

VALIDITY OF "DOUBLE DITCH" RIGHTS
ON PRICE RIVER

It is asserted by primary users on Price river and its tributaries that they have what they call "double ditch" rights under and by virtue of a supplemental decree in the case of the Tidwell Canal Company, a corporation, et al., plaintiffs, v. Pioneer Ditch Company No. 1, et al., defendants. Upon examination of pertinent decrees of the District Court of Carbon county, I find that the original decree in the above-mentioned case was entered on December 18, 1902. It purports to be a general adjudication of all rights on the Price river. After classifying the various rights and fixing the priority of each and determining the quantity of water to which each claimant is entitled, the court retained jurisdiction of the cause for the purpose of making changes as follows:

"It is further decreed that as to the permanent duty of water, and the regulation, distribution and management of the same, after the year 1903, this decree is not final, and the court may after the close of the irrigation season of 1903 hear further testimony relating to the duty of water, and to the control, regulation and distribution of the same, and upon those matters only, and may enter final decree thereon, and for said purpose only jurisdiction of said cause is hereby retained."

It will be noted that the court attempted to retain jurisdiction only for the purpose of hearing further testimony relating to the duty of water and to the control, regulation, and distribution of the same, and it is recited specifically that jurisdiction is to be retained only until after the close of the irrigation season of 1903. There is no mention in the original decree of the so-called "double ditch" rights.

On May 6, 1910 the court made a supplemental decree which recites that all of the parties to the action were given and received due legal notice of a hearing upon the supplemental decree. The court then definitely fixed the

future permanent duty of water at 1 cu. ft. per second for each 60 acres of land. The decree then provides:

"That, as between themselves and without prejudice to the rights of the other parties to this action or their successors in interest, the following named parties and their successors in interest, to-wit:

"Frank Jerome, Robert A. Powell, Sr., S. C. Powell, S. C. Harmon, (the names of the rest of the water users follow,) are, when there is sufficient water flowing in said Price River and its tributaries so to do, entitled to fill their respective canals to their carrying capacity, and when the said waters shall have become reduced so that they are insufficient to so fill said canals, then each of said parties shall be entitled to, and shall have the right to take and have distributed to him or it, through said canals, a pro rata share of the flowing waters of said river and its said tributaries in proportion to the number of acres of land, as stated in the original decree herein to be owned by him or it, and as the waters of said river and tributaries fall, the quantity flowing to each shall be reduced proportionately according to the acreage owned by each, as stated in said decree and when the said waters shall become reduced so that the same shall not be equivalent in quantity to one cubic foot per second for each sixty acres of said lands, then junior rights shall be cut off in the order provided in said decree, and when the said waters shall become reduced to a quantity less than one cubic foot per second for each sixty acres of said lands, specified in said decree, to be entitled to a prior right to the use of water then the said waters shall be distributed to the owners of such prior rights in proportion to the number of acres owned by each as specified in said decree."

This supplemental decree purports to divide among certain users the right to use surplus water in the river system which was not covered by the original decree. The question arises as to whether the court had jurisdiction to make the supplemental decree. The rule is well settled that in the absence of statutory authority the court has no jurisdiction to make substantive changes in a decree after the expiration of the term during which the decree was entered. This question was considered recently by the Supreme Court of Utah in the case of Frost v. District Court, 96 Utah 106, 83 P. (2d) 737. That was an original proceeding in certiorari filed in the Supreme Court of Utah to test

the validity of an order purporting to modify a decree generally adjudicating water rights. The order in question amended the decree by fixing the priority date of one of the rights and adding: "provided that at all times and in seasons when there is not ample and sufficient water to provide for the use hereunto granted to Allen N. Tanner, with a priority date of 1876, then the said Edward S. Frost, Sr., shall permit water to run by, down, and across his lands, above described, and into the lands, canals, creeks, ditches, and waterways of the said Allen N. Tanner, in compliance with the provisions herein contained."

It was contended by the defendants that the amendment was a mere correction of clerical errors in the decree and did not go to the substance ^{and} that the district court had jurisdiction. The Supreme Court, however, held that the changes were substantive and that the district court was wholly without jurisdiction to make them. The court said:

"In a decree relating to water rights, dates of priority in fluctuating streams or sources of supply with periods when the supply is insufficient to supply all, and some must go without such priority dates, if not the most important, are, next to quantity, the most important elements of such decree. To vary the quantity or to change the date of priority while priorities exist and are important, may have the effect of reversing the judgment or so materially modifying it as to deprive one entirely of a right which he had, or maintained that he possessed and enjoyed. The changes made by the trial court amount to substantive changes upon which the parties should have a right of appeal. The time for either party to appeal has long since expired, judgments must become final. It would be an intolerable situation if, after the time for appealing had expired, the court could modify or amend a judgment so as to materially affect the rights of parties and leave them without appeal. More than four years having elapsed since this judgment was entered, no right of appeal can now exist. No steps were taken within the six month period provided by statute within which an appeal must be perfected."

The court concluded: "Where there has been no retention of jurisdiction by the trial court, unaided by statute, it has no power after the expiration of the term and certainly after the time for appeal has expired to change or modify its judgment in a substantial or material respect. This is well settled law."

In the Price River decree, the court retained jurisdiction until after the irrigation season of 1903 for certain specific purposes which did not include the purpose of giving certain users so-called "double ditch" rights. In view of the fact that the supplemental decree was made seven years after the time of extension mentioned in the original decree and in view of the fact that it goes beyond the scope of the language by which the court retained jurisdiction, it is apparent that the court had no jurisdiction to make the supplemental decree by virtue of the retention of jurisdiction in the original decree.

Under the well settled law, the supplemental decree is void for lack of jurisdiction if the changes it purports to make are substantive changes and not mere corrections of clerical errors. The Supreme Court in the Frost case, supra, quoted with approval the following definition of a clerical error:

"A clerical error exists when without evident intention one word is written for another, when the statement of some detail is omitted, the lack of which is not a cause of nullity, or when there are mistakes in proper names or amounts made in copying but which do not change the general sense of a record."

It would be idle to contend that the supplemental decree merely corrected a clerical error. The court and litigants obviously had an afterthought about the surplus and unappropriated water and attempted to establish their rights by a supplemental decree awarding such surplus water to them. This is a change of a substantive nature, and the supplemental decree is absolutely void.

It appears that the parties to the suit received notice of the hearing on the supplemental decree. The mere fact that they were given notice and that they appeared would not confer jurisdiction upon the court to enter the supplemental decree. *Tinn v. United States District Attorney*, 148 Cal. 773, 84 P. 152. Even if the parties to the suit consented to the entry of the supplemental decree, this would not give the court jurisdiction. *United States v. Mayer*, 235 U.S. 55, 35 S.Ct. 16, 59 L.Ed. 129.

It is, therefore, my conclusion that if the so-called "double ditch" rights are based upon the supplemental decree, they have no validity whatever. If the "double-ditch" rights are based upon appropriation and beneficial use since 1903, they have no validity because they were not acquired in accordance with the statutory provisions. *Deseret Livestock Company v. Hooppiana*, 66 Utah 25, 239 P. 479. If it is contended that the "double ditch" rights were acquired by beneficial use prior to entry of the original decree in 1902, they cannot now be asserted because they were not included in the original decree and there adjudicated.

As pointed out above, the decree of 1902 purports to be a general adjudication. Under the circumstances, in my judgment the "double ditch" rights have no validity and need not be considered in connection with the Price River project.

The proper procedure for having this question definitely determined would be to file a petition for a writ of certiorari in the Supreme Court of Utah, as was done in the *Frost* case.

By E. J. Skeen
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