

ANNUAL STATEMENT

Table with financial data for Of the Hamburg Bremen Fire Ins. Co. of Homberg, Germany. Includes assets, liabilities, income, and expenditures for 1905.

ANNUAL STATEMENT

Table with financial data for Of the Mutual Reserve Life Insurance Company, 309 Broadway, New York. Includes assets, liabilities, income, and expenditures for 1905.

ANNUAL STATEMENT

Table with financial data for Of the Penn. Mutual Life Insurance Co. of Philadelphia, Penn. Includes assets, liabilities, income, and expenditures for 1905.

ANNUAL STATEMENT

Table with financial data for Of the Providence Washington Insurance Company of Providence R. I. Includes assets, liabilities, income, and expenditures for 1905.

OFFICIAL COURT OF STATE FUNDS.

Table listing state funds including County of Ormsby, State School Fund Securities, and Nevada State Bonds.

IN THE SUPREME COURT OF THE STATE OF NEVADA.

EBENEZER TWADDLE and EBENEZER TWADDLE as Special Admr., of the Estate of Alexander Twaddle, deceased, Plaintiffs and Respondents.

The respondents have moved to dismiss the appeal from the judgment because it was not taken within one year, and to dismiss the appeal from the order of the district court denying appellants motion for a new trial, also on motion for a new trial, upon the ground that the statement was not filed within the time prescribed by law.

DECISION

The respondents have moved to dismiss the appeal from the judgment because it was not taken within one year, and to dismiss the appeal from the order of the district court denying appellants motion for a new trial, also on motion for a new trial, upon the ground that the statement was not filed within the time prescribed by law.

Pursuant to this request Judge Murphy occupied the bench in Reno until July 31, 1903, when a recess was taken until a further order of the court. There was no other session until Judge Currier's return on August 17th. On July 17th, Judge Murphy, in open court in Reno, made an order allowing plaintiff until August 15th in which to file objection to findings, and prepare additional findings.

Under Section 2573 Judge Currier could have made an order granting them the extension at any place in the State, and as during his absence Judge Murphy was requested by the Court minutes to attend to all business for him, we conclude that he was empowered to make the order at Carson City as he did, and as Judge Currier could have done, and that it was not necessary for him to make the trip to Reno and undergo the formality of opening court to enter ex parte orders simply extending time, such as are usually made out of court.

ON THE MERITS This action was brought by Alexander Twaddle in his life time and by Ebenezer Twaddle, as co-owners, for 450 miners inches running under a six inch pressure of the waters of Ophir Creek alleged to have been appropriated by their grantors in the year 1856 by means of dams, ditches and a flume for the irrigation of their ranch containing 203.92 acres in Washoe county. The answer denies the allegation of the complaint sets up the ownership by the defendants, Winters, of a tract of land about one mile wide and two miles long, and alleges appropria. ons by them or their grantors aggregating 600 inches flowing under a four inch pressure, by the year 1867, which are stated to be prior to any diversion of the claim by the plaintiffs, and asserts a claim for defendant, Longbaugh, to 180 inches for fluming wood, lumber and ice from large tracts of timber lands owned by him, and for domestic use and irrigation garden on forty acres at Ophir.

Witnesses appeared to sustain, and others to dispute plaintiffs' right as initiated a half century ago, and the same is true regarding the claims of these defendants. The report affords a glimpse of pioneer history, of this State into the Union, and portrays the building and decay of saw and quartz mills and the rise and decline of towns by the banks of the stream, the waters of which are here in litigation. One witness testified that the Hawkins ditch, now known as the upper Twaddle ditch, was completed in 1857, and that he turned the water into it that year. Others stated that water was running in the ditch and flume about that time, and that these were apparently in the same place and of about the same capacity as it present.

On behalf of the defendant other witnesses testified that they were over the ground and saw no ditch, and that none existed there during those earlier years. It is unnecessary for us to detail the conflicting portions of the evidence. These were carefully considered by the district court, and for the reasons stated in its decision, enforced by statements in deeds, made many years before any controversy arose, the finding that this ditch was constructed and a prior appropriation of water made through it in 1857 finds ample support. At first on the Twaddle ranch land was plowed for only a garden and a small piece of grain and but little hay was cut. A reasonable time was allowed in which to extend and complete the use of the water that would flow through the ditch and the quantity of land irrigated was increased. The lower Twaddle ditch was constructed from Ophir Creek at some time prior to 1869 and runs to and irrigates the eastern portion of the plaintiffs' ranch. It is shown that since that year at least their lands have been in practically the same state of cultivation and irrigation that they were in at the time of the commencement of this action, and that during that period plaintiffs used all the water they needed from Ophir Creek without interruption except in 1887, 1888 and

light of reason as applied to the ordinary rules of practice, and give due weight to the later section. Apparently the object of this legislation was to prevent the granting of extensions and the meddling of judges in cases which they had not tried or which were not properly under their control, and yet in the case of the absence or inability of the judge who tried the action, to grant relief, or allow extensions to be made to deserving litigants.

The argument advanced concedes that if Judge Murphy had gone to Reno and entered the order in open court it would have been good, but under this contention if he had stepped through the door into the chambers and made it, it would have been void. Orders extending the time for filings are business usually, or properly transacted in chambers and under Section 2573 can and ought to be made by the judge having the case in charge, as if made by him in chambers or in open court. Judge Murphy was merely acting for Judge Currier during his vacation, but by analogy the construction claimed, if adopted, would, in every case where a district judge dies, resigns or is succeeded, invalidate the orders extending time under section 197 made out of court by his successor in office, although they are of that character ordinarily granted in chambers. This would mean a distinction and two rules for filing orders of the same kind, and that the judge who had tried the cause as Judge Currier had done in this instance, could make the order in chambers, while his successor could so make it only in the cases tried by him, and would have to be in court to make these simple orders extending time in actions which had been previously tried by another judge.

Appellants desired and were entitled to the time granted for the purpose of enabling them to secure from the court reporter who had left the State, a transcript of the testimony given on the trial, which would enable them to properly prepare the statement.

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On behalf of the defendant other witnesses testified that they were over the ground and saw no ditch, and that none existed there during those earlier years. It is unnecessary for us to detail the conflicting portions of the evidence. These were carefully considered by the district court, and for the reasons stated in its decision, enforced by statements in deeds, made many years before any controversy arose, the finding that this ditch was constructed and a prior appropriation of water made through it in 1857 finds ample support. At first on the Twaddle ranch land was plowed for only a garden and a small piece of grain and but little hay was cut. A reasonable time was allowed in which to extend and complete the use of the water that would flow through the ditch and the quantity of land irrigated was increased. The lower Twaddle ditch was constructed from Ophir Creek at some time prior to 1869 and runs to and irrigates the eastern portion of the plaintiffs' ranch. It is shown that since that year at least their lands have been in practically the same state of cultivation and irrigation that they were in at the time of the commencement of this action, and that during that period plaintiffs used all the water they needed from Ophir Creek without interruption except in 1887, 1888 and

at the time this suit was begun. It appears that the plaintiffs had not materially increased their appropriation in thirty-three years, while Theodore Winters admitted upon the stand that during the last ten or fifteen years he had been using twice as much water from Ophir Creek in addition to that from other streams, as he used during the first ten years that he cultivated his lands. As he claims and uses more than the plaintiffs, we conclude that this large increase in his diversion of the waters of the streams since the completion of their appropriation which has remained stationary may account for the shortage and dispute.

By consent of the parties in open court the district judge, accompanied by a civil engineer who had testified as a witness for the defendants, viewed the premises and made measurements. At the point of least carrying capacity of the upper Twaddle ditch, which is the old square flume near the Bowers' Mansion and grave, he measured the flow at 184 inches and the water lacked more than two inches of reaching the top. A surveyor had testified for the plaintiffs that its capacity was 182 inches at this point, and that the capacity of 100 feet of old flume remaining nearer the head of the ditch which had been impaired by age and abandoned, and supplanted by a new flume built above the old one by the plaintiffs in 1900, was 150 inches. At this point the judge found that 184 inches of water which he had measured below about filled the new flume, and he estimated that the old flume would carry from 200 to 200 inches. From his examination of the premises and the character of the soil the court was of the opinion that the plaintiffs required, and were entitled to, at least the amount of water they had flowing in the flume at the time he made the examination, and he decreed them a prior right to 184 inches inches running under a four inch pressure or 2 3/4 cubic feet per second from April 15th to Nov. 15th of each year, and 20 inches or 2 1/2 of one cubic foot per second for domestic use and watering stock at other times. It is claimed the amount allowed is not warranted by the evidence because more than the capacity of the upper Twaddle ditch as shown by the testimony mentioned being it at 182 inches at the point above the mansion, and a 150 inches along the 100 feet of old flume through which the water flowed prior to 1900.

It is not necessary to determine whether the court on its own examination and measurement may allow a quantity beyond the range of the evidence, nor whether the surveyor could actually estimate the capacity of the 100 feet of old flume without knowing the volume and velocity of the water that entered it, nor whether the variation of one part in sixtieth or the difference between 182 inches in his measurement and that of 184 by the judge should be disregarded as too trifling to be material and as a slight discrepancy to be expected for the judgment for the 24 inches which defendants' claim should be denied because in excess of the capacity of the upper ditch and flume before the construction of the flume in 1900 is supported by the finding of a court that the plaintiffs and their grantors had for more than thirty-one years before the commencement of this suit used a portion of the water through the lower Twaddle ditch. It is urged that 184 inches is more than required for the irrigation of plaintiffs' ranch and that this is especially so because a few of their 170 1/2 acres of cultivated land lie above the upper ditch from Ophir Creek and a small portion is naturally swampy. The quantity of water allowed by the decree seems very liberal, both for irrigation and for domestic use and watering stock. Engineers and others testified that one half and three eighths of an inch of water per acre was sufficient while for the plaintiffs, farmers from the vicinity varied in their estimates of the amount necessary from one and one half to three and one half inches per acre.

The evidence indicated that the plaintiffs had used as much water as that awarded to them and more, and had uniformly produced good crops. Much of their land is sandy with considerable slope. After examining the soil and viewing the quantity of water as it ran on the premises, the court agreed with the testimony of the plaintiffs that that amount was necessary, and adopted a mean between the highest and lowest estimates. The quantity of water requisite varies greatly with the soil, seasons, crops, and conditions, and we cannot say that the allowance is excessive.

Alexander Twaddle testified that there were times during the summer, evidently short periods after the land had been irrigated, when it was not necessary to use as much as the upper ditch full of water. On such occasions and whenever it is not needed by the plaintiffs it should be turned to the defendants, if they have any beneficial use for it, and not permitted to waste. It may be implied by the law, but it is better to have decrees, specify, and especially so in this case. In view of the testimony stated and of the perpetual injunction, that the award of water is limited to a beneficial use at such times as it is needed, Gotelli v. Cardelli. The point and purpose of diversion may be changed if such change does not interfere with the prior rights.

Under the testimony of Alexander Twaddle that the irrigating season closes about the first of October, and that sometimes he used water a little later, we think probably the decree should limit plaintiffs' right for irrigating purposes to October 15th. This may allow defendant Longbaugh to flume wood a month earlier at this season when the water is low, and allow Winters more for watering stock without material injury to the

plaintiffs. Although his flume was erected many years ago Longbaugh did not show any prior appropriation and the decree properly enjoins him from interfering with that part of the water of Ophir Creek awarded to the plaintiff, because he ran their water in his flume past their ditch and into one owned by Winters, and joined with the other defendants in answering and resisting the rights of plaintiffs. The decree does not prevent him from taking any water in the creek in excess of the amount awarded to plaintiffs. Nor does it in any way interfere with the water belonging to him coming from other sources. This he may turn into Ophir Creek and take out lower down provided he does not diminish the flow to which plaintiffs are entitled.

On May 30, 1877, John Twaddle, the father and predecessor-in-interest of the plaintiffs, conveyed to M. C. Lake "one-third of that certain water ditch and flume known as the Twaddle ditch, leading from what is now known as the Ophir Creek to the land of said Twaddle, southerly from said creek through the lands of C. E. Wooten and M. C. Lake, with the privilege of running water through said flume and ditch to what is known as the Bowers' Mansion or grounds, the expense of maintaining said ditch and flume to be paid by each in proportion to their interests in same." It will be noted that this language does not purport to grant any water, but rather the right to convey water and that it amounts to a sale of a third interest in the ditch with at least the privilege to that extent of running in it water which Lake had, or might appropriate. Later, the defendant Theodore Winters, acquired the Bowers' Mansion and grounds through conveyances which did not mention any interest in this ditch. It does not appear that Lake or his grantors ever made any use of the ditch or ever contributed towards its repair.

Alexander Twaddle stated on the stand that he did not claim all this ditch and that the plaintiffs owned two thirds of it. Whether under this deed the one-third interest in the ditch became appurtenant to the Bowers' land when it was never used for its irrigation, and later passed with the land without being mentioned, and whether after the lapse of twenty-five years without any use or contribution towards its repair the grantee of Lake has a third interest as a co-owner in the ditch and that part of the flume which has not been succeeded by the new one built by plaintiffs, are questions which we need not determine, for they, and that part of the judgment of the court which gives the plaintiffs the "exclusive use of the upper Twaddle Ditch and Flume," are not within the allegations of the pleadings which contain no reference to the exclusive use of, or a third or any interest in the ditch.

Under the assertion in the complaint of the appropriation of water "by means of certain dams, ditches and a flume" the court properly decreed to plaintiffs the right to use the water through either or both the ditches running to their lands. They would have that right in the upper ditch if their interest in it is only an undivided two-thirds, as the court has given them jointly with the defendants in the lower ditch, but whether the grantee of Lake owns and can assert a right to an undivided one-third interest, is a question as foreign as the ownership of the mansion, and one which ought not to be determined by the judgment in the absence of any issue or allegation concerning it. The defendants specifically excepted to finding number twelve in this regard.

Patents for defendants' lands lying along the banks of Ophir Creek were issued to their grantors before the passage of the Act of Congress of July 26, 1866 and it is asserted that for this reason a vested Common Law riparian right to the flow of the waters of Ophir Creek accrued of which they could not be deprived by that Act. If this were true defendants might as well be considered under the circumstances shown to have lost that right by acquiescence in the continued diversion of the water by plaintiffs for a period many times longer than that provided by the statute of limitations, but in this contention counsel is in error. We do not wish to consider seriously or at length an argument by which it is sought to have us over-rule well reasoned decisions of long standing in this and other arid states, and in the Supreme Court of the United States, such as Jones v. Adams, Reno Samplin, Works v. Stevenson and Broder v. Water Co., declaring that this statute was rather the voluntary recognition of a pre-existing right to water constituting a valid claim to its continued use, than the establishment of a new one. As time passes it becomes more and more apparent that the law of ownership of water by prior appropriation for a beneficial purpose is essential under our climatic conditions to the general welfare, and the flow of streams which may be unobjectionable in such localities as the British Isles and the coast of Oregon, Washington and northern California where rains are frequent and fog and winds laden with mist from the ocean prevail and moisten the soil, is unsuitable under our sunny skies where the lands are so arid that irrigation is required for the production of the crops necessary for the support and prosperity of the people. Irrigation is the life of our important and increasing agricultural interests which would be strangled by the enforcement of the riparian principle.

Congress is appropriating millions for storage and distribution and our Legislature have recognized the advantages of conserving the water above for use in irrigation instead of

having it flow by lands of riparian owners to finally waste by sinking and evaporating in the desert. The California decisions cited for appellants may no longer be considered good law even in the state in which they were rendered.

In the recent case of Kansas v. Colorado before the Supreme Court of the United States, Congressman Needham testified that irrigation had doubled and trebled the value of property in Fresno and King counties, California, that they had to depart from the doctrine of riparian rights and under that doctrine it would be difficult to make any future development; that there has been a departure from the principles laid down in Lux v. Haggin, because at that time the value of water was not realized, that the decision has been practically reversed by the same court on subsequent occasions, and that the doctrine of prior appropriation and the application of water to a beneficial use is in effect in force now in that State.

We must decline to award the defendants the waters of the stream as riparian proprietors and patentees of the land along its banks prior to 1866. The case will be remanded for a new trial unless there is filed on the part of the plaintiffs within thirty days from the filing hereof, a written consent that the judgment be modified by limiting the use of the 184 inches or 2 3/4 cubic feet per second of water awarded to the plaintiffs, to such times as may be necessary for the irrigation of their crops or lands or for other beneficial purposes, between April 15 and October 15 of each year, and by allowing plaintiffs for the remainder of the time the 20 inches awarded to them, when necessary for their household, domestic and stock purposes, and by striking from the decree the words:

"It is further ordered, adjudged and decreed that said plaintiffs have the exclusive use of the upper Twaddle Ditch and Flume at all seasons of the year." If such consent is so filed the district court will modify the judgment accordingly and as so modified the judgment and decree will stand affirmed.

We concur: Fitzgerald, C. J. McGross, J. County Report.

Ormsby County, Nevada. Receipts.

Table of receipts for Ormsby County, Nevada, including County licenses, Gaming licenses, Liquor licenses, etc.

Table of disbursements for Ormsby County, Nevada, including State fund, General fund, Salary fund, etc.

Recapitulation.

Summary table of receipts and disbursements for Ormsby County, Nevada, showing a balance in Treasury October 1905.