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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
OCT 29 1959
Clerk, Supreme Court, Utah

DON MACK DALTON,
Plaintiff and Appellant,

vs.

JOSEPH M. TRACY, as State Engineer of the State of Utah; RICHARD D. WADLEY and JESSIE R. WADLEY,
Defendants and Respondents.

Case No. 9104

BRIEF OF RESPONDENTS

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DON MACK DALTON,
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Defendants and Respondents.

Case No. 9104

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Generally speaking the Appellant has adequately set forth the nature of the case in his brief but the Respondents deem it necessary to enumerate facts as developed by both parties in order to present more clearly the present issues before this Court.

On September 9, 1953, Appellant, Don Mack Dalton, filed an application to appropriate water for domestic purposes,

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Application No. 25,218, in the Office of the State Engineer seeking to appropriate one second foot of underground water from what is known as Wadley Spring (being a water source developed by tunneling into a mountain side) which is located North and East of Pleasant Grove, Utah. The main purpose of said application was to "establish a record of these present rights and appropriate any water over and above that that may have been used for domestic and culinary purposes," (Application No. 25,218). Respondents Richard D. Wadley and Jessie R. Wadley immediately filed with the State Engineer a protest to this application. Appellant Dalton filed an answer to this protest and the Wadleys filed a reply to the answer of Dalton. A hearing was had before the State Engineer, Joseph M. Tracy, on November 19, 1956, who rejected the Appellant's application and noted that "all of the evidence justifies a conclusion in that there is a positive inability within economic limits to develop additional water from this source." Appellant then filed a complaint seeking a plenary review of the State Engineer's decision with the Fourth Judicial District Court in and for Utah County, Utah. When the case was called for trial on February 26, 1958, by the District Court, it was stipulated by respective counsel in open court as follows:

1. That the application as filed in the State Engineer's Office be made part of the record (Tr. 2).

2. That the transcript of the hearing before the State Engineer, the exhibits used at the hearing, the protest, answer, reply to answer, and the decision of the State Engineer were received in evidence (Tr. 2-6).

3. *That the Court may pass upon the question of whether*

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the application should be approved and fix the amount, if any, that Mr. Dalton should acquire under his application (Tr. 8) *to have the Court fix the amount of water under this application* (Tr. 9).

4. That the Court could determine the extent of the interest of the parties to this proceeding in and to Wadley Spring (Tr. 8-10).

There is no controversy or dispute as to the respective decreed interests of the parties to this proceeding in and to a 0.101 cubic feet per second quantity of water of Wadley Spring. Therefore, we will not attempt to abstract any evidence concerning the same.

It was ordered, adjudged and decreed by Judge Joseph E. Nelson of the Fourth Judicial District Court in part as follows:

1. That the parties of this action are the owners of the right to the water from the Wadley Spring in the following proportions: Richard D. Wadley to 32/47; Jessie R. Wadley to 12/47; and Don Mack Dalton to 3/47.

2. The parties, their agent, administrators and successors in interest are enjoined asserting any additional or further rights in and to the waters of Wadley Spring.

3. The right to the use of the quantity of water of Wadley Spring which is quieted in the parties herein as above specified is "0.101 of a cubic foot per second."

The Court found among other things that the flow of Wadley Spring is quite uniform throughout the year, and such flow is approximately 0.101 of a cubic foot per second, which fact was not disputed by any evidence offered by either party.

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In view of the fact that the parties by their respective counsels stipulated that the Court may fix the amount, if any, of water under the application (Tr. 8-9), we will limit our summary of the evidence to support such findings.

LaVern D. Green, Provo, Utah, called as a witness for and in behalf of the Plaintiff, testified in substance as follows: That he is the Utah County surveyor; that he has made water measurements; that he has been to Wadley Spring; that on May 25, 1957, he measured the water that was coming out around where the Wadley Spring is located; that a number of measurements were made and the average seepage water was close to 1/100 of asecond foot (Tr. 32-33); and that 0.01 was uncaptured water (Tr. 39).

Elmer Jacob, Provo, Utah, called as a witness for and on behalf of the Plaintiff, testified in substance as follows: That he is a consulting engineer and has been engaged as such since 1907; that his work has been principally with municipal work and irrigation (Tr. 40); that he made a measurement of water in the so-called seepage area around Wadley Spring on December 14, 1957; and it measured .0109 second feet (Tr. 41). In response to a question by the Court as to the source of this seepage water, Mr. Jacobs testified that it was a Spring area and came originally from a general uniform supply and that it came from the mountain above it and has a broad drainage area (Tr. 54-55).

Frank Jones of Lehi, Utah, called as a witness for the Defendants, testified in substance as follows: That he is a consulting engineer; that on August 16, 1956, he measured the total flow of water of Wadley Spring and found the dis-

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charge to be .096 cubic feet per second; that this was the total flow from the Spring as captured (Tr. 74); that he made another measurement on 19th December, 1957; that the total flow at that time was measured and found the discharge to be .101 cubic feet per second. On the same day he also made a measurement of a stream called the seepage and that came to .012 cubic feet per second; and that in his opinion the flow of the Spring would be uniform throughout the year, which information was given in response to a question by the Court (Tr. 77).

Richard D. Wadley, Pleasant Grove, Utah, called as a witness for and in behalf of the Defendants, testified in substance as follows: That his father homesteaded in the general area and he bought squatters' rights from one George Clark to the property on which the Spring was located; that the Spring had been used prior to that time; and that he used the Spring continuously from that time forward; that he spent a lot of time working for more water, running tunnels and digging into the side of the mountain. Four tunnels were dug over a period of years, the first being about 1884; that in the tunneling they encountered black clay and that the clay would after a few years cave in over the tunnel. The last of the four tunnels was dug in 1934. At that time a pipe was inserted back into the tunnel; that the pipe contained a valve which was partially closed at the date of the last cave in; that the last tunnel increased the supply of the flow to approximately one second foot for that summer; that by the end of the summer the reservoir back in the mountain had drained down until the flow was the same size of flow as the Spring formerly gave (Tr. 81-85); that since 1920 Water from this Spring

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has been rented to the people of Manila as a culinary water supply and that this basis continued until 1956 and from 1956 the Wadley Spring water has been a supplementary culinary supply; and that the community of Manila was using this water on a rental basis from the Defendants at the time of Plaintiff's application filing with the State Engineer (Tr. 86).

Frank W. Jones testified on re-cross examination as follows: "The seepage appears to be seasonal in that my observation, I didn't note a seepage in August and had been there twice in two winters, two different trips to the place, which would indicate that the seepage itself may be seasonal. All the measurements we have taken of the Spring itself are very uniform, which would indicate that the Spring itself is either a uniform Spring and in that case a seepage being part of the same system, should be to, or else water is being backed up in the tunnel acting as a reservoir and leaving the amount that flows from the pipe the same. If I make myself clear. The only way that could happen is for a partially closed valve or a restriction of some kind due to the cave in." (Tr. 111-112).

Ezra J. Swenson called as a witness for and in behalf of the Defendants, testified that in 1953, which would be the date of Plaintiff's application filing, that there were 42 or 43 connections on the Manila culinary water supply which was supplied from Wadley Springs; and that since 1956 it has been necessary to us the Wadley Spring as a supplementary source of supply and that this supplemental supply is absolutely necessary (Tr. 139-140).

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STATEMENT OF POINTS

Throughout the remainder of this brief Plaintiff will be referred to as Appellant and Defendants, Respondents. The Respondents will argue the Appellant's points in the order in which they appear in Appellant's brief.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT FAIL AND REFUSE TO ORDER AND ADJUDGE THE APPROVAL OF APPLICATION NO. 25,218 OF PLAINTIFF AND APPELLANT, WHICH WAS FILED BY HIM IN THE OFFICE OF THE STATE ENGINEER OF UTAH ON OR ABOUT SEPTEMBER 9, 1953, TO SUPPLY FIFTY FAMILIES WITH DOMESTIC AND CULINARY WATER TO THE EXTENT OF 7500 GALLONS PER DAY FROM OCTOBER 31 TO APRIL 1 OF THE FOLLOWING YEAR.

Appellant's Application No. 25,218 was to appropriate one second foot of water to be used from January 1st to December 31st inclusive and listed the direct source of supply as Wadley Spring and underground. From APPELLANT'S EXPLANATORY outlining what he intended to do we quote as follows: "This Application is filed to appropriate water that is piped from a tunnel known locally as "Wadley Spring." As far as can be determined there was evidence of water, or a small amount of water at this location before the tunnel was dug years ago, perhaps 40 or 50 years ago. Water had been conveyed from a portal of the tunnel, which is now covered

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over, through a pipe approximately 200 feet, to a settling tank. From this settling tank the water is conveyed through pipes of different sizes, to serve four homes at the present time. At the tunnel and also at the tank, a certain portion of the water has been overflowing and has not entered the pipeline, but has flowed Westward on the ground's surface, a small portion of which has been used for irrigation when there was sufficient available. It is now proposed in this application to appropriate all of the water developed and that may be developed from this tunnel and convey it through the present or new pipelines to furnish the domestic requirements of 50 homes, including the four homes already furnished water. It may be found necessary to construct a new tank or enlarge the present settling tank."

We can thus determine the Appellant's intent to appropriate water from a particular source. Sec. 73-3-2 Utah Code Annotated, 1953, expressly requires that every applicant shall set forth in his application "the name of the *source* from which the water is to be diverted" (emphasis added.)

The intent of an applicant to appropriate water from a specific source is of primary importance in order to notify any and all other users of water from a particular source as to the nature of the application. For example, *Kinney On Irrigation & Water Rights, Vol.* 2, Page 1222, states: "In order to appropriate water to apply the same to some beneficial use or purpose, one of the first steps necessary for the appropriator to take is to give notice of that intent. This is so in order that others may know of the claim of the appropriator, and the doctrine of relation may apply."

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The Utah Supreme Court in *Sowards v. Meagher,* 37 Utah 212, 108 Pacific 1112, stated: "The filing of an application with the State Engineer as required by the Statute, does not establish an appropriation of water. *It but takes the place of and is the preliminary notice of intent to appropriate*" (emphasis added).

It was ordered and adjudged and decreed by the Disrtict Court of the Fourth Judicial District in the case at hand that "the application to appropriate water from the Wadley Spring filed in the Office of the State Engineer of Utah, September 9, 1953, same being No. 25,218, is approved for 0.0109 cubic feet per second and subject to the 0.101 cubic foot per second, which is quieted in the parties herein in the proportion above specified."

The amount of water, if any, that Mr. Dalton should acquire under his application was to be determined and fixed by the Court as the parties hereto have previously stipulated.

The Court has approved the application and fixed the amount of water from the evidence obtained during the trial. Therefore, we are unable to see how the Plaintiff has been injured as a result, especially where the Appellant has stipulated that the Court may fix the amount of water under his application and then the Court finds from the Appellant's own witnesses the particular amount so determined.

The Appellant in his argument of Point I has cited several chapters and sections of the Utah Code Annotated 1953 together with several case citations purporting to construe the same.

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These citations deal primarily with surface waters and not underground waters as we have in the present case. The Appellant did not note any difference between surface waters and underground waters.

It is clear from the evidence that both parties are dealing with Wadley Spring as an underground water source and the Utah case of *Bullock v. Tracy,* 294 P 2nd 707, would appear to confirm that we are dealing with an underground water source.

The beneficial use of underground water prior to 1935 established a right to the extent of that use, and no application to appropriate such water was necessary at that time to establish right to use of such water. U.C.A. 1953 73-3-1, 73-3-8, 73-3-14, 73-3-15, 73-5-10, *Bullock v. Tracy,* 294 P 2d 707.

The use of Wadley Spring prior to 1935 would initiate a right for this use without an application to appropriate, and the evidence is conclusive that the town of Manila leased this water prior to 1935.

In Appellant's Brief an effort was made to nullify any rights which might have been derived by the Respondents in their use of the Wadley Spring water throughout the year as a source supply for the Manila Water System. There is abundant undisputed evidence in the Trial Transcript which would indicate that this water was used continuously from 1920 beyond the time of Applicant's filing notice of his intention to appropriate with the State Engineer, i. e. September 9, 1953. This water had been diverted by the Wadleys and put to beneficial use through lease to the Manila Water Co.

In the case of *Bullock v. Tracy,* 294 P 2d 707, 4 Utah 2d

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370, the following quotations will indicate that this Court's position is that substantial rights have accrued. "It is now well established that since 1903, the right to the use of the unappropriated public waters of this state can only be acquired by first filing an application therefor with the State Engineer's Office. However, our concept of what constitutes public waters has been changed during 1935 and since then. Prior to that time underground percolating and diffused waters and the waters of artesian basins were considered a part of the soil and belonged to the owner thereof, but since then all waters capable of being diverted and beneficially used without destroying the beneficial effect which they have in a natural state on the land where they appeared are considered public waters and the right to use of which cannot be acquired without first filing an application to appropriate in the State Engineer's Office." *Bullock v. Tracy*, 4 Utah 2d 374.

Other cases to this same effect are *Fairfield Irrigation Co. v. Carson, Utah,* 247 P.2d 1004; *Hanson v. Salt Lake City,* 115 Utah 404, 205 P. 2d 255; *Riordan v. Westwood,* 115 Utah 215, 203 P. 2d 922, and cases therein cited.

"We affirm the trial Court's holding that the right to the use of this water which has been developed and used in this system was acquired by the owners on the ground where the source of supply was located developing and diverting this water to the system and beneficially using it therein prior to 1935, and that no application to appropriate such water was necessary at that time to establish a right to the use of such waters." *Bullock v. Tracy,* 4 Utah 2d 274.

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POINT II

THE TRIAL COURT DID NOT ERR IN LIMITING ITS ORDER AND ADJUDICATION OF PLAINTIFF AND APPELLANT'S APPLICATION NO. 25,218 FOR 0.0109 OF A SECOND FOOT, AND IN FAILING TO ORDER THE APPROVAL OF SAID APPLICATION FOR ALL THE WATER THROUGHOUT THE YEAR THAT THIS APPLICANT MIGHT BE ABLE TO SAVE OR DEVELOP NOT TO EXCEED ONE SECOND FOOT SUBJECT, HOWEVER, TO THE PRIOR RIGHT OF THE PARTIES HEREIN IN AND TO THE 0.101 OF A SECOND FOOT.

The only question now appears to be the finding by the Court for 0.0109 cubic feet per second rather than the one second foot contained in the original application.

The parties, through their respective counsels, stipulated in open Court that the Court may pass upon the question whether the application should be approved and fix the amount, if any, that Mr. Dalton should acquire under his application, and to have the Court fix the amount of water under this application.

All of the evidence including the Appellant's own witnesses indicates that the only amount of unappropriated water from said source is 0.0109 cubic feet per second.

The Finding of Facts by the Trial Court pertinent to the issue in question are: Finding No. 9 "that all of the water from said Wadley Spring has been beneficially used continuously since the year 1870, and is presently being beneficially used for domestic and irrigation purposes, except approximately

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0.0109 of a flow of a cubic foot per second; Finding No. 10 "that the flow of Wadley Spring is quite uniform throughout the year, and such flow is approximately 0.101 of a cubic foot per second; Finding No. 11 "that there is and for more than five years prior to the filing of Plaintiff's application to appropriate one second foot of water from Wadley Spring, there has been approximately 0.0109 of a cubic foot of water coming to the surface at or near the Wadley Spring that has not been put to a beneficial use and such water is public water and subject to appropriation."

The above stated Findings of Fact were supported by abundant competent evidence.

It is well recognized law that the Supreme Court cannot disturb the Trial Court Findings of Fact if there is any competent evidence to support the findings. *Seamons v. Anderson,* 252 P. 2nd 209.

Other Utah cases where the same doctrine is applied are: *Parrish v. Tahtaras,* 318 P. 2d 642, 7 Utah 2d 87; *Dalton v. Dalton,* 307 P.2d 894, 6 Utah 2d 136; *Sugar v. Miller,* 315 P.2d 862, 6 Utah 2d 433; *Buehner Block Co. v. Glezos,* 310 P.2d 517, 6 Utah 2d 266; *Malstrom v. Consolidated Theatres,* 290 P.2d 689, 4 Utah 2d 181.

It has been further held that: "Upon review of determination of issues of fact, all the evidence and every inference and intendment fairly arising therefrom should be taken in the light most favorable to the finding made by the Trial Court. And if when so viewed, there is substantial support in the evidence for the finding made, it should not be disturbed. *Rummell v. Bailey,* 320 P.2d 653, 7 Utah 2d 137.

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CONCLUSION

There were no errors of law which occurred at the trial which would be prejudicial to the Appellant and Plaintiff. What has been stated about Point I also applies to Point II and vice versa.

For the reasons herein stated, the judgment of the lower Court should be affirmed.

Respectfully submitted,

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