be a finding of the amount of water Fairfield could beneficially use. However, Paragraph 1 of the decree expressly adjudicates that Fairfield has since prior to 1903 benefically used all of the water from the springs. There is no finding that the springs only yield 1600 acre feet, but as noted above, the court recited what the spring would yield if the flow were at different levels, and expressly in that finding refrained from any conclusion as to the springs' total flow. This method of handling the matter was vigorously challenged by Mr. White when he appealed from that decision, and in response we argued that there was evidence which would show that the spring would have yielded more than 2400 acre feet in 1963. Specifically, one of the farmers who had used the entire flow

during his turn on the same piece of land for many, many years, had testified that during 1963, when the spring yielded about 1237 acre feet (reduced because of Mr. White's pumping,) the stream was only about one-half of the quantity he had received in past years. In any event, the court didn't find in Finding No. 2 that the maximum yield of the spring was 1600 acre feet, and it didn't find that Fairfield could only use 1600 acre feet beneficially. What it did do was find and adjudicate that Fairfield had appropriated all of the water from the springs and that since prior to 1903 it had beneficially used all of the water from springs. It found that the flow of the spring varied from a low of 4.1 c.f.s. to a high of 6 c.f.s., and that a flow of 5 c.f.s. would yield 1800 acre feet per year. It simply awarded Fairfield all the water. It found that when Mr. White pumps his well, it immediately reduces the flow from the springs. It then made a general finding about the duty to replace. This finding is No. 26, and it expressly says that Mr. White should be enjoined from pumping:

> "at any time or during any season, except upon condition that the water of the plaintiffs (which had been adjudicated to be all the water from the springs) be fully replaced with . . . the same quantity of water."

We think this language prohibits Mr. White from taking the water in June and replacing it in October, and we think it also prohibits him from taking our water at any time or in any season without replacing it. If the subparagraphs which then follow were read entirely by themselves, and the specific findings and the specific decree provisions noted above are disregarded, it appears that

Mr. White has no duty, except not to reduce our springs below their historic minimum flow (4.1 c.f.s.). and that he can have all the water from the spring above 1600 acre feet, but to so interpret these subparagraphs ignores the very heart of the problem which caused the litigation.

We had a very lengthy trial, and the trial was concerned with the extent of Fairfield's water rights, and with the problem of whether the wells interfered with the springs. While Fairfield was put to proof about its diligence appropriation, there was never a serious dispute about the fact that historically all of the water had been used. The court so decreed, and then expressly decreed that it had been beneficially used. The big problem was to try to prove what the spring in its natural condition has yielded. There were not very many measurements taken before the equilibrium of the basin was destroyed by the drilling of wells. As the briefs in the previous appeal show, we used many types of evidence. We had the testimony of the individual farmers about the flow and yield of the spring. We had isolated measurements over a rather long period of years. We had an observation well maintained by the U.S.G.S., and the yield of the spring could be correlated with the elevation of water in the observation well, etc., and after what we remember as being about a twelve-day trial, the court found that the spring had never been below 4.1 c.f.s. before the equilibrium of the basin had been desroyed by drilling. It also found that the springs sometimes yielded as much as 6 c.f.s. It refused to find in Finding No. 2 specifically what the spring would yield in acre feet, but merely set forth a finding as to the acre feet which would be yielded by particular flows. It awarded Fairfield

all the water from the springs. It found that Fairfield had beneficially used all the water from the springs. It found that the wells interfered with the spring, and it found expressly that Mr. White should not be permitted to pump at any time or during any season, except upon condition that the plaintiffs' water be fully replaced with the same quantity of water.

The evidence here conclusively shows that he simply turns his wells on at his own discretion when the flow of the spring is greater than its historic minimum of 4.1 c.f.s. He has discovered that he can produce his well hundreds of hours without reducing the spring below 4.1 c.f.s., and then if he shuts off periodically the spring itself in the water years we have had since 1967, produces enough water to bring the total up to 1600 acre feet by October 20th. He thus takes much of the water which the spring would have yielded to us, and which we have historically had, in the critical months, and he asserts the right to take all of the spring water in excess of 1600 acre feet. The more than 2200 hours that he pumped his 5 c.f.s. well in 1969 assuredly took substantial amounts of spring water, which the court has adjudicated belongs to us, and he has made no replacement at all.

POINT II

IN CONSTRUING THE DECREE, IT SHOULD BE CONSTRUED TOGETHER AS A WHOLE SO AS TO GIVE MEANING AND FORCE TO ALL OF ITS TERMS.

The Utah cases uniformly hold that in construing a decree, it should be construed together as a whole, so as

to give meaning and force to all of its terms. It is also proper to look to the findings of fact which support the decree.

One case which is similar on its facts is *Ophir Creek Water Co. v. Ophir Hill Consol. Mining Co. et al,* 61 Ut. 551, 216 P. 490 (1923). In that case the decree awarded to Ophir Creek Water Co. "all of the waters of Ophir Creek." The defendant operated a power plant, which during high water took part of the water into its pipeline and during low water took all of the water into the line. The trial court had ruled that whenever there is an overflow at the head of the pipe, "'that is to say, whenever the entire flow of Ophir Creek" at the intake of the pipe is not being taken into the pipeline, then in the operation of its said power house, the defendant shall use for the delivery of water from the pipeline upon its water wheel a "nozzle with a discharge opening of 2⅜ inches in diameter, and shall at all times while such overflow continues, permit at least 7.5 c.f.s. to flow out of the pipe into the channel."

The case got back into court on an order to show cause why defendant should not be held in contempt. The defendant took the position that it had always complied with the decree in regard to a 2⅜ inch nozzle for the discharge of the water "just as the decree provides, and that was the measure of its duty under the decree."

In upholding the award of "all of the water of Ophir Creek" to the plaintiff irrigation company, and in holding that the defendant didn't meet his total duty by complying with the express provisions of the decree in regard to a 2⅜ inch nozzle, the court said:

"We have seen in the last-quoted paragraph of the decree, above set forth, that the water awarded plaintiff, as therein stated, is necessary and essential for plaintiff's use. It is manifest, therefore, that the purpose and object of the action was to specifically determine the rights of each of the parties, especially of the plaintiff to a specific quantity of water, and to quiet the title thereto. The quantity of water that each was entitled to was the principal thing to be determined. The method or means of discharging the water was of secondary importance. It is reasonably clear to the mind of the court that it was intended by the decree that appellant should permit 7.5 second feet of water to be discharged from its pipeline and returned to the stream whenever the water was not all taken into the pipe and there was an overflow at the head."

In other words, the court had found in its earlier decree that the irrigation company was the owner of all of the water from Ophir Creek. During low water, the entire creek flow could be taken into the pipeline, but during high water, the pipe wouldn't hold all of the water. In order to regulate the use of the water by the defendant for power, and to honor the decreed right of the plaintiff, the court had provided for a discharge of water through a 2⅜ inch nozzle, and the power company had complied strictly with the discharge through a nozzle of this size, but the plaintiff was not getting the water to which it was entitled, and the court said that it is manifest that the purpose of the action was to determine the water rights of each of the parties. The quantity of water that each was entitled to was the principal thing to be determined. The decreed method or means of discharging the water was of secondary importance, and would not be controlling.

Another case holding that it is necessary in the construction of a decree to construe the decree as a whole, taking into account all of the clauses, and to make them harmonious, one with the other, if this can be done, is *Salt Lake City v. Telluride Power Co.,* 82 Ut. 607, 17 P. 2d 281 (1932). Here again the court was being called upon to construe an earlier decree entered in 1901, and a supplemental decree made in 1912. The Supreme Court said that to determine the issues raised by the current appeal,

> " . . . it is necessary to construe and interpret the decree of 1912. . . . In construing the decree it is proper to refer to the pleadings in the case and the issues joined thereunder, in order to explain and limit the language used in the decree."

The court also said that in construing the decree, it should be construed together as a whole, so as to give meaning and force to all of its terms, and

> "In construing the decree, it should be construed together as a whole, so as to give meaning and force to all of its terms, and if a reasonable construction can be had which will give force to all of its wording, such a construction should be made. 23 Cyc. 1101. This being so, the only way to give effect to the words 'pumped water' would be to construe the two paragraphs together."

To the same effect is the more recent case of *Hubble v. Cache County Drainage District,* 123 Ut. 405, 259 P. 2d 893. Again the court was construing an earlier decree. The court quoted from the earlier decree, and said that it was necessary to consider the entire decree. It gave particular interpretation of it, and said, to hold otherwise "would treat as surplusage the word "improvements' ". The court

then cited *Salt Lake City v. Telluride Power Co.,* supra, in support of the proposition that in construing the decree, it should be construed together as a whole, so as to give meaning and force to all of its terms, and if a reasonable construction can be had which will give force to all of its words, such a construction should be made.

In *Huber v. Newman,* 106 Ut. 363, 145 P. 2d 780, the wording of the judgment, when read by itself, suggested that the defendant had to post a bond, without regard to whether plaintiff posted one. The conclusions of law, however, clearly indicated that defendant should post his bond, only "after" the court's approval of the plaintiff's bond. On appeal to the Supreme Court, the court held that it was necessary to read the conclusions of law and judgment together. The court said:

> "While the wording in the judgment might suggest that the defendant . . . was required to post an indemnity bond . . . whether plaintiffs had posted their bond . . . the conclusions of law clearly reveal that such is not the purpose or effect of the language used . . .The judgment must be construed in the light of the conclusions and must be read and given effect as indicated in the language . . ." of the conclusions.

The court has on a number of occasions also held that a decree awarding *"all of the water of a spring"* is clear, definite and unambiguous. In *Gianulakis v. Sharp,* 71 Ut. 528, 267 P. 1017 (1928), the parties had had a previous suit of the same name reported in 63 Ut. 255 P. 373 (1922). The parties agreed that the trial court should first determine whether that previous action was res adjudicata. The pleadings, findings of fact, conclusions of

law, decree and opinion of the Supreme Court affirming the decree, were all offered and received in evidence. The trial court then announced that he thought the issue had been adjudicated. On appeal to the Supreme Court in 1928 one of the contentions was that the former decree entered in 1922, which awarded to one of the parties all of the water from certain springs was void, for uncertainty. The findings recited that there were a number of springs, known as Big Springs, the East Springs and other unnamed springs located on the described land, and that for more than twenty years the plaintiff's predecessor in interest had diverted and used "all of the flow of water from each and all of said springs." The decree then provided that the defendant Sharp:

> " . . . is the owner and entitled to the use of all of the waters flowing from those certain springs known as Big Springs, East Springs and other unnamed springs."

The Supreme Court, at page 533 of the Utah Reports, said that there is nothing uncertain about the award of all the water from the springs to the plaintiff. It quiets plaintiff's title to all of the water flowing from the springs, and enjoins the defendant in that suit from taking any of the water of the springs. Then the court said:

> " . . . Nothing can be more certain than to decree all of the water flowing from certain designated springs to one party and perpetually enjoining the other party from taking any of the water flowing from such springs. This court has so held in the cases of Elmer v. McCune, 29 Utah 320, 81 P. 159; Anderson v. Hamson, 50 Utah 151, 167 P. 254. Nor can it be said that the decree is uncertain as to the period

> when Sharp is entitled to the use of all the water flowing from the springs. All of the waters flowing from the springs cannot well be considered to mean anything short of throughout the year. If there is any uncertainty in the decree in this respect, reference to the findings of fact hereinbefore set out makes it clear that Sharp was awarded all of the flow of water from all of the springs during all of each and every year."

The two cases cited fully support the above quote from the Utah Supreme Court.

In this case it is manifest that the primary issues were, first, plaintiff's ownership of the entire flow of the Fairfield Springs, and, second, whether the springs and the White wells were interconnected so that the pumping of the wells would take water from the springs. These are the issues raised by the pleadings. They are the issues resolved by the Court's Minute Entry and Ruling, and the issues resolved by the Findings, Conclusions and Decree. They were the issues raised on appeal to the Supreme Court.

The plaintiffs prevailed on these issues, with the Court finding in its Findings, and ruling in its Decree, that the plaintiffs had appropriated, through usage prior to 1903 *"all"* of the waters of the Fairfield Springs. The Court also found and decreed that the springs and the White wells produced water from the same source, and that the wells and the springs were immediately and directly interconnected, and that the production of water from the White wells took water from the springs.

Finding No. 26 is clear and unequivocal. It states that defendant White should be enjoined from pumping his two large wells.

> " . . . at any time or during any season, except upon condition that the *water of the plaintiff's be fully replaced* with the same quality of water, *with the same quantity of water,* and at the same point. . ."

It goes to say what the "replacement order" should require.

It is unreasonable to construe the replacement order as modifying or amending the adjudication which the court had made about the rights of the parties. The replacement order recognized the practical fact that if Mr. White was pumping the replacement well, which is immediately adjacent to the springs, and was pumping his other large wells, which are interconnected with the springs, it would be impossible to know what the springs would naturally yield if all the wells were off. It takes an average flow of about 4.4 c.f.s. to yield 1600 acre feet in the 183 day irrigation season. There is nothing whatever in the decree or in the findings even remotely to suggest that Mr. White can so manipulate his wells to give us less water in the critical growing months than the springs would naturally yield. We think that the language of Finding 26, which says that he is not to pump his well at any time or during any season, unless he fully replaces Fairfield's water, prohibits him from doing what he did in May and June of 1969, even if the court should hold that the replacement provision as to 1600 acre feet is in some way a restriction on the quantity of water awarded to us.

There is no sense, and there was no reason for a finding that the spring flow varies from 4.1 to 6 c.f.s., if all we could have is 4.1. There is no sense in or reason for a finding that 5 c.f.s. of water would yield 1800 acre feet, if in all events our right was limited to 1600 acre feet.

When he isn't making any replacement at all, it is res judicata that he takes our spring water when he pumps his well. Where the measurements show that the spring would be yielding at least 5 c.f.s. if he were not pumping, he ought to replace day by day on that basis. It is much more beneficial to us to have 5 c.f.s. in June, if nature will produce it, than it is to have 4 c.f.s. in June and 6 c.f.s. in October. Thus we assert that he must replace, in all events, day by day, and acre foot by acre foot, as he takes our water. We also assert that it was never intended by the specific replacement provisions to subtract from, limit or amend the express findings that we are the owners of and that we have beneficially used all of the water from the Fairfield Springs. The court should have adjudged that the prior decree means what it said, to-wit, that we are the owners of all of the water of the springs; that we are entitled to have the water day by day, as nature would produce it; that he cannot take our water in June and replace it in October; that he cannot have all of the water from the springs in excess of 4.1 c.f.s. whenever he elects to take it; and that he was not awarded the right to use all of the water from the spring in excess of 1600 acre feet. The evidence shows without contradiction, that he has pumped his well hundreds of hours since 1967, without

replacement. It is res judicata that he has taken our water, and without some further order from the court he will continue to do so. The conclusionary finding that what he is doing does not violate the decree is in error.

Respectfully submitted,

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