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Arthur L. Crawford v. Lehi irrigation Co. et al : Petition for Rehearing and Brief in Support Thereof

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

Petition for Rehearing and Brief In Support Thereof

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Comes now the plaintiff and appellant in the above entitled action and respectfully petitions the Court to grant a rehearing in the above entitled cause for the following reasons, and upon the ground that in its opinion heretofore written the Court erred in the following particulars:

1. The Court erred in failing to pass upon Point numbered 5 wherein plaintiff and appellant alleges that:

"The Trial Court erred in that part of its Finding No. 13 wherein it found 'that said lands including the Plaintiff's can be adequately watered on a twelve to fourteen day rotation basis.'"

2. The Court erred in failing to find that plaintiff's land requires an irrigation of once a week, and in failing to direct the Trial Court to amend its Decree to conform to such a Finding.

3. The Court erred in stating that:

> "the Trial Court found to be one-half second foot and decreed that that amount should be made available to the plaintiff."

We, the attorneys for plaintiff and appellant hereby certify that in our opinion there is merit to the foregoing claim that the Court committed error in the particulars above specified, and that a rehearing should be granted to the end that the errors complained of be corrected.

J. Rulon Morgan,

Elias Hansen,
Attorneys for Plaintiff and Appellant.

ARGUMENT

The attention of the Court is again directed to the facts established by all of the evidence that plaintiff's land is alkaline. (Tr. 85, 123-125, 14, See also Testimony of defendants' witnesses, Tr. 192) The evidence also shows without conflict that plaintiff had planted a

part of his land to various kinds of grasses, and was devoting the same during the summer season to pasturing his cattle.

Plaintiff is a man of learning. He needs only one quarter of college work at Stanford University to entitle him to a Ph. D. Such fact entitles his testimony to greater weight touching the effect of alkali on land and a need for frequent irrigation. He has observed the effect of infrequent irrigation on his land. With respect thereto he testified:

> "one of keeping the dilution of alkali such that it won't be toxic to the sap in the plants. Just as soon as the evaporation gets to a point where the concentration of alkali reverses the osmotic pressures of water so that it is drawn out instead of in, then it will start to burn and you can't raise crops under those conditions." (Tr. 85)

To put the thought in the language of a layman the evidence of plaintiff means that when the earth around the plant is surrounded by concentrated alkali the moisture is drawn out of the plant into the alkali, with the result that the plant burns up on account of a lack of moisture. Such result would seem to follow as a matter of course. It is also obvious that as the cattle, which

laintiff pastures on his land, eat the grasses growing hereon, thereby remove the shade caused by the growing rass so that the sun's rays fall directly on the land ith the result that the land dries up and concentrated lkali forms on the top of the ground around the plant nd draws the moisture from the plant life into the lkali.

Plaintiff testified that is what occurred unless is grass land is irrigated once a week; that the grasses ould scorch, wither and dry up, and when irrigated again he growth would start from the bottom. (Tr. 85)

That in effect is also the testimony of Rex olmstead, who had worked for plaintiff and irrigated is land. (Tr. 32)

It is said in Respondent's Brief, page 25:

> "We do not dispute that land heavy with alkali salts needs 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 lands."

The treatises referred to are:

The treatise of Dr. Franklin S. Harris, former President of the Brigham Young University and of the State Agricultural College, in his book

on "Soil Alkali", where he 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)

At pages 223-230, it is said:

> "Experiments in Wyoming 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."

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

> "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."

At page 159 it is said:

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

It is provided in U.C.A. 1953, 78-25-1, that:

> "Courts take judicial notice of the following facts: . . . .
> (8) The laws of nature . . ."

This Court has applied the doctrine of judicial knowledge to the facts in a number of cases somewhat similar to the facts here involved. Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 Pac. 116; Cottrell v. Millard County Drainage District, 58 Utah 375, 199 Pac. 166; Willis v. Kronedonk, 58 Utah 592, 200 P. 1025, 18 A.L.R. 947.

It is held in the case of State v. Rolio, 71 Utah 91, 97; 262 Pac. 987, that what is judicially known may not be controverted by pleadings or made issuable by them. It is generally held that judicial notice will be taken of facts of common knowledge relating to the qualities and properties of matter. 31 C.J.S., Sec. 75, page 656, and cases cited in footnotes, and of Scientific Facts, 31 C.J.S., page 659, and cases cited in footnotes.

If the courts are not familiar with a matter concerning which they are not advised, it is proper to consult recognized authorities dealing with the subject. It is so provided in U.C.A. 1953, 78-25-1, where it is said:

> "In all cases the court may resort for its aid to appropriate books or documents of reference."

We again call the attention of the Court to the case of Bartholomew v. Fayette Irr. Co., 31 Utah 1, 86 Pac. 481, where it is held that the corporation has no right, without the consent of other owners of water rights, to control and regulate the manner of distribution of water especially where some of the owners of the right to use some of the water of a stream are in need of water at more frequent intervals than the stockholders generally.

The evidence in this case fails to show that the stockholders of the Lehi Irrigation Company will sustain any injury by giving plaintiff a water turn about every week. On the contrary the evidence of plaintiff and his employee, together with facts of which the Court takes judicial notice, all show that plaintiff will suffer irreparable damage if he is not permitted to have the use of his turns more frequently than that provided by the Decree entered herein.

There would seem to be no merit to the contention of Respondents that before the Court may take judicial notice of the need for frequent irrigation of plaintiff's land, those who wrote the treatises touching the need of frequent irrigation of lands impregnated with alkali must examine plaintiff's land. If that be the law, then indeed would the Court rarely be able to take judicial notice of "The laws of nature" and many other scientific facts. The effect of alkali on land and the need of frequent irrigation of such land is doubtless the same in Wyoming as it is in Utah. Many of the authors of scientific works are dead, and many others are not available at a particular court. Moreover, it will be noted that much of the language above quoted applies to alkali lands generally, and is not confined to any particular location. Alkali is alkali wherever it is found, and, according to the statements of the quoted authors, has the same effect wherever found. If plaintiff is to receive the benefits of a rotation system, it is of the utmost importance that the turns be such as to keep the plants growing, otherwise the rotation of turns may prove to be a detriment rather

than an advantage. The fact that the stockholders of the defendant Company may be able to get along with turns as far apart as that fixed by the Trial Court does not show that plaintiff may do so. Crops that shade the ground may well prevent the results experienced by plaintiff in his pasture. It may be that the fact that plaintiff has received his turns once a week during the last irrigation season with beneficial results to plaintiff's land, and without any detriment to the defendants is a matter which the Court may not consider, but we cannot refrain from calling that fact to the attention of the Court. However, such practice will doubtless cease if the Decree is not amended.

We have directed the attention of the Court to the statement in the opinion to the effect that the Trial Court awarded to plaintiff one-half a second foot. That is true only in part. Up to July 1st plaintiff was awarded one second foot. No complaint is made by the defendants of such award. One reading the opinion of this Court may conclude that there was an issue as to the award of one second foot up to

July 1st. Of course, the fact that no direct order was made in the opinion rendered changing the award in such particular made by the Trial Court may overcome any claims that this Court reduced the award to one-half a second foot throughout the entire year. Be that as it may, fear has been expressed that the claim will be made that this Court has by the language above quoted ordered that the award of one second foot up to July 1st has been changed to one-half a second foot.

In its opinion this Court has mentioned all of the applications made by the parties herein except Application No. 24,036 made by plaintiff to appropriate two second feet for one-half of the time. The evidence shows that at times there is water available to supply that filing. It is feared that because of the failure of the Court in its opinion to mention that filing, the same is without any validity, which is contrary to the fact.

It is earnestly urged that the Court grant a rehearing to the end that the matters complained of may be corrected.

Respectfully submitted,

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