1959

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

Utah Supreme Court

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

Reply Brief of Plaintiff and Appellant

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CASES CITED

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REPLY BRIEF

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There are some matters discussed in Respondents' Brief which we deem require a reply. However, it would serve no useful purpose to refer to the disparaging remarks that Counsel for defendants make in their Brief concerning Appellant and his testimony. It may be observed, however, that it too frequently occurs that when there is no basis for attacking the testimony of witness resort is had to abuse in the hope that such abuse will serve the function of logic. We are satisfied

that this Court will properly evaluate the testimony of plaintiff and appellant without us pointing out the numerous reasons why the same is worthy of belief. This further observation should be made.

In the Stipulation had with respect to the manner in which plaintiff was to be supplied with water he had filed upon, it was provided that such stipulation should be without prejudice to the claims of the parties. Notwithstanding such stipulation and contrary to the provisions thereof Counsel for Respondents contend in their Brief that such stipulation indicated that plaintiff was content to have his turns of water as much as fourteen days apart. We have always understood that stipulation should be binding upon the Counsel and upon the Court when approved by it, and may not be employed as a means of securing a final favorable decision.

THE APPELLANT DID NOT CONFINE HIS APPLICATION NUMBERED 22,900 TO MERELY APPROPRIATE THE WATER THAT FLOWED IN THE UNNAMED DRAIN AT SOME DISTANT PAST.

There is quoted on page 7 of Respondents' Brief some of the language of the Brief of Appellant. From the language quoted it is concluded that Appellant concedes that plaintiff only intended to file on the water historically flowing in the open unnamed drain, but confuses the evidence. Just what is meant by water historically flowing in the unnamed drain certainly cannot be ascertained by the filing made by plaintiff. Nor does the testimony of plaintiff support or tend to support such a novel theory. In support of such theory the following cases are cited: Smithfield West Bench Irrigation Co. v. Union Central Life Ins. Co., 105 Utah 468, 142 Pac. (2d) 866; Lehi Irrigation Co. v. Jones, 115 Utah 136, 143, 202 Pac. (2d) 892; McNaughton v. Eaton, 121 Utah 394, 242 Pac. (2d) 570. In our view none of those cases support or tend to support the theory advanced by Respondents.

In the case of Smithfield West Bench Irr. Co. v. Union Central Life Ins. Co., et al., supra, the law is thus stated:

> "The owner of a water right, after diversion from the stream is the owner and entitled to possession of the water itself, the corpus of the water as long as he retains it in his ditch or reservoir on his property or under his control. Burkart v. Meiberg, 37 Colo. 187, 86 p. 98, 6L.R.A., N.S. 1104, 119 An. St. Rep. 279; Weil, Water Rights in Western States, Vol. 1, page 50ff. Once the water has passed beyond these conditions it is no longer the water or property of the prior appropriator. Under such conditions an appropriator cannot complain of the use of water by another below his point of diversion of use. (citing cases) But once the water has passed onto the land of another and out of the control of the user, the right to use such water passes to the occupant of the land upon which it is found."

The same doctrine is adhered to in the case of McNaughton v. Eaton, supra.

In the case of Lehi Irr. Co. v. Jones, et al., supra, it is held that Jones, having acquired a right to the flow of a spring, did not have a right to other springs which were developed by reason of water having been applied to the lands above the spring water owned by Jones. It will readily be seen that the facts in the foregoing cases are so unlike the facts in this case that the law there announced does not aid Respondents here. There is no evidence that the Lehi Irrigation Company ever owned the water which was filed upon

by Crawford. The water was brought about by the Provo Reservoir constructing its canals above the lands in Lehi City. See Testimony of Swen Peter Hanson. That occurred in about 1914 or '15 when they put water across the bench and sold Deer Creek water to the stockholders on the north. (Tr. 195-196) Not only does the evidence fail to show that the Lehi Irrigation Company ever owned the water here brought in question, but so far as appears the Lehi Irrigation Company never made any attempt to control, nor made any claim to the water here involved until it made the filings in the office of the State Engineer, which were made after the first filing of Crawford. Nor is there any evidence that an additional source of supply of water was brought into the area at the point where Crawford made his filing after such filing was made.

It is true that Appellant offered evidence to show the flow of water in the unnamed drain during a period extending back some time before

the date when he filed his application numbered 22,900. If Respondents' historical theory as to the time that plaintiff intended his filing to take effect, it is difficult to tell when in the past such intention took effect. Was it ten years or ten days before the filing was actually made. The only reasonable inference to be drawn from the evidence is that Crawford intended to apply for the water available for appropriation at the time and place of making the application. Any other conclusion would deny to Crawford the qualities common to a normal person. The obvious purpose of offering evidence as to the flow of the water flowing in the drain prior to the time and place where filing numbered 22,900 was made was to ward off any claim that the Lehi Irrigation Company may advance in support of the claim that it and not Crawford was entitled to such water, or some part thereof. That Crawford and his Counsel were right in assuming that the Lehi Irrigation Company would make such a claim is amply born

out by the evidence it offered. A struggle was made in an attempt to show that it had acquired a diligenceright to the use of some water from some of the owners of lots in Lehi City. It failed in such attempt because: It is made to appear that after the Provo Reservoir Company water was carried across the lands above the land in Lehi some of the Lehi people, among whom were a Mr. Logsdon, Thomas Webb, George Webb, Ray Robertson and Bill Nelson, used some of the water which seeped from the Provo Reservoir Canal and used some of such seepage water shortly before 1920. (Tr. 197) That such water was used until the City drain was constructed. (Tr. 198) There is other evidence to the same effect. While there is evidence that one-half a second foot of water was beneficially used by the persons above mentioned, (Tr. 227), there is no evidence as to the amount of land that was irrigated with the one-half second foot, or what part of the water used found its way back into the drain. The claim is made that the parties

who used the water above mentioned acquired a diligence right thereto, and that the same was conveyed to the Respondent Lehi Irrigation Company. Ever since this Court rendered its opinion in the case of Deseret Livestock Co. v. Hooppiania, 66 Utah 25, 239 Pac. 479, it has become the settled law of Utah that a water right, except underground water, cannot be acquired without a compliance with the provisions of Chapter 100, Laws of Utah, 1903, now U.C.A. 1953, 73-3-1. No claim is made in this case that a compliance was ever had with that provision. Nor is it claimed that the persons who claim to have used the one-half second foot ever complied with the provisions of Chapter 105, Laws of Utah 1935. The sole basis for the claim of the one-half second foot is that certain residents of Lehi City used the water prior to 1935. We are mindful of the law announced in such cases as Hanson v. Salt Lake City, 205 Pac. (2d) 255, 115 Utah 404, where it is held that the law enacted in 1903, did not apply to underground

water which had been developed and beneficially used after 1903 and prior to 1935.

In the case of Hanson v. Salt Lake City, supra, the laws of Utah touching the manner in which a water right may be acquired in Utah is discussed at length, but the facts in this case do not bring it within the law announced in the case of Hanson v. Salt Lake City, supra, because there is no evidence that the residents of Lehi City who now claim to have had a right to the use of one-half a second foot of water did anything to develop that water. All that they did according to the evidence was to divert and use the water which had been collected in the drains of and abandoned by Lehi City. See also Fairfield Irr. Co. v. Carson, 247 Pac. (2d) 1004, 122 Utah 225. There can be no doubt that such water flowed in a well defined channel when the residents of Lehi City began using the same. If the citizens of Lehi City who claimed the one-half second foot of water had no title thereto, they could not convey a title to the Respondent Lehi

Irrigation Company. Notwithstanding these facts the trial court found in its Finding numbered 11 (R.68) and by its Decree, (R.70), that the above mentioned one-half second foot is owned by Respondent, Lehi Irrigation Company. It is, in effect, argued in Respondents' Brief that Appellant may not be heard to claim the invalidity of Respondents' claim to the above mentioned one-half second foot because he offered evidence touching the quantity of water that was flowing in the drain at the point which Appellant designated as his point of diversion. As we pointed out in our original Brief, this Court is committed to the doctrine that a right to the water of a stream extends to its source. Among additional cases which support such elementary doctrine are: Wrathall v. Johnson, 86 Utah 50, 40 Pac. (2d) 755; Cole and Thomas v. Richards Irr. Co., 27 Utah 205, 75 Pac. 376; Yates v. Newton, 59 Utah 105, 202 Pac. 208; Chandler, et al., v. Utah Copper Co., 43 Utah 479, 136 Pac. 106. Moreover, there is no evidence that Respondent Lehi Irrigation

Company has ever received a written conveyance from anyone to the water right here involved. U.C.A. 1953, 73-1-10.

THE LAW PERMITS THE FILING OF AN APPLICATION TO APPROPRIATE WATER FROM A SOURCE THAT HAS NO NAME.

On page 17 of Respondents' Brief attention is called to U.C.A. 1953, 73-3-2, which provides that the application to appropriate water shall name the source of the water. It is true that the application of Appellant does not state any name of the stream upon which Appellant made his filing. Evidently the stream did not have a name at the point where the filing was made. However, the filing stated the point where the water applied for was to be diverted. That being so, no one could be mislead as to the water that Appellant seeks to appropriate. The State Engineer apparently had no difficulty in determining what water applicant seeks to appropriate. The application was made on a form provided by the State Engineer, and the State Engineer approved the same as being in conformity

with a proper application.

THE NECESSITY OF FREQUENT IRRIGATIONS OF ALKALI LANDS IN UTAH IS THE SAME AS LANDS IN WYOMING AND ELSEWHERE.

On page 25 of Respondents' Brief it is said:

> "We do not dispute that lands heavy with alkali salts need more water than lands having little or no alkali, but we believe the quotations from those treatises have no bearing here since the authors of those books did not base their conclusions upon any study of appellant's land."

It will be seen from the language just quoted that Counsel for Respondents admit that alkali land needs more water than lands without alkali, but that the statements of eminent authors quoted by Counsel for Appellant should be given no weight because they did not examine Appellant's land. The Court will doubtless take judicial knowledge that alkali lands in Utah will respond to frequent irrigations the same as alkali lands elsewhere. That the land of Appellant requires frequent irrigations to keep the forage grown thereon is made evident by his testimony, (Tr. 78-85), as well as that of Rex Holmstead. (Tr. 32) There is no evidence to the contrary as applied to the grasses

that were being grown by Appellant.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT DANSIE AN INJUNCTION PREVENTING APPELLANT FROM DIVERTING THE WATER FROM THE DRAIN.

The evidence without conflict shows: That a number of years before Dansie acquired the land which he claims was flooded with water caused by the dam in the drain, the east fence of the Dansie land was moved to its present position leaving the drain and the road to the east thereof. Mr. Dansie testified that he acquired his land in 1943, (Tr. 234); that the gate to divert water from the drain to Appellant's land was closed in 1952, also in 1953, but the water was not taken out long enough to cause the witness any damage. (Tr. 236) That the fence was where it is now when witness purchased his land. (Tr. 245) That when Crawford puts in his dam it raises the water within six inches of the top of the Dansie land. (Tr. 291) The fence was moved by the W.P.A. during the thirties, along in 1935, so that the drain and road were east of the fence. See testimony of Mr. Peterson. (Tr.183,

Mr. Schow, a witness called by Lehi Irrigation Company, testified that if Mr. Crawford used the water for only the ten hours allocated to him, there would not be too much drainage to the Dansie property. It may here be noted that if Appellant were to make his turn only a week apart instead of fourteen days, the water would not be backed up in the drain only half as long. Such fact is another good reason why Appellant should be given his turn every week.

Appellant testified that because Respondent Irrigation Company would not allow him the use of the water to which he was entitled, he left his headgate in to catch any water that may come down in order to minimize his loss; that he left word with his employee at the farm to take care of the water; that water came down apparently because the pump of Respondent failed to work and because water came down and flooded that area. (Tr. 294) Mr. Crawford further testified that the only time water was diverted onto the Dansie land was when the drain was obstructed by some posts

lodging in the drain, which posts collected some watercress resulting in the water backing up and going onto the Dansie property for a short distance, and then back into the drain. (Tr. 301) That the land to the east of the enclosure of the Dansie property has been dedicated as a public highway for the use of the public cannot well be doubted. It has been used as such since it was improved in 1935 by the W.P.A. (Tr. 183, also marked 211) See U.C.A. 1953, 27-1-1, and cases cited in footnotes. Mr. Dansie has thus lost control over the property occupied by the road and the drain. Moreover, the evidence fails to show that where is any liklihood that the Dansie property will be damaged in the future. Indeed, there is grave doubt that it has been damaged by anything that Appellant has heretofore done.

There are a number of matters in which Appellant claims that the Court below erred which we have argued in our original Brief. We are mindful of the rule that a Reply Brief should be

confined to a discussion of new matter which has been raised in the answering Brief. With the rule in mind we shall not attempt to enlarge on what is said in our original Brief as to those questions which we have not discussed in this Reply Brief.

We submit that Appellant is entitled to the relief urged in the original Brief and in this Reply Brief.

Respectfully submitted,

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and

Elias Hansen

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