

IMPORTANT DECISION IN WATER LITIGATION

Comprehensive Opinion of Judge Brown In Case of George vs. Smith is of Vital Interest to All Persons Concerned With Ownership of Natural Water Source

In view of the intense activity in water development and appropriation throughout the entire state, the decision of Geo S. Brown in the case of Sadie B. George vs Perry L. Smith and others is of particular interest at this time and the Review believes it of sufficient importance to warrant its publication verbatim. Judge Brown has had the case under advisement since the last term of court and it is apparent that careful consideration has been given every detail of the decision. With the exception of citations to other cases the decision is printed in full:

In the Fourth Judicial District Court of of the State of Nevada, in and for Clark County:

Sadie B. George, plaintiff, vs. Perry L. L. Smith, Henry Thurtell, as State Engineer, and Frank R. Nicholas, as State Engineer, defendants, H. M. Townner and J. T. McWilliams, Interveners.

THE FACTS

From the evidence the following facts appear:

On the 12th day of October, 1901, the State of Nevada entered into a written contract to sell to Hampton E. George, the husband and grantor of the plaintiff, the N. E. 1-4 of the S. E. 1-4 of Section 1, Township 18, Range 55 East, the same being "State" land. By deed dated May 27th, 1906, Hampton E. George conveyed said forty acres to the plaintiff. There is near the southern boundary of this tract of land a spring from which, by a natural depression, the water runs in a northerly or northeasterly direction over this land and into a ravine which deepens toward the north. The water from the spring flows in a channel down this ravine at times for a distance of fifteen miles, and the stream is known as Cold Creek. Cold Creek is a natural water course, having bed, banks and water therein. In July, 1906, the defendant, Perry L. Smith, made to the defendant Henry Thurtell, as state engineer, his application for permission to appropriate seven cubic feet per second of the waters of said spring. Notice of such application was published in a newspaper, the Las Vegas Age, commencing on the 4th day of August, 1906. On Sept. 24th, 1906, before the expiration of thirty days after the completion of the publication of such notice, Hampton E. George filed with said Thurtell his written protest against the said application of the defendant Smith. Thereafter, and without hearing any evidence, or giving further notice to said Hampton E. George, or the plaintiff, said defendant Thurtell on November 10, 1906, allowed the application of said defendant Smith. Thereafter defendant Smith entered on said land of plaintiff, knowing that she or her husband claimed the same, and constructed a small dam below the said spring, and

cleaned out and enlarged and in part reconstructed an old, abandoned ditch on said land, and thereby conveyed the water from where it was diverted by said dam, in an easterly and northerly direction away from the land of the plaintiff unto land which the defendant Smith had entered and held as a homestead under the United States land laws, and the water was used in the irrigation of the land of said defendant Smith, and in the cultivation and production of crops thereon. Smith entered the land of plaintiff without the consent of plaintiff or her husband and without any deed, grant or conveyance of any right of way or easement from the intervenors or either of them.

Plaintiff's land is wild, unenclosed, unimproved and unproductive, rough, mostly a rocky or cement soil, with only a few acres of good soil. On it grows scrub cedar, mahogany trees and sage brush. The amount of the actual damage to plaintiff's land by the construction of the dam, and the cleaning out and reconstruction of the old ditch and the diversion of the water was not shown. It could have been little more than nominal. It did not appear that either the plaintiff or her husband had ever made any use of the water from the spring or creek, or made any attempt to divert or otherwise appropriate the same. There was no evidence. There was no evidence tending to show that the defendant Smith is insolvent or unable to respond in damages for any injury he may have done, or may hereafter do to the plaintiff's land. There was no evidence tending to show that the defendants, or either of them, ever ousted or ejected the plaintiff from her land or any part thereof, or had ever withheld from her the possession of the same or any part of it.

The plaintiff's counsel in his written brief filed herein has, on plaintiff's behalf, admitted that the intervenors have the interest in the land which they set up in their petition in intervention. So no findings need be made in this decision as to the allegations of said petition.

OPINION.

Under two rules of law may rights to use water flowing in a natural stream be acquired—under the rule of riparian rights and under the rule of appropriation.

The supreme court of Nevada has for more than 20 years held that the doctrine of riparian rights is so unsuited to the conditions existing in this state, and is so repugnant in its operation to the doctrine of appropriation, that it is no part of the law and does not prevail here.

By an Act approved March 16, 1899, entitled, "An Act to define and preserve existing water rights, provided for the storage of surplus water, and reg-

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ulate the mode of using and acquiring the use of the water in the future," the legislature made statutory declaration of the repudiation by Nevada of the doctrine of riparian rights and the substitution of the rule of appropriation and beneficial use.

"Section 1. All natural water courses and natural lakes, and the waters thereof which are not held in private ownership, belong to the State, and are subject to regulation and control of the State" (Cutting's Comp. Laws, Sec. 354.)

"Sec. 3. There is no absolute property in the waters of a natural water course or natural lake. No right can be acquired to such water, except as a usufructuary right—the right to use it—or to dispose of its use for a beneficial purpose x x x" (Cutting's Comp. Laws, Sec. 356.)

The statutory declarations are continued in substantially the same form through the later statutes with reference to water rights.

The doctrine of Reno Smelting Co. vs. Stevenson, supra, has been criticized as being judicial legislation when applied to waters flowing through lands then held in private ownership. But there can be no question that the State of Nevada could make such a rule of law for all waters upon or flowing through state lands, and that after the passage of the Acts just quoted, all water courses and lakes upon lands granted or contracted to be sold by the state of Nevada were retained by the state, and that no rights could be obtained therein except for the purposes and by the methods prescribed by the statutes. The Act of 1899 was a part of the law under which Hampton E. George obtained his right to the land described in the complaint, and the contract of sale made by the state to him gave him no rights to the waters of any natural water course on his land. The fact that the spring which rises on plaintiff's land is the source of the waters of Cold Creek makes them none the less public waters. The spring and the waters therefrom are a part of the water course, and rights therein can only be acquired by appropriation and beneficial use.

The waters of the spring and of Cold Creek were subject to appropriation, and if the defendant Smith has made a valid appropriation thereof, no rights of the plaintiff have been invaded by the diversion.

Although the waters were subject to appropriation for a beneficial purpose, and although Smith in accordance with the statutes obtained from the State engineer permission to divert and appropriate the waters, he did not thereby acquire the right to build his dam, and to take possession of, or construct a ditch on plaintiff's land for the purpose of completing the appropriation.

Smith, when he entered plaintiff's land and built his dam, and cleaned out the old ditch, and diverted the water through that ditch from Cold Creek, was at all times a trespasser. It is familiar law that no right can be initiated by a trespass.

This rule has been applied to attempted acquisition of water rights by appropriation.

"Beyond a doubt no appropriation of water can be made on private land against the opposition of the owner of the land. An entry upon the land for such purpose is a plain trespass and unlawful, like any trespass upon private property. No right to the water can be acquired against the land-

entry and acts of trespass on plaintiff's land, Smith has made no valid appropriation of the waters of the creek and has acquired no right to their use.

The permission granted by the State engineer did no wrong to plaintiff and did not make the State Engineer Thurtell, nor Nicholas, his successor, in any way a party to Smith's wrongful acts.

The "permit" presupposed a right to perform the acts of diversion and appropriation. It cannot be interpreted as in any way authorizing a trespass. Nothing was proved at the trial which would make either Thurtell or Nicholas a joint tort-feasor with Smith. The motion to dismiss the action as to them should therefor be granted.

Under the rule announced by the supreme court in Thom v. Sweeney, 12 Nev. 251, and Hoyer v. Sweetman, 19 Nev. 377, the plaintiff should not be granted an injunction against the repetition or continuance of the trespass. It is within plaintiff's power to prevent defendant Smith from acquiring any easement through the operation of the statute of limitation. No amount of damages was alleged or proved as resulting from the acts of trespass on the part of the defendant Smith, nor was the recovery of any damages for the trespass prayed for. Therefore none will be allowed. But as the acts of trespass were wilful, the defendant Smith should be required to pay to the plaintiff her costs.

CONCLUSION:

From the facts found, I conclude:

1. That the action should be dismissed as against the defendants Thurtell and Nicholas, and that they should recover their costs as against the plaintiff.
2. That the plaintiff should be required to convey to each of the two intervenors an undivided one-third interest in the land described in the petition in intervention, upon the intervenor McWilliams entering into a written agreement with plaintiff, agreeing that he will pay one-half of all moneys due or to become due the state on the purchase of said land and for patenting the same. The intervenors are entitled to judgment against the plaintiff for their costs.
3. That plaintiff should have judgment against the defendant Smith for her costs in this action.

A judgment and decree in accordance with the foregoing may be entered.

GEO. S. BROWN, Judge.

Dated March 21, 1910.