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APPROPRIATION OF WATER IS PLACED ON NEW BASIS

Supreme Court Announces New Doctrine Which is Based on the Amount of Water Necessary for Irrigation and Priority of Appropriation Can Only Inure to the Benefit of the Appropriator for the Amount Necessary to Proper Cultivation of His Lands.

Donnelly and Daughtrey v. Cuhna, Umatilla County.

Decided, December 12, 1911. Frank Donnelly and Wm. H. Daughtrey, appellants, v. Joseph Cuhna, respondent. Appeal from the circuit court for Umatilla county. Hon. H. J. Bean Judge. Argued and submitted at Pendleton, November 3, 1911. R. R. Johnson (Carey & Kerr Harrison Allen, R. R. Johnson and Frederick Steiner on brief) for appellants. J. H. Raley (Raley & Raley on brief) for respondent. Moore, J. Modified.

This is a suit to enjoin interference with the flow of water. It is alleged in the complaint, in effect, that the plaintiff's, Frank Donnelly and Wm. H. Daughtrey, own at Echo, Oregon, a grist mill which is operated by water taken from the Umatilla river and conducted in a race whereby a prior appropriation of the water of that stream was made to the extent of 35 second feet which quantity has been used in propelling the machinery of the mill and in irrigating about 60 acres of alfalfa land lying under the race; and that the defendant Joseph Cuhna unlawfully diverted the water from the river above plaintiff's dam that deflected the water into the race thereby preventing the operation of the mill. The answer denies the material averments of the complaint and alleges that defendant's predecessors in title and interest made a prior appropriation of the water of the river, at a place above plaintiff's dam, whereby 400 inches, miner's measurement, was diverted and has been constantly used under a claim of right for more than 10 years prior to the commencement of this suit adversely to all persons.

The reply puts in issue the averments of new matter in the answer and the cause having been tried findings of fact and of law were made conformable to the averments of the answer, except that defendant was entitled to only 150 inches of the water as a prior right and a decree having been given in accordance therewith, the plaintiffs appeal. Moore, J. The testimony shows that plaintiff's predecessor in title, J. H. Koontz, in 1883 built a dam across the Umatilla river near the southeast corner of the southwest quarter of section 22 in township 3 north of range 29 east in Umatilla county and dug a ditch part of the way and constructed a flume the remainder of the distance of about two miles northwesterly, on the east side of the river to Echo, where, in 1885, he built a flour mill, the motive power of which was furnished by water flowing in the ditch and flume. The mill was destroyed by fire in 1889 but was rebuilt the next year. The United States Reclamation Service occupied for a short period the line of the mill race but at all other times since the mill was originally built, it was operated and the land lying under the ditch has been irrigated when there was sufficient water for that purpose. From October 1st of any year until July or August of the next year there is an abundance of water in the river to supply all reasonable demands, but between August and October of each year that quantity diminishes and contests ensue for the use of water.

The title to the land owned by Cuhna and his alleged right to appropriate water for irrigation from the river at places above the plaintiff's dam were derived as follows: John Dickey was the owner of 160 acres of land lying on the west side of the stream and above the line where the dam now diverting water into the mill race was subsequently placed and in 1879 he commenced near the southeast corner of his land to dig a ditch from a slough, following the foot of a rock bluff, northwesterly across his premises in which undertaking he was assisted by James Taylor who extended the ditch to and upon his lands, four 40-acre tracts of which he west and two 40-acre pieces are situate north of the line of the Dickey lands and water was thereby diverted and used for irrigation. Dickey conveyed his premises to Taylor who in 1887 dug a new ditch, commencing below the old ditch but above the dam now owned by plaintiffs and extended the conduit across his lands, using the water owing therein for irrigation, and thereafter abandoned the old ditch. Taylor died and his widow having remarried, conveyed the Taylor and Dickey lands to Cuhna, who continued to use water through the new ditch for irrigating such premises.

Koontz secured from persons who owned lands bordering on or through which the Umatilla river flows, quit claim deeds conveying the right to divert from the natural channel of that stream between the places of intake and the termination of the mill race, such quantity of water as might be necessary for irrigation along the line of the ditch and flume and also to propel any mill that he, his heirs or assigns might erect at or near Echo. Taylor being owner of 80 acres of riparian land, situate below the line of the dam built by Koontz granted to the latter December 21, 1883, the right to divert from such premises and appropriate water by the mill race. At that time it will be remembered that Taylor and Dickey had an old that tapped a slough on the west side of the river some distance above the dam built by Koontz. Taylor's deed conveyed only the right to divert water affecting his lands lying below the intake of the mill race and did not diminish his right to take water by the old ditch for irrigation, nor prevent him from moving his place of diversion to that of the new ditch. It is maintained by plaintiff's counsel that the old ditch referred to was dug by Taylor and Dickey to drain their lands and that no water flowing in that conduit had ever been used for irrigation. The fact thus asserted to have been established is deduced from testimony which shows that levees were built by Dickey and Taylor to keep the freshets caused by melting snow from overflowing their lands. Two sons of John Dickey testified that in 1871 their father and Taylor built levees along the slough to protect the lands from overflow but that in 1879 the old ditch was dug through such embankment. We think it satisfactorily appears that after the sudden floods subsided and the river reached its ordinary stage, water was diverted from the slough by the old ditch and used for irrigation, the quantity being annually increased as the lands were leveled and put in cultivation, the limit of which area has been reached by Cuhna. His claim to the use of the water by the new ditch is prior to plaintiff's appropriation and therefore superior to their right and the only question remaining is the quantity of water to which he is reasonably entitled. The defendant's attorney, invoking the rule adopted in *Coventon v. Seufert*, 23 Ore. 548, that the capacity of the ditch at the smallest place affords the measure of the right, insists that the quantity of water awarded by the decree was a just distribution. The principle announced in the case referred to is not now controlling, when more careful methods of irrigation have been discovered so that water is not wasted and a larger area of land is adequately moistened, thereby promoting a greater and better development of the country. The adaptability of arid lands to the arid growth of particular crops by careful irrigation furnishes the test of the quantity of water reasonably necessary for that purpose. The number of acres of such land that is susceptible to cultivation, the degree of sterility of the premises, the most profitable crops that can be raised by artificial application of moisture, and the quantity of water reasonably necessary to produce the harvest on an acre by careful husbandry, are elements to be considered in determining the measure of an appropriation. Keeping this rule in view the testimony will be examined as to the area of the defendant's cultivable land that can be irrigated by his ditch. L. M. Canfield, a surveyor, as plaintiff's witness stated upon oath that he accurately measured such lands to determine the acreage and topography of the premises, and from the notes of such survey and a plane table sheet he made a map which was received in evidence. He was then directed as follows: "You may take up this Cuhna land section by section in your own way and tell the court how much alfalfa land, orchard land, grain land, irrigated and non-irrigated land you found in making your survey of the same." He replied: "The southeast quarter of the southeast quarter of section 21, I will say all of this land of Joseph Cuhna's is in township 3 north, range 29 east of the Willamette Meridian. In section 21 there 10.46 acres grain. There is no alfalfa and no orchards. In the southwest quarter of the southwest quarter of section 22 there is 54 acres of alfalfa, no orchard and 55.5 acres of grain. That being all the land in 22. In the northeast quarter of the northeast quarter of section 28, there 2.79 acres of alfalfa, no orchard and 9.36 acres of grain. This

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(Continued on Page 6.)

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