PACIFIC LIVE STOCK CO. *v.* MALONE, STATE ENGINEER

No. 2920

January 2, 1931. 294 P. 538.

1. WATERS AND WATER COURSES.
   Water law must be read and construed in its entirety (Stats. 1913, c. 140, as amended, Stats. 1929, c. 176).
2. WATERS AND WATER COURSES.
   State engineer is not concerned with the enforcement of a decree which is not a statutory adjudication but an adjudication of water rights in an equity action. (Stats. 1913, c. 140, as amended.)
3. WATERS AND WATER COURSES.
   State engineer, by virtue of his office, is not required to take notice of all judgments or decrees involving water rights (Stats. 1913, c. 140, as amended).
4. WATERS AND WATER COURSES.
   Duties of state engineer as an officer of the district court in water cases (Stats. 1927, c. 192) are of a special nature, and plainly restricted to cases of determination or adjudication of water rights as prescribed in the water law, and the court cannot extend his duties as such officer beyond the limitations of the statute itself.

ORIGINAL PROCEEDING in mandamus by the Pacific Live Stock Company against George W. Malone, State Engineer, and respondent demurs to the petition. **Demurrer sustained, alternative writ quashed, and proceedings dismissed.**

J. E. Woolley and *Vincent J. McGovern*, for Petitioner:

The laws of Nevada require the state engineer to divide the waters of natural streams according to the rights of the parties. Section 54 of water laws, as amended by Stats. 1929.

This duty enjoined on the state engineer is without any limitation whatsoever. Where the petition, as in this case, sets up adjudicated rights on the stream, and a refusal of the state engineer to conform to section 54 of the water law, it would seem mandamus would clearly lie to force him to carry out his obvious duty. It would seem to be immaterial whether or not the rights were adjudicated in any particular manner, or whether, in fact, they were adjudicated at all, providing they were

determined, for instance, as by contract. The language of the statute is: "According to the rights of each, respectively, in whole or in part." From the language used by the legislature it would not seem that there need be even a complete determination.

In the instant case before the court, the parties have, through long and expensive litigation in the district court, obtained a decree defining their respective rights, and that decree has been affirmed in the highest court of the state; hence it would seem that such an adjudication comes clearly within the provisions of section 54 of the water laws.

As to defendant's demurrer, we call the court's attention to section 5695, Rev. Laws of Nevada. All the facts are fully set forth in the petition, and there seems to be no merit in the ground of the demurrer that it does not state facts sufficient to constitute a cause of action, providing, of course, that our analysis of the law is correct, which we believe it to be.

M. A. Diskin, Attorney-General and *Wm. J. Forman,* Deputy Attorney-General, for Respondent:

Respondent contends that sec. 54, Stats. 1913, chap. 140, as amended, Stats. 1929, p. 298, is a part of the system of the water law of this state and must be read in connection with other sections of such law; that the general purpose of the Nevada water law is to provide a means whereby all streams within the state will eventually be adjudicated and the rights of all claimants thereon settled as against the world, and that a record will be made of such rights; that the state is to be divided into water districts when, and only when, the creation of such districts becomes necessary after a statutory adjudication has been completed; and that the administration by the state engineer will then be in accordance with the rights as settled by the courts in the statutory adjudications as appears from the recorded water rights. This contention is based upon the construction of chap. 140, Stats. 1913, as amended, construed as a complete statute and not as a series of

detached parts. It is a familiar rule of statutory construction that all parts of a statute must be considered together, in order to ascertain the true meaning of its several sections. State v. Brodigan, 37 Nev. 139. It is another familiar rule of statutory construction that statutes having a system or scheme should be construed so as to make that system or scheme consistent in all its parts and uniform in its operation. Howard v. Nashville R. R. Co., 284 S. W. 894.

Analyzing chap. 140, Stats. 1913, as amended, in the light of these rules of construction, it will readily be seen that the legislature never intended the state engineer to take charge of the distribution of waters of any system except where a statutory adjudication of the rights thereon had been made, regardless of any decrees in personam that might have been made on such stream systems. The judgment in the instant case, therefore, does not create a condition bringing into being the distribution power of the state engineer, and such power may not be exercised until the machinery of the law as contained in the general adjudication statute has been fully carried into effect.

STATEMENT OF FACTS

This is a petition for an alternative writ of mandate against the respondent, Geo. W. Malone, as state engineer of the State of Nevada. The petition, among other things, alleges: that Quinn River is a natural stream and water course; that petitioner is and for more than thirty-five years last past has been the owner and seized in fee and in the actual possession of a large body of land situated in the county of Humboldt, State of Nevada, and commonly known as the Quinn River ranch; that said Quinn River flows and from time immemorial has flowed to, over, upon and through the said Quinn River ranch, and the said ranch includes the banks, beds, and stream of said river; and the waters thereof to which petitioner is entitled when available are used to irrigate said land, and as hereinafter shown are necessary for that purpose.

That in 1907 the petitioner commenced a suit in Humboldt County, Nevada, numbered on the court records of said Humboldt County district court as No. 1596; that on the 9th day of April, 1919, said court rendered its final decree in and by virtue of which said court ordered, adjudged, decreed, and established the water rights of said Quinn River and its tributaries, and in said decree the water rights of each of the parties to said action were specifically set forth so as to designate and show the amount of water appropriated by each of said parties, the dates of appropriations, relative priorities, and the particular stream from which each appropriation was made and the number of acres irrigated by each appropriation. A copy of said decree is attached to the petition, marked "Exhibit A," and made a part of the petition.

That after the making and filing of the aforementioned decree, an appeal was taken from the same by certain of the defendants therein, and an appeal was taken by the plaintiff from an order made by said second judicial district court of the county of Humboldt, State of Nevada, permitting certain of the defendants to amend their answers so as to put in issue certain questions of fact; that said appeal was taken to the supreme court of the State of Nevada, and thereafter and on the 2d day of April, 1930, the supreme court, pursuant to its written opinion (286 P. 120), made and entered its final order dismissing the appeal from said judgment, thereby affirming the judgment and decree of said second judicial district court; that thereafter, and on the 21st day of April, 1930, the remittitur in said cause issued from the supreme court was filed in the second judicial district court of the State of Nevada, in and for the county of Humboldt.

That the decree of said second judicial district court of the State of Nevada, in and for the county of Humboldt, rendered in the above-mentioned action, was and now is a final and complete adjudication of the water rights of each and every party to said action in and to the waters of said Quinn River and its tributaries; that

petitioner alleges on information and belief that the plaintiff and the defendants to the above-mentioned action were and now are the only parties claiming or asserting any rights in or to the waters of said Quinn River and its tributaries.

That the aforementioned decree of the second judicial district court awards the first priority to the waters of said Quinn River to petitioner for use on said Quinn River ranch, but various defendants in said aforementioned action whose lands border on said Quinn River above said Quinn River ranch, but whose priorities were and are junior and inferior to that of petitioner, have on many occasions prior to the filing of the petition, and do now, take and divert the waters of said Quinn River contrary to the terms of said decree and so as to deprive petitioner of the use of the waters of said Quinn River to which it is entitled under said decree at times when the same are necessary for the irrigation of said Quinn River ranch; that said last-mentioned defendants have and are now disobeying the terms of said decree to the damage and injury of petitioner as aforesaid; that petitioner has at all times and does now obey said decree and each and every of the terms thereof.

That for the aforementioned reasons it is necessary for said respondent to assume and take control of said Quinn River for the purpose of dividing the waters thereof in order to carry out the terms and provisions of said aforementioned decree; that petitioner is ready and willing to pay any and all lawful charges proposed by said state engineer in connection with his control of the distribution and administration of the water rights on said Quinn River.

That prior to the filing of this petition, petitioner requested said respondent to assume and to take jurisdiction of said Quinn River and its tributaries for the purpose of dividing or causing to be divided the waters of said river among the several ditches taking water therefrom, according to the rights of each as set forth in said decree of the second judicial district court of the State of Nevada, in and for the county of Humboldt,

in the aforementioned action, and to otherwise assume control and supervision of the waters of said river so as to carry into effect the terms and provisions of said decree; that said request was made in accordance with and in reliance upon the terms and provisions of the water laws of the State of Nevada, and in particular sections 45 and 51, and section 54 (as amended Stats. 1929, c. 176), of chapter 140, Statutes of 1913.

That notwithstanding the request of petitioner as aforesaid, said respondent has failed and refused to assume or take charge of or control of the waters of the said Quinn River and its tributaries in order to distribute and administer the water rights of the parties to the aforementioned action as determined in said decree or otherwise, and said respondent has failed and refused to divide or cause to be divided the waters of said Quinn River and its tributaries among the several ditches taking water therefrom according to the rights of each respectively as set forth and determined in said aforementioned decree.

That petitioner has not a plain, speedy, and adequate remedy in the ordinary course of law.

The respondent thereupon demurred to the petition upon several grounds, including that said petition does not set forth sufficient facts to constitute a cause of action against respondent herein or to justify the granting of the relief prayed for or any relief whatsoever.

OPINION

By the Court, MORAN, District Judge:

It is the contention of the petitioner that the state engineer should, upon request, take charge of the division and distribution of the waters of the Quinn River stream system pursuant to the decree of the Humboldt County district court.

The contention of the respondent is that, as the decree in question does not constitute a statutory adjudication pursuant to the 1913 water law, as amended, no such

duty on the part of the respondent arises by reason of such decree.

The petitioner urges in his brief that there are two distinct methods whereby water rights may be determined under the statute:

One, as contemplated by sections 18 to 35, inclusive (as amended), and, two, as prescribed in section 45.

It is immaterial for the purposes of this opinion whether the statute contemplates two distinct methods or not; but, in passing, we express the belief that, instead of a duality of methods, there is only a dual system in which suits for the adjudication of water rights may originate. That is to say, either through the office of the state engineer (by his own motion or by petition) or by complaint in the district court, with the state engineer acting as an officer of the court in either case.

It does not follow, however, that all suits involving water rights must originate in either way; since it is easy to conceive of many kinds of water controversies that have no dependency on the statute.

1. It goes without saying that the water act must be read and construed in its entirety—this is borne out by the language used by this court in the case of Ormsby County v. Kearney, 37 Nev. 338, 142 P. 803, 806, wherein Justice NORCROSS, who was passing upon a question of constitutionality, said: "In considering the constitutionality of sections 18 to 51, inclusive, they should be viewed with reference to the purpose designed to be accomplished by sections 52 to 56. The latter sections are clearly administrative. Before they can be put into force, the relative rights of water users upon a stream must be ascertained."

It is very evident that the court in the phrase "the relative rights of water users upon a stream must be ascertained" could not mean anything else than to make the ascertainment or adjudication of water rights under the statute an indispensable prerequisite for their subsequent administration. In other words, there must first be a final adjudication of water and water rights on a

particular stream or stream system before the administrative sections begin to apply.

2-4. The procedure for such a final adjudication is plainly outlined in the act. This being so, we must examine the petition and decree in question, in order to ascertain whether the adjudication is a statutory one as contemplated by the law. If it is, the duties of the state engineer in connection with its administration are clearly stated by the legislature and should be performed by him. If the decree, on the contrary, is not a statutory adjudication, but an adjudication of water rights in an equity action, then it would follow that the state engineer is not concerned with the enforcement of such a decree or such rights, since his duties are special and cannot be extended by the court.

It cannot reasonably be contended that the state engineer, by virtue of his office, is required to take notice of all judgments or decrees involving water rights. If this were so, we would be compelled to accept the untenable position that the state engineer must interpret and carry out all decrees of state courts wherein water or water rights were in some fashion determined between litigants.

It has not been contended that in the Quinn River case the proceedings for adjudication originated in the office of the state engineer, either on his own initiative or by application to him according to law. In fact, the petition states that the action was originally instituted in the district court of Humboldt County. Therefore, in order to determine the question as to whether the decree before us constitutes a statutory adjudication, we must inquire whether the procedure was in compliance with what the petitioner calls the second method whereby adjudication of water rights may be had.

After careful examination of the decree which we are requested to enforce by writ of mandate, we find that it is nothing more than an equity judgment between several water users on the Quinn River and certain tributaries thereof. It contains nothing from which we could even infer that an adjudication of water rights such as

is prescribed by the statute was contemplated by the court. It does not appear that a preliminary determination was ever made by the state engineer according to the provisions of sections 18 to 35 (as amended), both inclusive; neither does it appear that the state engineer ever made, or was called upon to make, a hydrographic survey of the stream system, as provided by section 20, and as directed by section 45. The petition and decree further fail to state that the suit was ever transferred or referred by the court, under section 45 of the act, to the state engineer for determination, or that, indeed, any other administrative matter was ever referred to the state engineer by the court at any time during the course of the action.

So that, aside from the mere request by the petitioner, after the action was closed, that the state engineer enforce the decree, there is nothing to show that that officer had any knowledge of the litigation or any information that such a decree ever existed.

If the procedure outlined in the water law of 1913, and amendments, were not followed in the Quinn River case, at least to some degree, it is difficult to conceive how the judgment or decree in question could be considered an adjudication of water right as contemplated by statute.

In section 36½ (as added by Stats. 1927, c. 192) the legislature expressly constitutes the state engineer an officer of the district court in water cases; but his duties are of a special nature, and plainly restricted to cases of determination or adjudication of water rights as in the act prescribed. We cannot extend his duties as an officer of the court beyond the limitations of the statute itself. Hence, it follows that, if section 36½ is to have a special application only in cases of adjudication under the statute, it also follows that all of the prescribed duties of the state engineer under section 45 and section 54 (as amended) are also special duties, which apply only to cases of adjudication as in the act provided.

Thus, if the water law be read as a whole, the interpretation is irresistible that the duties of the state engineer in water cases are interlinked with and dependent

upon the procedure outlined in the act itself; and it would be a strained construction of the statute, as we view it, to attempt to extend these special duties into a general obligation on his part to administer and enforce every adjudication of water rights, regardless of compliance with the statute.

We, therefore, are of the opinion that the petition does not state facts sufficient to warrant the issuance of an alternative writ of mandate, or sufficient to constitute a cause of action.

The views herein set out are, in a measure, sustained by the case of Wattles v. Baker County, 59 Or. 255, 117 P. 417.

We do not deem it necessary to discuss the other questions raised by the demurrer, and we have not overlooked the fact that section 54 of the water act was amended by the Statutes of 1929, p. 298, c. 176.

For the reasons stated, the demurrer is sustained on the ground that the petition does not state facts sufficient to constitute a cause of action against the respondent, or facts sufficient to entitle the petitioner to any relief. The alternative writ is quashed, and the proceedings are dismissed.

It is so ordered.

NOTE—DUCKER, C. J., being disqualified from participating in this decision, the Governor designated Hon. THOS. F. MORAN, District Judge, to sit in his place.