

JORDAN WATER CASE.

Associate Justice Bartch, Justices Zane and Miner concurring, handed down an important opinion in the case of Salt Lake City vs Joseph H. Collidge et al. The judgment of the lower court is reversed and the cause remanded with directions.

In his review of the case, and the opinion thereon, Judge Bartch says:

"This controversy arose over certain dams, which the plaintiffs erected and maintained in the Jordan river near its source at the Utah lake, for the purpose of irrigation. The action was brought to establish the low water mark in the lake, referred to in a certain contract, between the plaintiffs and defendants, made in 1885, to determine the plaintiffs' rights to maintain their dam, and to have defendants restrained from interfering with them and from commencing or prosecuting any suits at law against the plaintiffs on any claim that they had wrongfully raised the water in said lake, or flooded the defendants' lands, or caused any injury or damage thereto by said means.

It appears that during the pendency of the suit the parties thereto entered into stipulations as to a number of the issues raised in the pleading, and, respecting those issues, the decree of the court was entered in conformity with the stipulations, and the appeal was taken only from that portion of the decree which relates to the issues tried and decided by the court. But two questions are presented for our consideration.

"By virtue of the contract above referred to the plaintiff acquired the right to erect and permanently maintain a dam in the Jordan river, at a certain height specified, for the purpose of storing the water in the lake. The construction of the dam was to be such that, by placing plank or other obstruction into the water way, the water in the lake could be raised, or by removing them could be lowered. For the purpose of carrying the agreement into effect provision was made for the appointment of a commission, who were constituted the agents of both parties to the contract, and among other things were empowered to determine and direct when and to what extent obstructions might be placed into the waterway of the dam, not to exceed the highest elevation specified in the contract. It was also agreed that the plaintiffs should have the right to dredge the bottom of the river and cut through a certain bar in the lake at the head of the river, so as to permit a more rapid flow and to secure to themselves a more reliable supply of water, by being able to draw it from a lower level in the lake, provided a dam were put at a suitable place in the river, or at the bar, the lake to be used and maintained as a reservoir.

"Under this contract and the evidence, the court decreed, among other things, that the plaintiffs had the right to maintain obstructions in a certain dam, to the height of fourteen inches above the floor of the dam, and the first question to be determined is whether the court erred in its decree on this point.

"It appears that the first dam was constructed by Salt Lake county, near the boundary line between Salt

Lake and Utah counties, to divert water from the river for the purposes of irrigation. All the plaintiffs became interested therein and afterward, in pursuance of the contract, a bar in the river, known as the 'New Bar,' was cut through and dredged, the channel of the river lowered and a new dam built about a mile below the new bar, but above the old dam, for the purpose of holding the water in the lake at the same level as it was before the new bar was removed, the removal of which was effected and the dam built to enable the plaintiffs to draw the water, when necessary, from a lower level in the lake; and the height at which permanent obstruction may be maintained by the plaintiffs in the new dam, without interference by the commission or any of the defendants, is the exact point now under consideration.

"The appellants contend that the evidence does not justify the finding of facts on the question, or that portion of the decree entered thereon, which determines the elevation at which the plaintiffs have a right to maintain the new dam, and the number of inches in depth of the new bar and other obstructions they had removed above the new dam and permanently lowered the bed of the river. The finding in question is as follows:

"That plaintiffs in the years 1888, 1889 and 1890 removed bars and other obstructions which naturally existed in the bed of the Jordan river at the new dam, and at the point known as New Bar, in the neighborhood of one mile above the dam, erected by said plaintiffs in said river, and in such removal removed permanent natural obstructions then in said river above said dam and permanently lowered the bed thereof fourteen inches, thus increasing the capacity of said river and thereby enabling said plaintiffs to utilize fourteen inches more in depth of the water of said lake, over the entire surface thereof, in seasons of low water. That said plaintiff, by reason of the removal of said bars and other obstructions to the depth aforesaid, are entitled to at all times keep and maintain planks or other obstructions on the floor or sill of the new dam erected by them, to the height of fourteen inches above the floor or sill of said dam and no more, and the court finds that said planks to the height of fourteen inches above the floor of the new dam are no more or greater obstruction to the flow of the water in said river than were said bars and other natural obstructions before their removal, as aforesaid. The floor of said new dam is found to be six inches lower than the top of the sill of the old dam as fixed by said contract.

"On the facts thus found the court decreed that 'the plaintiffs are entitled to at all times keep and maintain planks or other obstructions on the floor or sill of the new dam erected by them in the Jordan river, to the height of fourteen inches' and no more. It is difficult to see by what process of reasoning such a conclusion was reached.

"Counsel for the respondents have, in their brief, attempted an explanation of it, but to say the least their argument, in the face of the record and the above finding, is far from convinc-

ing and is quite unsatisfactory to us. Here is an express finding that the plaintiffs had actually lowered the new bar to the depth of fourteen inches, and because thereof were entitled to utilize fourteen inches more in depth of the waters of said lake, over the entire surface thereof, and that the top of the sill of the new is six inches lower than the top of the sill of the old dam, which was fixed by contract. It appears from the evidence—that the sill of the old dam is eighteen and a half inches lower than the new bar was before it was removed and the new dam being above and six inches lower than the old, how can the plaintiff utilize fourteen inches more of water, over the entire surface of the lake, if they be limited to fourteen inches of obstruction on top of the sill of the new dam? That water seeks its level is a self-evident proposition, and thus the sill of the old dam, being six inches higher than that of the new, the effect is to neutralize six of the fourteen inches of obstructions which the decree permits to be placed on top of the sill of the new dam, which practically is to allow the plaintiffs but eight inches of obstructions. This is so manifestly erroneous as to amount to an oversight or inadvertence on the part of the court in entering its decree, notwithstanding the views of counsel for the respondent to the contrary. In conformity with the finding of facts the court ought to have allowed twenty instead of fourteen inches of obstructions to be placed on the top of the sill of the new dam. Such would be the inevitable result from the finding of facts quoted, but the appellants insist that they dredged the river and lowered the river bar more than fourteen inches; that the facts found respecting this point are not such as the evidence warranted, and that they are entitled to maintain in the new dam at least twenty-two inches of obstructions. Upon careful examination of the whole evidence we are bound to admit the correctness of this position.

"The witness Doremus, who made the original survey of the river for the purpose of settling the controversy between the interested parties, testified: 'I can put an obstruction upon the floor of the new dam of 2.04 feet before I will obstruct the flow to any greater extent than the presence of the new bar did obstruct it. The difference in elevation between the floor of the new dam and the top of the new bar is 2.12 feet, the top of the bar being the higher; according to the further testimony of this witness, when the contract was made the difference between the present sill of the lower dam and the top of the outlet bar at the lake was two feet and three inches.'

"The witness McAllister testified: 'I superintended the work of dredging; was there frequently at the dam while it was being constructed, and three times ran a line of levels so as to make sure if the upper dam might be maintained two feet above its present elevation without retarding the flow of the water any more than the natural obstructions would have done if they had remained in the river and in the bar at the mouth of the lake.'

"The witness Young said: 'The channel is now practically 11 feet