1959

Arthur L. Crawford v. Lehi irrigation Co. et al : Brief of Plaintiff and Appellant

Utah Supreme Court

J. Rulon Morgan; Elias Hansen; Attorneys for Plaintiff and Appellant;

In the Supreme Court of the State of Utah

ARTHUR L. CRAWFORD,
Plaintiff and Appellant,

v.

LEHI IRRIGATION COMPANY, a corporation, A. CLARK NELSON; R. WARD WEBB; VIRGIL H. PETERSON; JOSEPH E. SMITH; REED THOMPSON; W. H. DANSIE; GEORGE A. RICKS and RANDALL SCHOW,
Defendants and Respondents.

CASE NO. 9074

APPEALED FROM THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH, IN AND FOR UTAH COUNTY

Brief of Plaintiff and Appellant

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made apparent in this case that the water here brought in question is public water subject to appropriation because the defendant Irrigation Company filed upon the same a very short time after plaintiff made his filing.

There is still other well established principl of law which preclude defendant Irrigation Company from making the claim that plaintiff is not entitle to the entire second foot of water that he filed upon by his application 22,900. One who claims to have developed water near the source of supply of water owned by another which reaches the surface at a lower level must establish by clear proof that the water claimed to have been developed is not the water claimed or owned by the claimant or owner of the water which reaches the surface at a lower level. Peterson v. Wood, 71 Utah 77, 262 Pa 828; Mountain Lake Mining Co. v. Midway Irr. Co., 47 Utah 346, 149 Pac. 929; Silver King Consol. Mining Co. v. Sulton, et al., 85 Utah 297, 39 Pac. (2d) 682. Numerous other cases are cited in foot-notes to the last mentioned case. So also one who

has a water right or an approved application for the appropriation of water has a right to the source of supply of the water so owned or applied for. To hold otherwise would mean that one could go above the point where the owner or prior applicant diverts his water and there divert or apply for water and thus defeat the rights of the lower owner or applicant. Surely no one will contend that one may defeat a water right or a prior applicant to appropriate water by going farther up the stream and there divert or seek to divert any of the water that finds its way to the lower owner or prior applicant to appropriate the water of the stream. There is no evidence to support the Court's Finding of paragraph 5 wherein it is found:

"that application No. 22,900 did not by its terms purport to cover water developed by the Third East Drain of Lehi City, nor to appropriate the water developed at a considerably later date by a drain known as the Third West drain."

The evidence conclusively shows that the appellant in his application 22,900 filed on one second foot of water flowing at his point of diversion on May

14, 1951. There was no occasion for appellant to state in his application the various sources which supply the water upon which he filed. Neither the law nor the rules of the State Engineer, so far as we can find, make any such requirement. In order to defeat or minimize appellant's application No. 22,900 the Court in its Finding No. 8 found that the water accumulating in said two drains "had been beneficially used for irrigation purposes since prior to 1935." Even if that were so, such fact does not defeat or minimize appellant's right to a full second foot by reason of his application No. 22,900. See U.C.A. 1953, 73-3-1, and cases there cited.

POINTS V, VIII and XII.

BY POINTS V, VIII AND XII THE TRIAL COURT FIXED, CONCLUDED AND DECREED THAT THE TURNS OF THE USE OF THE WATER BY THE PLAINTIFF SHOULD BE FOURTEEN DAYS APART UNTIL JULY 1st AND TWELVE DAYS APART THEREAFTER. IN SO FINDING, CONCLUDING AND DECREEING THE TRIAL COURT IGNORED THE EVIDENCE AND GREVIOUSLY ERRED.

It will be seen from the evidence heretofore abstracted that the land upon which appellant desires to use the water applied for is alkaline. The

evidence also shows that in order to keep such crops as appellant grows upon his land it is necessary that the same be irrigated as often as once a week. See testimony of appellant, Tr. 78-85, and of Rex Holmstead, Tr. 32. Notwithstanding that appellant is an interested party his testimony as to the frequent need of irrigation should be given considerable weight because of his scientific training and his actual experience. Authors of scientific works on the effect of alkali on crops are in accord with the testimony of the appellant. Dr. Franklin S. Harris, former President of the Brigham Young University and of the State Agricultural College, in his book on Soil Alkali has this to say:

"Under some conditions, such as after irrigation or heavy rains, alkali may be so diffused throughout the soil that the concentration at any point is not sufficient to prevent the crop from beginning a good growth. . . . When a seed is placed in a strong salt solution or a soil that has a large amount of alkali it does not absorb moisture, consequently it lies dormant the same as it would in dry soil or dry air." (Pages 36-37)

Fig. 8, page 61, Alkali crusts at the surface preventing the growth of practically all vegeta-

tion. At pages 229-230, it is said:

"Experiments in Wyoming (31) show that where only small quantities of water are added practically all of the salts in the water are retained by the soil. Large quantities of water applied weekly or semi-weekly kept the salts moving downward continually".

At page 235 the author says:

"Experiments have shown that land flooded every 8 days with alkali water contains less than one-third the quantity of alkali found in the temporary ridges under furrow irrigation and about 27 per cent of that found in uncultivated tree rows."

Several views are expressed by Thorne and Peterson in their book entitled "Irrigated Soils", 2nd Ed. page 142, where it is said that:

"The amount of soluble salt in the soil is an additional factor which often necessitates heavier water applications than would be desirable for an efficient irrigation",

and at page 159 where it is said that:

"Since all irrigation water contains some dissolved salts there must be some extra water applied to each accumulated residue from the soil * * *."

We shall not burden the Court with further quotations from the authorities above mentioned because it would seem obvious that if water containing alkali is applied to land that is itself alkali, some of such water must be permitted to run off the land because otherwise each irrigation would add to the amount

of alkali in the soil. So also if water containing alkali evaporates leaving a crust of alkali on the surface, the plants growing therein will wilt and cease to grow. That is especially so where the ground is not shaded by crops.

Moreover, there is no evidence and no finding is made that the stockholders of the defendant Irrigation Company will be injured by allowing appellant to have his turns once a week. It should be kept in mind that plaintiff's filing No. 22,900 is prior to those of defendant Irrigation Company. That being so, by what right should appellant yield to the whim of the Irrigation Company. Defendant Irrigation Company is without right to determine the time that shall elapse between turns especially where, as here, to do so would result in grave damage to the appellant. Bartholomew v. Fayette Irr. Co., 31 Utah 1, 86 Pac. 481.

POINT IV

THE TRIAL COURT ERRED IN MAKING THAT PART OF ITS FINDING NO. 12 WHEREIN IT FOUND THAT PLAINTIFF CAN

BENEFICIALLY USE UP TO THREE ACRE FEET OF WATER PER YEAR TO IRRIGATE THE LAND PRESENTLY OWNED BY HIM.

A reading of the pleadings will show that there is no issue therein as to the duty of water on the lands of plaintiff. At the trial plaintiff objected to such testimony. Moreover, the validity of application 22,900 is in no way dependent upon the duty of water on the land presently owned by him. U.C.A. 1953, 73-3-1; Sewards v. Meagher, 37 Utah 212, 108 Pac. 1112; East Grouse Creek Water Co, Ltd., v. Frost, 66 Utah 587, 245 Pac. 338; Whitmore v. Salt Lake City, 89 Utah 387, 57 Pac. (2d) 726. Such finding is prejudicial not only because the appellant was not advised that any such claim would be made, but also because it tends to give the defendant Irrigation Company an excuse for withholding some of the water applied for by appellant.

POINTS VI, X and XIV.

THE TRIAL COURT ERRED IN ITS FINDING THAT IT IS NOT NECESSARY TO GRANT PLAINTIFF ANY INJUNCTIVE RELIEF, CONCLUDING THAT HE IS NOT ENTITLED TO INJUNCTIVE RELIEF AND DECREEING THAT HE IS NOT ENTITLED TO SUCH RELIEF.

It is, of course, the established law in this jurisdiction that one who makes an application to appropriate water must show that he has placed the same to beneficial use before he may acquire a Certificate of Appropriation. U.C.A. 1953, 73-3-16 and 17, and cases cited in footnotes to the text. If defendant Irrigation Company and its officers are permitted to behave as they have in the past, it will be impossible for appellant to make his proof that he had put the water applied for to a beneficial use. The fact that defendants have resisted injunctive relief and have received from the Court an erroneous Finding as to the duty of water on appellant's land is calculated to enable the defendants to defeat appellant's application. There would seem to be no other purpose. Obviously if appellant is to be thus deprived of being able to prove up on his application , he will suffer irreparable injury. It will further be noted that the respondents are in effect given the power to determine the quantity of water that appellant can beneficially use.

POINT XIII.

THE TRIAL COURT ERRED IN DENYING APPELLANT DAMAGES.

On May 6, 1955, a Stipulation was entered into between Counsel for the parties whereby the temporary restraining order theretofore issued was dismissed and the parties entered into a stipulation to the effect that plaintiff should have the right to keep his dam in the drain in question 48 hours of each seven days, and that if Crawford elects to rent water and the Court shall find that the ten hour schedule given to Mr. Crawford is less water than he is entitled to, then Mr. Crawford may rent water and the defendant Company will pay the reasonable rental price of the water he rents. (R. 45 and 53) The evidence shows, and the Court found, that Crawford did use more water than the ten hours each turn; that he rented 20 shares of water from Mr. McCullough in 1955 for which he paid $5.00 per share or $100.00. In 1956 he again rented 20 shares from Mr. McCullough for which he paid $100.00, and in 1957 he rented 20 shares from Mr. McCullough for which he paid $100.00, making a total of $300.00. (Tr. 80-81)

There is also evidence that Mr. Crawford was deprived of the water which he filed upon in 1954 after July 17th of that year. There is other evidence of the damages which Mr. Crawford sustained. It may be that the Court below was justified in finding against Mr. Crawford as to some of the damages he claims to have sustained, but the evidence, together with the Findings of the Court, show that Crawford is entitled to damages at least in the sum of $300.00. The stockholders of defendant Irrigation Company had the use of the water which belonged to Crawford, and they are not entitled to be thus unjustly enriched.

We submit that the Decree and Judgement be amended in the foregoing particulars, and the Court below should be directed to so amend the same.

Respectfully submitted,

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