

1951

William D. Jackson v. Spanish Fork : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

DOCKET NO. 7450 A

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IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM D. JACKSON,

Plaintiff and Respondent,

vs.

SPANISH FORK WEST FIELD IRRIGATION COMPANY, a corporation,
SPANISH FORK SOUTH IRRIGATION COMPANY, a corporation,
SPANISH FORK SOUTHEAST IRRIGATION COMPANY, a corporation,
THE SALEM IRRIGATION AND CANAL COMPANY, a corporation,
SPANISH FORK EAST BENCH IRRIGATION AND MANUFACTURING COMPANY, a corporation, LAKE SHORE IRRIGATION COMPANY, ED WATSON, State Engineer of the State of Utah, a corporation, and WAYNE FRANCES,

Defendants and Appellants,

Case No.
7450

BRIEF OF APPELLANTS

STATEMENT OF CASE

The plaintiff brought this action to quiet title to a flow of one cubic foot per second of the waters of

Thistle Creek a tributary of Spanish Fork River for the irrigation of about nineteen acres of land in Spanish Fork Canyon, Utah County, Utah, and for damages because of having been deprived of the use of such waters during a part of the year 1948. (J.R. 1-5).

To the Complaint the defendants and appellants filed their answer in which they denied the right of the plaintiff to the use of the one cubic foot per second, so claimed by the plaintiff, and defendants sought to secure a judgment against the plaintiff quieting their right to the use of the water claimed by the plaintiff and for the value of the use of the water by the plaintiff during the time he was using the same pursuant to an order of the court enjoining the defendants and appellants from using such waters and permitting the plaintiff to use the same. (J.R. 9-13).

A determination of the questions which divides the parties to this controversy requires a review of the evidence offered and received at the trial. We shall therefore briefly review such evidence.

The Plaintiff and Respondent claim the right to the use of the one second foot of water as the successor in interest of one Leven Simmons, who was one of the defendants in an action brought by Spanish Fork City, et al, against the Spanish Fork East Bench, Irrigation and Manufacturing Company, et al. That action resulted in a judgment dated April 20th, 1899 made by the Hon. Wm. McCarty and which judgment or decree is referred

to in the evidence as the McCarty decree. (See Plaintiff's Exhibit J.)

It will be noted from an examination of that decree that by such decree, it is, among other things, ordered, adjudged and decreed.

"That the defendants taking and using water above the mouth of said Spanish Fork Canyon, hereinbefore specifically named, are entitled to have of the waters of the said river and its tributaries, such a proportion of the waters of the said river as their necessities require, until the waters of said river recedes in volume to a quantity not exceeding Twenty-two inches in depth by Forty-one (41) feet in width, weir measurements, measured at the said measuring gates of the parties, below the mouth of said canyon hereinbefore stated:

That whenever the water of said river recedes in volume to a quantity not exceeding Twenty-two (22) inches in depth, by Forty-one (41) feet in width, measured as above stated, the said defendants above the mouth of said Spanish Fork Canyon, as aforesaid, are entitled, to have the water of said river not exceeding two (2) per centum thereof, until the water of said river recedes in volume to a quantity not exceeding Eighteen (18) inches in depth by Forty-one feet in width, measured as aforesaid.

That whenever the water of said river recedes in volume to a quantity not exceeding Eighteen (18) inches in depth, by Forty-one (41) feet in width, measured as aforesaid, the said Defendants above the mouth of

said Spanish Fork Canyon, as aforesaid, are entitled to have of the water of said river not exceeding One Per Centum thereof, until the water of said river recedes in volume to a quantity not exceeding Fifteen and One-half ($15\frac{1}{2}$) inches in depth, by Twenty-four (24) feet in width, measured as aforesaid, and thereafter said Defendants above the mouth of said Canyon, are not entitled to any of the water of said river, except for the irrigation of Thirty (30) acres of land and so long as the volume thereof continues at or below the said Fifteen and one-half inches in depth, by twenty-four feet in width; and for the purpose of irrigating said Thirty acres of land, said Defendants above the mouth of said canyon are entitled to have such a quantity of water as the plaintiffs have and use for irrigation of the same number of acres of land, at the same season of the year; said Thirty acres of water right to be known and designated in this decree as a "primary right."

That it is expressly stipulated and agreed by and among the said defendants above the mouth of said canyon that the water of said river hereby awarded to them, shall be distributed among the said defendants and the same to be decreed to them as follows: It is therefore ordered, adjudged and decreed;

That for the purpose of determining the rights of the parties taking their water above the mouth of Spanish Fork Canyon, and distributing and dividing the same among them, the said parties are divided into three classes, which shall be known in this decree as the First class, the Second class, and the Third class;

That the First Class embraces those persons who by this decree are entitled to the use of thirty acres of water, hereinbefore provided for and denominated as "primary" water, and said thirty acres of "primary" water is hereby decreed to be the property and to belong to the persons hereinafter named in the schedule made a part of this decree as being in the First Class;

The Second Class embraces those persons who are entitled to the use of that portion of the water of Spanish Fork River and its tributaries hereinbefore provided for, and classified as Two Percentum and One Per Centum of the Waters of Spanish Fork River, the said Two Percentum being two per cent of the waters of said river, when the same measured at the measuring gate of the Corporations, parties, hereto below the mouth of said canyon, as aforesaid, shall have receded in a volume to a point less than Twenty-two inches in depth and Forty-one feet in width, and not less than Eighteen inches in depth, and Forty-one feet in width, weir measurement; and the said One Per Centum being One Percent of the water of the said river when the same, measured as aforesaid, and not exceeding Fifteen and one-half inches in depth by Twenty-four feet in width weir measurement; and the said One Per Centum and Two Per Centum of the water of the said river and its tributaries are hereby decreed to be the property of, and shall be distributed to the persons named in said schedule as being in said First and Second Classes;

The Third Class embraces those who are entitled to the use of the water of said river and its tributaries

when the same shall exceed in volume twenty-two inches in depth by forty-one feet in width measured in the manner and places aforesaid.

That so long as the waters of Spanish Fork River and its tributaries exceed in volume said twenty-two inches in depth by forty-one feet in width measured as aforesaid, all said defendants who take their water above the mouth of Spanish Fork Canyon, the same being hereinafter specifically enumerated in the schedule which is made a part hereof, shall be entitled to the use of a sufficient portion of said waters for their necessities according to their respective rights as set forth in said schedule.

That when the waters of the said Spanish Fork River and its tributaries measured as aforesaid, shall exceed to a point not exceeding twenty-two inches in depth by forty-one feet in width, measured as aforesaid, then the rights of the parties hereto who are embraced within the Third Class shall be terminated and the Two Per Centum of the waters and the One Per Centum of the water of said river and its tributaries, provided for as aforesaid, shall be distributed to the parties hereto, who have rights in the First and Second Classes, in proportion, to their respective rights, as shown in the schedule contained herein.

That when the water of said river recedes to a point not exceeding Fifteen and One-half inches in depth and Twenty-four feet in width measured as aforesaid, then the parties in the said First Class shall be entitled to all

of the waters decreed herein to belong to the parties herein taking water above the mouth of Spanish Fork Canyon, the said water being the said thirty acres of primary right and the same is awarded and distributed as provided in said schedule, to the said parties named in the said First Class, according to their respective rights.

That the following is the said schedule and contains the names of the parties hereto entitled to water from said Spanish Fork River and its tributaries, above the mouth of Spanish Fork Canyon, and contains the rights of each person respectively in said classes, stated in acres the right of each person in each class being the proportion which the number of acres set opposite his name bears to the aggregate acreage in each class.

SCHEDULE

Name	First Class	Second Class	Third Class
Emma Gardner	20 acres		20 acres
Henry Gardner	3 acres		9 acres
D. A. Mitchell		5 acres -	45 acres -
H. B. Hicks		20 acres	40 acres
Geo. S. Pickering		5 acres	25 acres
Henry Elmer		4 acres	12 acres
John Drollinger		5 acres	35 acres
Jas. A. Mitchell		7 acres	9 acres
Samuel Francum		17 acres	23 acres
Henry Sargent		5 acres	40 acres
Jas. Francum			30 acres
Louis Nielson			10 acres
S. J. Courdin			25 acres
Herman Overhansly			45 acres

10 2 1/2
100 3 1/4

John Partridge		23 acres
J. J. Loveless	5 acres	10 acres
H. F. Johnson	7 acres	43 acres
Lorenzo Gardner	2 acres	
Robert Henderson	13 acres	7 acres
Leven Simmons	7 acres	8 acres
Hyrum Siller	4 acres 8 acres	13 acres
F. A. Jones	2 acres	1 acre
Wm. Brook	2 acres	2 acres
S. S. Powell	8 acres	17 acres
A. Gardner	2 acres	
Bert Jones	6 acres	6 acres
J. S. Lewis	20 acres	30 acres
M. D. Warner	10 acres	10 acres
John Warner		7 acres
John Bigley	10 acres	10 acres
T. J. Schofield	8 acres	12 acres
Wm. Rawlings	3 acres 20 acres	27 acres
Ed. Sackett	8 acres	12 acres
W. T. Williams	5 acres	10 acres
Jas. Ballard	6 acres	10 acres
Henry McKell	14 acres	12 acres
Wm. McKell	8 acres	5 acres
W. S. Pace	10 acres	10 acres
J. W. Coburn		30 acres
J. S. Lee		30 acres
Samuel Cornaby		15 acres
George Killian	6 acres	4 acres
Bernard Snow	6 acres	4 acres
Aaron Chadwick	4 acres	4 acres
Mrs. M. Reger		10 acres

That whenever the waters of said river decreed herein to the parties named in said schedule, shall be insufficient in volume to meet the requirements of the persons having interests in the first and second classes, those persons having interests as provided in said sche-

dule of the third class only, shall be cut off in their use of said water in proportion to the said rights, the cutting off to continue as long as the persons having rights in the said First and Second Classes shall require the water according to their rights as ascertained in said schedule and when the water of said river shall have diminished so that the one Per Centum provided for as aforesaid, is cut off from the said defendants taking their water from above the mouth of Spanish Fork Canyon, then the said primary water, being thirty acres, as aforesaid, shall be distributed to the said persons having first class rights only, as provided for in said schedule, and according to the rights of each respectively.

That for the purpose of carrying into effect the provisions of this decree relating to the division and distribution of the rights to the water as set forth in said schedule, to and among said defendants taking their water above the mouth of Spanish Fork Canyon, said persons stipulate and agree with themselves, and each one with the other, that three watermasters shall be selected, one from what is known as Thistle Fork, one from what is known as Soldier Fork, and one from what is known as Diamond Fork of said river, who may select either from their own number or otherwise, a person who shall be known as Head Watermaster, and they together, shall prescribe such rules and regulations in respect to the division and the distribution of said water as will secure the economical use thereof, and best observe the interests of all parties in this suit; the said Head Watermaster shall see that said rules and regu-

lations so prescribed for the division and distribution of said water are enforced.

It is further ordered, adjudged and decreed; that all of the water of said river not hereinbefore decreed to the defendants above the said mouth of said canyon, is hereby awarded to the parties herein below the mouth of said canyon, to-wit: The Spanish Fork East Bench Irrigation and Manufacturing Company, the Salem Irrigation and Canal Co., the Spanish Fork South Irrigation Co., Spanish Fork City, Spanish Fork West Field Irrigation Co., Spanish Fork Southeast Irrigation Co., and The Lake Shore Irrigation Co.

It appearing to the court that the parties herein below the mouth of said canyon last above named, have stipulated in writing among themselves, and filed the same in court, by which said parties have agreed among themselves that the water herein decreed to them shall be apportioned to them by this decree; and it appearing from said stipulation that the defendant Spanish Fork East Bench Irrigation and Manufacturing Co. diverts its water from Spanish Fork river, at or near the mouth of Spanish Fork canyon, by a separate ditch constructed for its purpose alone, and known as the Spanish Fork East Bench Canal; and that next below said East Bench Irrigation Canal, the Salem Irrigation Canal, and for its separate and independent use; and that next below the Salem Irrigation Canal, the Spanish Fork South Irrigation Co. diverts its water from said river by a canal known as the Spanish Fork South Irrigation Canal, and for its separate and independent use; and that next below the

last mentioned canal, Spanish Fork City, The Spanish Fork West Field Irrigation Co., and Spanish Fork Southeast Irrigation Co. divert their water from said river by a canal used in common between them, and known as the Mill Race, for their joint use, and that next below the last mentioned canal or Mill Race, the defendant The Lake Shore Irrigation Co. diverts its water from said river by a canal known as the Lake Shore Canal, and for its separate and independent use; and that said canals, being five in number, are all of the canals, and all of the diversions of water from Spanish Fork river, in Utah Valley below the mouth of said Spanish Fork Canyon, and that the said parties to said stipulations are the only appropriators of any of the said water of said river below said canyon.

And it further appearing from said stipulation that this decree as to the distribution of said water among said parties may be made, it is therefore ordered, adjudged and decreed, that the waters of said Spanish Fork river herein decreed to said parties below the mouth of said Canyon, be awarded to and divided among them as follows, to-wit;

That until the water of said river recedes in volume to a quantity not exceeding 25 inches in depth by 24 feet in width, weir measurement, measured at the measuring gates of said parties below the mouth of said canyon, each of said parties shall have and be entitled to take of said water according to their necessities.

That whenever the water of said river recedes in volume to a quantity not exceeding twenty-five (25) inches in depth, and twenty-four (24) feet in width, measured as aforesaid and until the same receding in volume to a quantity not exceeding eighteen (18) inches in depth, by twenty-four (24) feet in width, measured as aforesaid, the defendant, the Spanish Fork East Bench Irrigation and Manufacturing Co. shall have Seven-forty-firsts ($7/41$) thereof, the plaintiff the Salem Irrigation and Canal Co. Seven and one-half forty-firsts ($7\frac{1}{2}/41$) thereof, the plaintiff, the Spanish Fork South Irrigation Co. Eight and one-half forty-firsts ($8\frac{1}{2}/41$) thereof, the plaintiffs Spanish Fork City, Spanish Fork West Field Irrigation Co., and Spanish Fork Southeast Irrigation Co. through their common canal, known as the Mill Race, Eleven Forty-firsts ($11/41$) thereof, and the defendant, the Lake Shore Irrigation Co. Seven forty-firsts ($7/41$) thereof.

That whenever the water of the said river recedes in volume to a quantity not exceeding eighteen (18) inches in depth by Twenty-four (24) feet in width, measured as aforesaid, and until the same recedes in volume to a quantity not exceeding Fifteen and one-half ($15\frac{1}{2}$) inches in depth by Twenty-four feet in width, the defendant, Spanish Fork East Bench Irrigation and Manufacturing Co. shall have two-twenty-fourths ($2/24$) thereof, the plaintiff Salem Irrigation and Canal Co., four twenty-fourths ($4/24$) thereof, the plaintiff, Spanish Fork South Irrigation Co., shall have six twenty-fourths ($6/24$) thereof, the Plaintiffs, Spanish Fork City, the Spanish

Fork West Field Irrigation Co., and the Spanish Fork Southeast Irrigation Co., to be taken through their common canal known as the Mill Race, shall have, eleven twenty-fourths ($11/24$) thereof, and the defendant, the Lake Shore Irrigation Co., shall have one twenty-fourth ($1/24$) thereof, measured as aforesaid, at the City and Mill Race dam; and that thereafter, so long as the waters of said river continue at or below said fifteen and one-half inches in depth, by twenty-four feet in width, measured as aforesaid, the said defendant, the Lake Shore Irrigation Co., shall not be entitled to any of the water, of said river, except such as may be called seepage water, arising below said city dam.

That whenever the said water of said river recedes in volume to a quantity not exceeding Fifteen and one-half inches in depth, by twenty-three feet in width, measured as aforesaid, and until the same recedes in volume to a quantity not exceeding ten inches in depth, by twenty-three feet in width, measured as aforesaid, the defendant, the Spanish Fork East Bench Irrigation and Manufacturing Co., shall have two twenty-thirds ($2/23$) thereof, the plaintiff, the Salem Irrigation and Canal Co. shall have four twenty-thirds ($4/23$) thereof, the plaintiff, the Spanish Fork South Irrigation Co. shall have six twenty-thirds ($6/23$) thereof, the plaintiffs, Spanish Fork City, the Spanish Fork West Field Irrigation Co., and the Spanish Fork Southeast Irrigation Co. to be taken through their common canal, known as the Mill Race, eleven twenty-thirds ($11/23$) thereof.

That whenever the water of said river recedes in volume to a quantity not exceeding ten (10) inches in depth, by twenty-three (23) feet in width, the defendant, The Spanish Fork East Bench Irrigation and Manufacturing Co. shall have a quantity of water not exceeding six (6) inches in depth by Two (2) feet in width, measured as aforesaid, and the remainder of the waters of said river shall be distributed as follows: The plaintiff, The Salem Irrigation and Canal Co. shall have Four twenty-firsts ($\frac{4}{21}$) thereof; the plaintiff, The Spanish Fork South Irrigation Co., shall have six twenty-firsts ($\frac{6}{21}$) thereof; the plaintiffs, Spanish Fork City, The Spanish Fork West Field Irrigation Co., and the Spanish Fork Southeast Irrigation Co. to be taken through their common canal, known as the Mill Race, shall have Eleven twenty-firsts ($\frac{11}{21}$) thereof; and this last measurement shall continue in relative proportions as the water recedes, so long as the quantity in said river does not exceed Ten (10) inches in depth by Twenty-three (23) feet in width, measured as aforesaid.

It is further ordered, adjudged and decreed, that notwithstanding any of the provisions of this decree, none of the parties hereto shall divert water from the said Spanish Fork river at any time, except it be needed for, and actually used, for beneficial and useful purposes, and none of the parties hereto, that take their water from said river below the mouth of Spanish Fork Canyon, as hereinbefore designated, shall divert from said stream more water than will fill their ditches as at present constructed, and this provision shall in no

wise interfere with the right of any of the parties to clean out or improve their ditches at their present size, or to change the course or place of use without increasing their size.

It is further ordered, adjudged and decreed; that each of the parties hereto diverting water from said river below the mouth of Spanish Fork Canyon, shall, or at or near the point where it respectively divert said water, maintain good measuring gates, so as to accurately measure by weir measurement, the amount of water diverted by said canal respectively.

That for the purpose of carrying into effect the provisions of this decree, and in order to distribute the water of said river, and its tributaries to the parties severally entitled thereto, pursuant to the terms of this decree, the Watermasters of the Spanish Fork South Irrigation Co., the Salem Irrigation and Canal Co., Spanish Fork East Bench Irrigation and Manufacturing Co., the Lake Shore Irrigation Co., the Watermaster of the Mill Race, and the Head Watermaster selected by the parties hereto taking water from said river above the mouth of Spanish Fork Canyon, shall constitute a commission, and it shall be the duty of said commission to select some disinterested, suitable, and competent person to make proper measurements, divisions and distributions according to the terms of this decree, and if said commission is unable to agree on any such person, then such person so aggrieved may call upon the County Surveyor of Utah County to make such measurements, division and distribution, and his

determination shall be final; and if upon such determination being made, it shall be found that such complaint of the aggrieved party is groundless, whatever costs may be incurred in making such measurement, division, and distribution shall be paid by such party demanding the same, but if it is found to be right, or made in good faith, then the costs so incurred shall be borne in six equal parts, one part by the parties who take water above the mouth of Spanish Fork Canyon, and the balance by the parties representing the five different ditches below the mouth of the Canyon; but in case said dispute has no relation to the use of the water up the canyon, then it is to be paid in equal parts by the parties represented by the five different ditches below the mouth of the canyon, one-fifth to each of said ditches."

It is further made to appear that because of the difficulty of determining the quantity of water in second feet that the people below the mouth of the Spanish Fork Canyon were entitled to receive as provided by the measurements mentioned in the McCarty decree, thus when the flow of Spanish Fork River exceeded $344\frac{1}{2}$ second feet the Canyon people were under the McCarty decree entitled to use all the water that they could beneficially use, that when the flow of the river is between $344\frac{1}{2}$ and $253\frac{1}{2}$ record feet, the Canyon people are entitled to two per cent of the total flow of the river and of which amount the Clinton Irrigation Company stockholders were entitled to 102 acres, and the other canyon people were entitled to 70 acres. (Trs. Vol. 2, page

564). When the flow of Spanish Fork River recedes below 253 second feet down to 118 second feet the Canyon people are entitled to one per cent of the total flow of the River. After the flow of the river recedes to below 118 cubic feet per second, the Canyon people are not entitled to any water. That such has been the practice of distributing the water of Spanish Fork River is established by the testimony of Wayne Francis, the water commissioner on Spanish Fork river (Trs. 565).

It is further made to appear by documentary evidence that on July 22, 1918 Leven Simmons and his wife Teresa entered into a contract for the purchase of additional water for the land which he then owned, such land being the same land as that now owned by the plaintiff who claims one cubic foot of water by adverse use. It will be noted that such contract, Defendant's Exhibit 2, among other things, recites, "Whereas, during certain portions of the irrigation season, the flow of these creeks which the contractors desire to divert belong to appropriators lower down on Spanish Fork River System and, whereas, the contractors desire to use the natural flow of said creek (Benney and Thistle Creeks), or a portion thereof, and desire the United States to release stored water from the Strawberry Reservoir to replace said natural flow belonging to such lower appropriators as own land below where the water of the Strawberry reservoir flows into Spanish Fork River System.

“ARTICLE I. Now therefore it is agreed that the United States will discharge 224.00 acre feet of water annually from the Strawberry Reservoir for the benefit of the contractors, during the months of May to September, inclusive, as may be requested by the Contractors. The water discharged by the Government from Strawberry Reservoir will be measured at the Government rating flume about two miles below the West Portal of the Strawberry Tunnel.

For and in consideration of the release of such stored water the contractors will pay the United States a construction charge of \$51.75 per acre foot and an annual operation and maintenance charge.

“ARTICLE 6. . . . The contractor's watermaster elected in accordance with the agreement of September 4, 1915, between the contractor and the owners of prior rights around Spanish Fork, shall have power to receipt for Government water on behalf of the contractors and each of them and to represent the contractor or their agent in requesting for the contractor the discharge, change of rate of discharge, or cessation of discharge of stored water from the Government Reservoir”. (Defendant's Exhibit 2)

The Plaintiff called 13 witnesses, many of whom testified as to the water that was diverted through a ditch which extended along the west side of the land, consisting of about 19 acres located above Thistle in Utah County, Utah, upon which 19 acres of land the Plaintiff claims the right to use the one cubic foot per

second, in addition to the McCarty decree water and the water purchased from the United States.

Plaintiff William D. Jackson testified: That he moved up on the property upon which he claims the right to use the one second foot of water, in 1944, Trs. 7; That he installed an electric pump to pump water from a well located at the home on the premises, Trs. 7 and 8. In his testimony, Mr. Jackson referred to a drawing made by him and his wife, but such drawing seems to have been lost, Trs. 11. He testified as to the manner in which he irrigated the land upon which he claimed the right to use the water while he was on the property, Trs. 13-14; That on July 12, 1948 the water commissioner of Spanish Fork River turned the water out of the ditch which diverted water from Thistle Creek, a tributary of Spanish Fork River, Trs. 14; That as a result the water in the well receded, Trs. 15. The water was turned back in the Jackson Ditch on July 27, 1948, Trs. 17. The quantity of water turned back in the Jackson Ditch was one second foot, Trs. 21. About a week after the water was turned back in the Jackson ditch the water in the well became usable, Trs. 22; That he was in the vicinity of the land where he now lives in 1923, Trs. 22. He had been in the vicinity of that land and along the ditch to the west of said land ever since the year 1923, Trs. 24; That prior to 1943 abundant crops were grown on the land in question, Trs. 25; That when he passed the land along the road to the west, the ditch to the west was always full or nearly full of water, Trs. 25; That since he has owned

the land upon which he claims the right to use water, he has produced two crops of hay; That he produced two crops in 1944, 1945, 1946 and 1947. About two tons per acre were produced on the first crop and one and a half tons per acre on a second crop, Trs. 27; That after the hay was harvested he used the land for pasturage for his lambs, Trs. 28; That he used Strawberry water to increase the stream, Trs. 28; That during 1943, 1944, 1945, 1946, and 1947 he used 35 acre feet of Strawberry water and 20 shares of McCarty Decreed water to irrigate the 19 acres of land, Trs. 34.

The time that Jackson was near the place where he now resides, in 1923 was the forepart of May, Trs. 44; That he is not familiar with the McCarty Decree or the amount of water that is available under that decree, Trs. 49 and 50. Under that decree the Canyon people are entitled to water throughout the irrigation season, Trs. 50. There is ample water for everyone during April and May, Trs. 50. He does not know when water is no longer available under the McCarty decree, Trs. 51. It is possible that the water he saw running in the West Simmons or Jackson Ditch was water delivered under the McCarty decree, Trs. 51. Plaintiff Jackson used 35 acre feet of water on the nineteen acres and some other land, a total of about 35 acres, Trs. 59-61. He has no idea of the amount of water that he receives from his secondary water right, Trs. 62; That he has drawn his secondary water in the fall, Trs. 62; That when he wants water he notifies Bert Oberhansley, Trs. 63; That he had a credit for water in July 1948, Trs.

63-64; That in 1948 there was $\frac{3}{4}$ of an acre foot of water for each share, Trs. 65; That of the 19 acres around the home, about one acre cannot be irrigated from the West Jackson ditch, Trs. 69. The water commissioner might have measured the water that he has used. I think he has. The water commissioner has slammed the headgate down, but they haven't shut it off. The headgate was so they couldn't shut off all the water, Trs. 72; That he did not know of the Water commissioner closing off the water before 1948, but it has been slowed up, Trs. 73-74; That he doesn't recall asking Mr. Stewart, the water commissioner in 1945, to let a little water run down so that he might water his livestock, Trs. 77.

Mariah J. Shepherd a witness called by the Plaintiff testified: That she lived on a dry farm south of the Jackson property from 1909 to 1920 and travelled to and from Thistle along the road which is West of the Jackson home; That she passed over the road every Tuesday, Thursday and Saturday and then on Sunday, Trs. 102; That during that time Simmons had good crops of hay and grain, Trs. 103; That when she travelled along the road there was always water in the ditch along the west side of the road, Trs. 104; She did not know how much water was in the ditch but it was always full, Trs. 104. The water at times was used to irrigate the land, Trs. 105; That she worked for Simmons who then owned what is now the Jackson land, Trs. 107. They used water from the well and it did not go dry, Trs. 108. The ditch might have gone

back into the Creek but at times it was used for irrigation, Trs. 111-112; That the fence on the west of the highway was not there all of the time she travelled that road, Trs. 116.

Joseph H. Shepherd a witness called by the Plaintiff, testified: That he is the husband of Mrs. Shepherd who just testified; That he lived on Crab Creek from 1909 to 1920 and frequently travelled along the road just west of the property now owned by Jackson, Trs. 119-120; That he travelled the road on Sunday and at times during the week, Trs. 120; That during the winter he lived at Thistle, Trs. 122; That he didn't remember of seeing the ditch on the west of the Jackson property when it did not have water in it, Trs. 122-123; That the land now owned by Jackson was farmed and wheat, oats and hay were raised on the farm, Trs. 125. Potatoes and garden was also raised on the land, Trs. 126; That the ditch was always full but he didn't know how much water was in the ditch, Trs. 127; That he didn't know if Leven Simmons irrigated in July and August, but his grain was always tall, Trs. 129.

On cross examination, Mr. Shepherd testified that grain was generally harvested in the latter part of July, Trs. 129; That grain is generally watered the last time in the latter part of June, Trs. 130; That he crossed the ditch along the west side of the Jackson property and crossed three times in going along the road, the last time being when it crossed from the east to the west of the road, Trs. 133-134. In the summer time there

was usually water in the ditch, Trs. 137; That he did not know where the water that was in the ditch went to, but he saw them irrigating, Trs. 137-138.

Earl Gardner, a witness called by the plaintiff, testified: That he owns some property and has resided south of the Jackson property for about 25 years or since 1920, Trs. 140; That he worked on the road which runs West of the Jackson property from 1923 to 1935; That he observed the crops growing on the Simmons property; That when the property was in alfalfa or grain they raised a good crop, Trs. 141; That where the ditch crossed the road it often ran over onto the road when sheep passed over the road, Trs. 144; That the amount of water in the ditch (one second foot) was not nearly as much as was in the ditch when it went over the road on a previous occasion, Trs. 145; That he passed along the road from two to four times a week and there was always water in the ditch, Trs. 145-146. On cross examination he testified: That when he saw water in the West Jackson Ditch there was about twice as much as there was the other day or about two second feet, Trs. 148-149. Spencer Simmons used the water at times to irrigate. Simmons used a second foot of water for eight acres of land, Trs. 150.

George C. Jackson, a witness called by the Plaintiff, testified: That he is a brother of the Plaintiff and operates a sheep outfit, Trs. 150; That between 1923 and 1931 he passed along the road which runs west of the Jackson property. He passed there about every week

or ten days, Trs. 154; That sheep were taken up the road west of the Jackson place twice a year, once in the spring and once in the fall, Trs. 155. He did not recall of the ditch west of the Simmons, now Jackson property, ever being dry; That when he saw the water in the ditch during past years there was twice as much water as there was in the ditch the other day, Trs. 157-158.

Alvin J. Jackson, a witness called by the Plaintiff, testified: That he is a brother of the plaintiff; that he owns five acres of land near the land of his brother which he irrigates with Strawberry and McCarty decree water, Trs. 165; That after 1923 he observed the crops grown by Spencer Simmons on the land now owned by plaintiff and that Simmons field was green and good crops raised, Trs. 166; That there was not as much water in the ditch the other day as there was in former years, Trs. 169; That he never remembered the West Jackson Ditch being dry when he went by there in former years, Trs. 169.

David A. Mitchell, called as a witness by the plaintiff, testified: That he has lived in the vicinity of Thistle since 1889; That he is acquainted with the Jackson property which was formerly owned by Simmons, Trs. 175; That every time he went by the Simmons property he saw water running in the ditch to the west of the property, the ditch was full ordinarily, Trs. 179; The crops grown by Simmons and others on the Jackson property were about average, Trs. 180.

On cross examination he testified that the people from Spanish Fork, Lake Shore and Benjamin often came up in the canyon to regulate the water, but early in the season when there was enough water for all, the people in the canyon were permitted to take all the water they wanted to take, Trs. 182-183; That he had no occasion to notice whether or not the people in the valley ever interfered with the water on the Jackson property, Trs. 184; That he did not recall whether or not Simmons leased some of the water that was developed in driving the Strawberry Tunnel, Trs. 186.

T. E. McKean, a witness called by the plaintiff, testified: That he has lived in Spanish Fork Canyon on Thistle Creek since 1910; that he passed along the road west of the property now owned by plaintiff about once a week, Trs. 189; That when Spencer Simmons owned that farm he raised good crops, Trs. 190; That he didn't remember of passing that ditch when it was dry, Trs. 192; That Simmons had cattle on the property that secured water out of the river; That he didn't know how many cattle Simmons had, but it seems he had 50 or 60 head. He kept them there in the spring and fall, Trs. 194; That he was on the Jackson place on August 20, 1948 and the crops were burned up, Trs. 195; That the water in the well was about a foot below the valve and the water from the well smelled, Trs. 197.

On cross examination he testified: That he is a farmer and that they usually irrigate grain two times a year, the first irrigation being about the middle of

May and the last about June 1st to 10th, depending on the season, Trs. 198; That hay is irrigated from two to four times, Trs. 199; That he didn't remember of seeing the ditch west of the Simmons place dry; That he saw water in the ditch most of the time when he went by, Trs. 200.

James Hicks was called as a witness by the plaintiff and testified: That he had lived in Thistle Creek Canyon; That he was familiar with the land operated by Spencer Simmons; That in about 1912 and 1920's he helped to put up hay, Trs. 207; That Simmons raised good crops, Trs. 208; That Simmons had cattle on his farm, Trs. 209; That Simmons raised hay and grain on the farm, Trs. 211; That Simmons raised good average crops, Trs. 212; That Simmons used a little better than a second foot when irrigating, Trs. 213; That he did not remember seeing the ditch when it was dry, Trs. 214.

On cross examination he testified that generally they irrigated up in the canyon two or three times, Trs. 216; That they irrigated about July 1st and two weeks thereafter, Trs. 218; That he recalls the people from down in the valley coming up in the canyon and regulating the water about June 1st, Trs. 219; That at times the canyon people were regulated in the use of water about July 1st and sometimes later, Trs. 220; That he remembered when the people in the canyon including Simmons bought Strawberry water, Trs. 222; That there was a water commissioner on Spanish Fork River who regulated the water of Spanish Fork River; That the people

in the canyon had a water commissioner whose name is Bert Oberhansley, Trs. 224; That he didn't raise any better crops after he purchased Strawberry water than he did before, Trs. 225; That with the McCarty decree water and the Strawberry water the people in the canyon have enough water to get along and raise good crops, Trs. 226.

During the time the witness worked on the Simmons farm, water was used from the well; That most of the time the water was good, but there were times when it wasn't; The well dried up, Trs. 227.

Max De Pew was called as a witness by the defendant and testified: That at one time he owned the property now owned by Plaintiff, Trs. 228; That he went to work on the property in 1930, Trs. 229; That culinary water was supplied from the well; That he had livestock on the property, Trs. 230; That there was a water hole for the livestock; The water came through the west ditch, Trs. 231; That Spencer Simmons had about 75 head of cattle on the property, Trs. 232; That while he was on the property he raised wheat, barley, alfalfa and some grass, Trs. 232; That when he bought the farm he had 20 acre feet and after he bought the place, another twenty acre feet of Strawberry water, Trs. 235-236; That the water at times was taken in turns, Trs. 236; That there was always a small stream in the ditch while he was there, Trs. 236; That when they watered the property south of the house, a booster was used so that more water was put in the ditch, Trs. 236; Some-

times the water commissioner permitted them to use what water they wanted; That the watermaster kept track of the water used, Trs. 237; That in 1931 it seems there was more water than there was yesterday, but he couldn't tell whether it was more or less, Trs. 239; That at one time he recalled all of the water was turned out of the ditch, Trs. 239; That the extra 20 acre feet of water which the witness received when he purchased the property was owned by the Simmons estate; That the estate had 50 acre feet, and 20 acre feet that he bought was for property farther south, Trs. 243; That there is about 17 acres of land irrigated out of the west ditch, Trs. 244; That when he used 20 shares of McCarty and 40 acre feet of Strawberry water on the 17 acres he raised good crops, Trs. 245; When there was no demand for water below, the commissioner let them use all the water they wanted to use, Trs. 246; That when he wanted more water he would order it from Bert Oberhansley and usually received a second foot, Trs. 246; That when he finished using the water he turned it off, Trs. 237; The commissioner may have shut off the water but the witness ordered the water, Trs. 247; That he didn't know where Simmons used the fifty acre feet of Strawberry water before he purchased the property, Trs. 257; That it takes one irrigation to raise one crop of hay, Trs. 258.

Wm. C. Anderson, a witness called by the plaintiff, testified: That he at one time worked about $4\frac{1}{2}$ miles south of Clinton; That he travelled the road West of the Jackson property while he lived in the canyon, Trs.

260; That he remembered travelling the road as far back as 1922 or 1924; That Spencer Simmons raised mostly hay on the property when he owned it, Trs. 261; That he raised meadow hay in the sloughs; That he pastured his cattle on the land in the fall, Trs. 262; That the ditch west of the land always had water in it, Trs. 263; That he didn't know how much water was in the ditch, but the ditch was full and slopped over, Trs. 263; That he was Secretary of the Clinton Irrigation Company in 1932; That Company distributed the Strawberry water; That in the spring of the year the people in the canyon took all the water they wanted, Trs. 265; That Clifford Jex was the first water commissioner he remembered, Trs. 265; That he occasionally assisted Jex to measure the water, Trs. 265; That he didn't know whether the people below had all the water they needed while the people in the canyon were permitted to use all the water they wanted, Trs. 267; That he did not know how much water the people in the canyon used but he knew that they used more than their decreed McCarty water and the Strawberry water in 1922 to 1932; That during those years the people in the canyon turned over to the lower users all of their Strawberry water and used such water as they diverted from the river, Trs. 269; That beginning in 1932 the people in the canyon would all come to the Secretary of the Clinton Irrigation Company and tell him the amount of water he needed from the Strawberry Reservoir and then the Secretary would tell the commissioner the quantity of water the canyon people wanted and the commissioner

would order that quantity of water and charge the same against the Strawberry water owned by the stockholders of the Clinton Irrigation Company. The canyon people would apportion the water among themselves, Trs. 275-277; That Simmons owned cattle that were watered from the West Simmons ditch, Trs. 285.

Ernest Mitchell, was called as a witness by the Plaintiff and testified: That he is 39 years of age and resides at Birds Eye; That he is acquainted with the plaintiff's property; That he passed by the Simmons property about once a week while Simmons owned it; That hay was being raised on the property, Trs. 289-290; That hay in the canyon in 1948 was worth \$20.00 per ton; That the pasturage on the land of plaintiff after the hay is cut was worth from \$12.00 to \$15.00 an acre, Trs. 295.

Raymond B. Farnsworth was called as a witness for the plaintiff and testified: That he had examined the property of the plaintiff and that the Jackson land requires from 15 to 48 inches of water during the growing season, Trs. 334; That one second foot of water can be beneficially used to irrigate the land, Trs. 335; On Cross Examination he testified that he is familiar with what the State Engineer regards as a full water right which is one second foot to 60 acres of land, Trs. 337; That to raise grain on the land of Jackson's will require from 15 to 23 inches, Trs. 339; For alfalfa from 36 to 60 inches per acre per annum; That the average would be

about 48 inches, Trs. 339; That as much as 6 acre feet might be used, Trs. 340.

The defendants called the following witnesses who testified as follows:

L. P. Thomas testified that he is 77 years of age; That he had been an officer of the defendant, West Field Irrigation Company; That back in 1902 he made his first trip into Spanish Fork Canyon for the defendants, Trs. 352; That the people below the mouth of Spanish Fork Canyon had a committee to see that the term of the McCarty decree was carried out; That committee appointed a watermaster, Trs. 353; That the people up in the canyon at times had a watermaster, Trs. 354; That the first water commissioner that he remembered being selected was Newell Monk who is still alive, but his mind has gone and he is incompetent, Trs. 355; That the duties of Newell Monk were to see that the McCarty decree was carried out, Trs. 356; That in 1914 between four and five o'clock in the afternoon he turned off the water from what is now the Jackson property, Trs. 359; That Spencer Simmons at no time claimed any water other than that to which he was entitled under the McCarty decree, Trs. 360; That 1948 was an unusually dry year, Trs. 364; That 1934 was also a very dry year, Trs. 364; That in 1920 some water was turned out of the Strawberry Reservoir and no charge made for the same, Trs. 365; In 1921 everybody on the river had all the water they wanted, Trs. 365; That the River Commissioner was directed to regulate the water of

the river in conformity with the rights of the water users as fixed in the McCarty decree and the Strawberry water as called for, Trs. 374; That Mr. Sabin, the deputy water commissioner was directed by the Central committee to turn off the second foot of water flowing in the West Jackson Ditch, Trs. 377.

Loren W. Jones was called as a witness by defendants and testified: That he was water commissioner of Spanish Fork River during the years 1923 to 1928 inclusive; That as water commissioner his duties were to distribute the waters of Spanish Fork River including the Strawberry water; That during the time he was water commissioner beginning about June 1st, he made trips into Spanish Fork Canyon about once a week, Trs. 379; That the trips were made when the flow of the river fell down to a point where the canyon people were to be regulated in the use of the water; That he went to the place where water is diverted into the Simmons or Jackson farm about once every two weeks; That he kept notes but the same have been lost or misplaced, Trs. 381; That measurements were taken of the amount of water that was being diverted, Trs. 382; That he did not turn water into the Simmons ditch as he assumed it was turned in by Simmons; That the Clinton Irrigation Company took care of the water which was distributed to its stockholders and the commissioner of the river kept a record of all the water that was delivered to the stockholders of that company, Trs. 383; That when he turned the water off from the Spencer Simmons property he frequently talked with Spencer Simmons,

Trs. 384; That when he turned the water off he notified Spencer Simmons that he had received all the water he was entitled to use; That at no time did Spencer Simmons claim that he was entitled to any water other than the McCarty decree water and the Strawberry water; That the witness told Simmons that the people in the canyon were under the regulation of their company and Simmons said that, "We haven't any Company that will function up here;" That whenever commissioner Jones turned off the water he discussed the matter with Simmons which would be several times during the season of each year, Trs. 384; That the Spencer Simmons cattle had access to the creek; That he did not recall seeing cattle on the west side of the road; That when the witness turned off the water he, Simmons, did not say anything about water for cattle, Trs. 385; That after about September 20th he did not attempt to regulate the use of the water by the people in the canyon because the farmers below did not need the water, Trs. 386-387; That Spencer Simmons told the witness to turn off the water, Trs. 395; That when the people in the canyon were cut to 2% or 1% of the water under the McCarty Decree, the witness would so regulate them that they received only the water to which they were entitled, Trs. 398-399.

James A. Anderson, a witness called by the defendants, testified: That he was water commissioner of Spanish Fork River during the season of 1929-1930; That in 1929 the witness went up into Spanish Fork Canyon with Lew P. Thomas to learn what he was to do

and again on July 1st, 1929 he again went into the canyon and made measurements on Crab Creek and Thistle Creek; That he made another trip in May 1930; That later in May 1930 he made another trip, Trs. 400; That he did not find any of the people in the canyon using water that they were not entitled to use; That at one time early in the season water was running in the Simmons ditch; That later in the season of 1929 and 1930 when he was up in the canyon no water was running in the Simmons ditch, Trs. 401.

David Warner, a witness called by the defendants testified: That he was deputy water commissioner on Spanish Fork River in 1934 and about six months in 1930, Trs. 411. He served in the canyon in 1934 and measured the water in the canyon and filled the requests for Strawberry water, Trs. 412; That he received information as to the water used by the various individuals in the Clinton Area who diverted water from the river, Trs. 413; That he went several times to the place where Leven and Spencer Simmons diverted water; That he measured the water diverted onto the Simmons property from time to time; That he turned the water off the Simmons property several times, Trs. 414; That one time when the water was turned off Spencer Simmons was right there and he wanted me to turn it off further down, Trs. 415; That it was a common practice in the canyon not to remove the dam in the creek but to cut the water back into the creek from the ditch at some lower point; That when the water was cut back into the creek no water was permitted to course down the

West Simmons ditch, Trs. 417; That the witness did not remember of Simmons ever protesting when he turned off the water, Trs. 421; He knew the water was out of the Simmons ditch a lot of the time during that summer (1934), Trs. 424.

Angus D. Taylor a witness called by defendants testified: That in 1937, 1938, 1939 and 1940 he was assistant water commissioner on Spanish Fork River, Trs. 426; That his principal duties were in Spanish Fork Canyon, Trs. 427; That the Clinton Irrigation Company ordered the Strawberry water turned down, Trs. 428; That the watermaster of the Company made requests in writing as to the quantity of water that should be turned into each ditch; That the witness was at the Simmons ditch on an average of once every week or ten days, Trs. 429; That the witness turned the water out of the Simmons ditch at least six times during the years he was assistant commissioner; That whenever he turned off the water he notified the user, that applied to Simmons, Trs. 430; That he remembered of seeing Mr. Simmons himself in 1937 and of seeing his helper Max De Pew in 1938, that he left word at the house when he turned off the water; That he turned all of the water out of the Simmons ditch, Trs. 431.

Benjamin F. Simmons was called by the Defendants and testified: That he was Assistant Water Commissioner of Spanish Fork River in 1934, Trs. 437: That whenever, on account of rain, the lower users did not need the water the Canyon people were permitted to

take the water, Trs. 438: That he turned off the water from the Jackson property when De Pew owned that land; That one time there was difficulty in turning off all of the water because the gate leaked and one time De Pew wanted a small amount of water for his cattle and the witness did not take all the water, Trs. 439: That Mr. De Pew was there when the witness turned off the water, Trs. 445-446: That on April 23rd (1943) water was turned off from the Jackson property; On June 1st he had the water but no charge was made because it rained and there was ample water. On July 21 the water was off; On June 3rd he had it on; 4th he had it on; 5th he had it on; 6th and 7th he had it off, 8th and 9th he had it on. June 10 to June 20 it was off; On June 21st it was on; July 18 to 21st it was off. There was about 1 and $\frac{1}{2}$ second foot stream. Aug. 6 it was on; Aug. 7th was off. Aug. 20 on, August 21st off, Sept. 10th it was on; 11th, 12th and 13th off. Trs. 449.

Willis Hill, a witness called by the Defendants, testified: That he was Water Commissioner in 1944 on Spanish Fork River; That he told Mr. Jackson when he wanted water he should put out a red flag on his gate and when Jackson got through with the water he was to put out another flag: That Mr. Jackson agreed to that arrangement and that practice was followed, Tr. 457; That water was not running in Jackson ditch when it was not his turn, Tr. 458.

Orla Stewart, a witness called by the Defendants testified: That he was Deputy Commissioner of Spanish

Fork River during the year 1942 and 1945: That he attended to the distribution of the water in Spanish Fork Canyon: That he had occasion to go to the Jackson property which was then being operated by Max De Pew, Trs. 465: That he visited the Jackson property nearly every day: That he kept a memorandum of the visits and of the quantity of water flowing in the ditch. There were times that there was ample water for everyone, Trs. 466: That when the water receded he would notify the water users and Mr. Oberhansley, the water Commissioner that they were being charged with the water used: That if they didn't want to use the water it was held in reserve for them, Trs. 467: That in 1942 he began regulating the water on or about June 1st; That as the water users in the Canyon wanted Strawberry water, Mr. Oberhansley would give Mr. Francis the order and Mr. Francis would order Strawberry water turned in to replace the water that was taken out by the Canyon people: That Mr. De Pew in 1942 called for water on May 21st, on June 3rd he ordered the stream off; On June 18, he ordered a second foot of water again; On June 19th, he ordered it off; On July 9th, he ordered one second foot of water; July 12th, he ordered it off; July 27th, he ordered one second foot; On July 29th, he ordered it off; On August 15th, he ordered one second foot; On August 16th, he ordered it off; On September 8th he ordered it off. That was the water used by Mr. De Pew through the West Simmons or Jackson Ditch according to his records: That he generally went up into the canyon every day, Trs. 468: That he turned off

the water nearly every time because Max De Pew's little girls were doing the irrigating and they couldn't turn the water off. Some times Max De Pew would turn the water off. It was difficult to shut the water off dry, a little water leaked through the gate in spite of most anything he could do, Trs. 469; That when he was up there shutting off the water he talked to De Pew, his wife and daughters, Trs. 470.

That on about June 1st 1945 the water was put under regulation; That the river commissioner kept a record of the McCarty decreed water and the Strawberry water; That the water users were credited with all of the water to which they were entitled and then charged with the water that was actually delivered; That 1945 was a wet season; That on May 28th two second feet of water was taken out of the West Simmons or Jackson ditch, Trs. 471. It was used for three days and turned off on May 31st, that was free water as everyone had ample water; That the water was on the Jackson property from June 5th to June 19th and no charge made for that water because there was ample water for everyone on the river, Trs. 472; That on August 4th the Jackson Dam washed out and remained out for about a week, Trs. 473; That there was no water running in the West Simmons or Jackson ditch during the year 1945 except during the time allotted except the little water that leaked through the gate, Trs. 474.

On cross examination Mr. Stewart testified concerning the water that was used on Crab Creek, Trs. 475-481.

Victor P. Sabin testified as a witness for the defendants: That he is a Deputy Water Commissioner of Spanish Fork River and has served as such since May 1st 1946; That he was required to oversee the distribution of the water in Spanish Fork Canyon, Trs. 490; That up to May 12, 1946 there was water for everyone and the flow of the river was not regulated, Trs. 491; Again on May 28th there was ample water in the river for everyone, and that condition continued to and including June 3rd; On June 13th one second foot of water was ordered for 24 hours, Trs. 492. The water was taken through the West Simmons or Jackson Ditch; On July 5th one second foot of water was ordered for 24 hours; That the witness went up to the West Simmons or Jackson Ditch every day except when it was raining; That no water was running in the West Simmons or Jackson Ditch except during the turn of Jackson except the small trickle that seeped around the head gates; That two or three times in 1946 he put dirt in front of the steel headgate to stop the water that was running around the headgate, Trs. 493; That when water was ordered by plaintiff, Jackson, he used the water on any of the two or more tracts owned by him; That up to May 9th 1947 free water was flowing in the West Jackson ditch, and again on May 15th there was free water, which continued to May 20th; That on May 29th Jackson was charged with one second foot of water on the

West Jackson Ditch; Again on June 6th there was free water on account of rain; Again on June 11th to June 19th there was free water, Trs. 497. Again on June 22nd to June 25th there were three days of free water; On July 20th there was a charge of one second foot of water for one day. Once again on July 31st there was a charge of one second foot of water. There was a charge of water for one second foot of water on August 8th, and on September 12th. That was the end of the charges for 1947. That in the latter part of 1947 he checked the West Jackson ditch and found about one-half second foot in the ditch and asked Jackson why the water was in the ditch and Jackson said that he felt he should have some water for his stock; That was the first difficulty he had with Jackson; That the witness told Jackson that he was not entitled to the water according to the decrees and he turned off the water, Trs. 498; That Jackson had never complained about not having water for his stock before that time; That in 1948 there was free water up to May 12th; The water was then off for two days; That from May 14th to May 25th there was free water and a second foot was permitted to flow in the Jackson Ditch; On June 3rd the West Jackson Ditch was charged with a second foot, on June 10th with 1.2 second feet, on June 16th with one second foot, on June 28th with one second foot, on July 27th with one second foot and on August 13th with one-half a second foot, on August 17th Jackson was charged with a half second foot, Trs. 499-500.

On cross examination Mr. Sabin gave the amount of water that was distributed to Mr. Jackson on Crab

Creek in 1946, Trs. 501-502, and again testified as to the quantity of water distributed through the West Jackson Ditch, Trs. 502-503. He also testified to the quantity of water distributed to Mr. Jackson from Crab Creek in 1947 and through the West Jackson Ditch, Trs. 505-511. That he received his instructions from Mr. Francis as to how to distribute the water, Trs. 512; That in 1948 the witness turned the water off from the West Jackson Ditch and someone turned it back on again on July 1st, 2nd and 3rd; That he turned it off on July 14th when L. P. Thomas was with the witness, Trs. 513-514; That Mr. Jackson was regular in turning off the water at the end of his turn in 1946 and 1947 except the latter part of 1947, when he used the water one time out of his turn, Trs. 516-517; That water was shut out of the Jackson Ditch when it was not his turn in 1947 except on one occasion and except such water as leaked through the gate, Trs. 518; That before 1947 Mr. Jackson shut off the water at the end of his turn, except for a small trickle that went around the gate, Trs. 425; That there was no water running in the West Jackson Ditch except a dribble between the 16th and 28th of June 1948, Trs. 529-530; That the witness swore to a complaint for the arrest of Jackson; That the only interest the witness has in this action is to have the water distributed to the persons entitled to the same, Trs. 534; That the water in the Canyon is regulated by Mr. Oberhansley giving orders for the amount of water desired by the people in the Canyon, and the Ditches where the water is to be diverted and the witness goes to the ditches and sees

that the correct quantity of water is delivered, Trs. 537; That when the witness turned off the water Mr. Jackson was not entitled to the use thereof according to the orders given to the witness, Trs. 539-540.

Roy Creer was called as a witness by the Defendant and testified: That he is and since 1923 has been an officer of the Defendant, Spanish Fork South Irrigation Company, Trs. 542; That in July 1933 he shut off the water running in the West Simmons Ditch; That the River Commissioner was with him when the water was shut off, Trs. 544-545.

Wayne Francis was called as a witness by the Defendants and testified: That he is and since 1941 has been the Water Commissioner of Spanish Fork River; That a record of Spanish Fork River has been kept since 1904, Trs. 546; That since 1932 records of the flow of Spanish Fork River have been filed with the State Engineer; That he has compiled the information from the records of Spanish Fork River and the same is shown on Defendant's 'Exhibit I' which shows where the flow of the river has receded to $344\frac{1}{2}$ cubic feet per second, and below $253\frac{1}{2}$ cubic feet per second and below 118 cubic feet per second and where water has first been released from the Strawberry Tunnel, Trs. 547. Exhibit I was admitted as evidence, Trs. 548. Exhibit 2 and 3 were admitted as evidence, the same being contracts with the United States Government and the predecessor in title of the plaintiff and others for the purchase of Strawberry water, Trs. 553. Exhibit

4 was admitted as evidence, the same being a contract between the lower users of water of Spanish Fork River and the Canyon people whereby the lower user agreed that the Canyon people could exchange river water for the water purchased from the United States Government, Trs. 553-554; That since the witness became Water Commissioner in 1941 he has kept a daily record of the flow of Spanish Fork River during the irrigation season except when the water in the river was so high that all of the water was not used, Trs. 555-556. That the water is divided according to the various decrees on the river; That the West Field Irrigation Company, Spanish Fork City and the Spanish Fork Southeast Irrigation Company all divert their water out of the Mill Race, Trs. 556; That the water commissioner does not divide the water between the parties who divert the same through the Mill Race; That the witness divides the water between the Spanish Fork South Irrigation, Springville and Mapleton Irrigation, the Strawberry Highline Canal Company, a small turn out to R. T. Jex, Spanish Fork City Culinary Pipe line, the Spanish Fork East Bench Canal Company, and the various canals in Spanish Fork Canyon, Trs. 557-558; That the Commissioner keeps a record of the water which flows in the various ditches, Trs. 558; That the water master of the Clinton Irrigation Company ordered all of the water for the users under that system; That when the order was made for water the water available under the McCarty decree was delivered and enough Strawberry water to make up the amount demanded, Trs. 559; That

the ditch to which the water was to be diverted was recorded on the order so that the Commissioner would know what ditch the water was to be delivered, Trs. 560; Exhibits 5 and 6 were admitted as evidence. They show the manner of making orders for water, Trs. 561; That in 1947 the Clinton Irrigation had only 2.7 acre feet of water that its stockholders did not use. In 1946 there was 12.1 acre feet. In 1945 there was 264.3 acre feet. In 1944 there was .6 of an acre foot. In 1943 there was 100.8 acre feet. In 1942 there was 75 acre feet. In 1941 there was 103.6 acre feet. In 1940 there was 61.9 acre feet. In 1939 there was 112.3 acre feet. In 1938 there was 128.4 acre feet. In 1937 there was 5.9 acre feet. In 1936 there was 450.1 acre feet, and in 1935 there was 407 acre feet of water that the water users in Spanish Fork Canyon did not use and about two-thirds of the water not used was water to which the stockholders of the Clinton Irrigation Company were entitled to use, Trs. 563; That when Spanish Fork River is above $344\frac{1}{2}$ second feet there is sufficient water for all of the water users of Spanish Fork River; That when the water is between $344\frac{1}{2}$ feet and $252\frac{1}{2}$ feet the Canyon people are entitled to two percent of the flow; That of that amount, the Clinton people are entitled to $102/174$ and the other people in the Canyon to $70/174$, Trs. 565; That when the flow of the river is below 253 and above 118, the Canyon people are entitled to one percent of the flow, and where the flow is below 118 the water users under the Clinton Irrigation Company are not entitled to any of the McCarty decreed

water, Trs. 565; That in order to give the water users the use of the stream that can be used, he is permitted to build up a credit and use his water in a stream that he can irrigate with, Trs. 566-567; That in 1941 while he was Deputy Water Commissioner of Spanish Fork River, he turned off the water from the Jackson property on several occasions, Trs. 568-9; That in 1941 Max De Pew was operating the property now owned by the plaintiff; That when he wanted water or was through with water, he would put out a red flag and by that means water would be ordered on or off, Trs. 569; That the witness recalled that in May 1928 he had difficulty in getting enough water by using a salmon can, out of the West Simmons or Jackson Ditch to fill the radiator of a Ford car, Trs. 571-572; That on one occasion, June 1941, De Pew did not turn off all of the water and the witness turned it off and told De Pew that he had turned off the water, Trs. 576.

Burgess Larsen was called as a witness by the defendants and testified: That he served as Water Commissioner of Spanish Fork River in 1935; That he visited the Jackson property nearly every day during the irrigation season of 1936; That he turned off the water, Trs. 595; That there was a fraction of a second foot of water running in the ditch in July when he turned it off; Water was running in the ditch part but not all the time, Trs. 596.

Mr. Jackson, the Plaintiff, was called as a witness in his own behalf and testified that there was a roadway

south of the house, Trs. 599, and that there was no fenced lane leading from the corral.

Upon motion of the Defendant the case was reopened and R. A. Hart was called as a witness by the defendants and testified that he was the Commissioner of Spanish Fork River in 1906 and part of 1907 and 1908, Trs. 604; That his duties were to see that the provisions of the McCarty decree were carried out, Trs. 605; That he sent our cards informing the users of water in Spanish Fork Canyon when the water receded so that they were regulated, Trs. 607; That when he made a trip up into Spanish Fork Canyon after notice was sent out, all of the people in the Canyon had complied with the notice, Trs. 608; That he had a talk with Simmons who was in the possession of the Jackson property; That at that time there was a second foot of water running in the West Simmons Ditch, Trs. 609; Simmons asked why a man was not entitled to the water flowing from the springs and Mr. Hart stated to him that the Springs made up and was a part of the river; That Simmons made no claim to any water other than that covered by the McCarty decree, Trs. 609; That in 1908 he was succeeded by Mr. Richard C. Fowler, now deceased, as Water Commissioner, Trs. 610; That he didn't visit the Simmons property in 1908; That Mr. Simmons was not using the water when he visited his property; The water simply ran through his place right close to his house; That he didn't follow the ditch to see where it flowed back into the river, but it was not being used,

Trs. 613; That he didn't visit the Simmons place in 1907 or 1908, Trs. 614.

Wayne Francis was recalled as a witness for the defendant and testified: That the irrigation season of 1948 ended on November 20th, Trs. 615-616; That water was drawn from the Strawberry Project up to October 10th in 1948, Trs. 617.

The foregoing is a summary of all of the evidence offered and received at the trial.

Upon such evidence the trial court found that from 1891 until August 4, 1914 the predecessor in interest and in title of the plaintiff in the lands above described went upon Thistle Creek at the head of the West Jackson Ditch, and diverted from said streams through said ditch to and upon the said land, one cubic foot per second of the flow thereof and used the same upon the said land for the irrigation of about 19 acres thereof and for stock-watering and domestic and culinary purposes throughout the entire year of each and every year; that such use was a beneficial use; that the use thereof was open, notorious, uninterrupted and under claim of right on the part of the predecessors in interest and in title of the plaintiff and was adverse to the rights of defendant corporation and their predecessors in interest and stockholders and that the predecessors in interest and in title of the plaintiff thereby acquired and became, and their successors in interest and in title, including the plaintiff, ever since have been the owners and the plaintiff at the time of the commission of the acts complained of

in plaintiff's complaint was and the plaintiff now is the owner of the right to the use, continuous flow throughout the year of one cubic foot per second of the flow of Thistle Creek which is tributary to Spanish Fork River to be diverted from said creek at the head of the West Jackson Ditch and to be used upon the lands described for the irrigation of about 19 acres thereof and for the stockwatering and domestic and culinary purposes where said right is appurtenant to the lands above described.

The Court further finds that the predecessors or interest of the plaintiff did not lose said water right, and the plaintiff has not lost said water right by forfeiture for non-use by abandonment nor by adverse use thereof by the defendants, or any of them, nor otherwise.

The Court further found that by reason of the plaintiff having been deprived of the use of the water, having been shut off by the Water Commissioner from July 12th to August 9th 1948, the plaintiff had been damaged in the sum of \$480.00.

The Trial Court made and entered its conclusions of law in conformity with its Findings of Facts, J.R. 101-104.

The Trial Court also entered a judgment in favor of the plaintiff and against the defendants by which judgment the plaintiff was awarded a continuous flow of one second foot of water throughout the year and also awarded plaintiff judgment against the Corporate Defendants in the sum of \$480.00 and costs, J.R. 105-106.

This appeal is prosecuted from the judgment so entered and the whole thereof, J.R. 128.

The Defendants and appellants rely upon the following points for a reversal of the judgment appealed from.

POINT ONE

There is not sufficient evidence to support the Findings of Facts, or the Conclusion of Law or the Judgment to the effect that the plaintiff has acquired title to one second foot of the water of Spanish Fork River by reason of the adverse use thereof by plaintiff and his predecessors in interest.

POINT TWO

The evidence fails to show what quantity, if any, of the water used by the plaintiff and his predecessors in interest since the entry of the McCarty Decree in 1899 was in excess of that decreed to the predecessor of the plaintiff by that decree and the quantity that plaintiff was entitled to receive by being the owner of the right to the use of Strawberry water.

POINT THREE

The evidence fails to show that the plaintiff can beneficially use a flow of one second foot of water on his about 19 acres of land throughout the year or at all,

in addition to the McCarty decreed water and the Strawberry water owned and used by him upon said 19 acres of land.

POINT FOUR

The evidence fails to show that the Defendants or either of them is liable for the damages, if any, which the plaintiff sustained by reason of the water Commissioner of Spanish Fork River turning off the water from the property of the plaintiff.

POINT FIVE

The evidence shows that the trial court was without authority or jurisdiction to enter a judgment or decree amending or changing the McCarty decree without having before it all of the parties or the successors in interest to such decree.

POINT SIX

The trial court was in error in striking the testimony of L. P. Thomas, one of the Defendant's witnesses.

ARGUMENT

The evidence in this case is somewhat lengthy, consisting as it does, of 619 typewritten pages, and we have, therefore, summarized and condensed all of the evidence which we deem material for review of the questions pre-

sented for determination of this court. In our view, the principal questions raised by this Appeal are matters of facts, and particularly whether or not the evidence shows that Plaintiff has established the various elements that are necessary to establish a right to the use of any of the water of Spanish Fork River by adverse use. And also whether or not the evidence supports a finding that the plaintiff can beneficially use a flow of one second foot of water throughout the year to irrigate about nineteen acres of land. In order to determine those questions it becomes necessary to review all of the evidence. We are mindful that for all of the members of the court to read the entire transcript will consume considerable time, and therefore we have at some length summarized all of the evidence which we deem material for the court to consider in passing on the questions of fact.

POINT ONE

THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE TRIAL COURT THAT PLAINTIFF AND HIS PREDECESSORS IN TITLE HAS ACQUIRED TITLE TO ONE SECOND FOOT OF WATER OR ANY WATER RIGHT BY ADVERSE USE.

The elements which are necessary to acquire a right to the use of water by adverse use are well established in this and other jurisdictions. The law is thus stated in

Kinney on Irrigation and Water Rights, 2nd Ed. Vol. 2, page 1876:

“There are five elements required to make out an adverse possession sufficient to constitute a defense under the statute of Limitations: (1) The possession must be actual occupation, open and notorious, not clandestine. (2) It must be hostile to the plaintiff's title. (3) It must be held under a claim of title, exclusive of any other right, as one's own. (4) It must be continuous and uninterrupted for a period of five years (seven years in Utah) prior to the commencement of the action, not however, necessarily next before the commencement of the action. (5) Since the passage of the the provision of Section 325 of the Code of Civil Procedure in 1878, payment of taxes.”

Among the cases dealing with the nature and extent of the use of water necessary to establish a right to the use of water in this jurisdiction are: *Yeager v. Woodruff*, 17 Utah 361, 53 Pac. 1045, *Ephraim Willow Creek Irrigation Company v. Olson*, 70 Utah 95, 258 Pac. 216, *Center Creek Water and Irrigation Co. v. James Lindsay*, 21 Utah 192, 60 Pac. 559; *Spring Creek Irrigation Co. v. Zollinger et al*, 58 Utah 90, 197 Pac. 737; *Wellsville East Field Irrigation Co. v. Lindsay Land and Livestock Co.* 104 Utah 448, 137 Pac. 2nd 634.

It will be observed that the Trial Court found that the adverse use extended from 1891 to August 4, 1914. J. R. 100. It will also be observed that the McCarty Decree was entered on April 20, 1899. Plaintiff Exhibit J. Even

though it should be conceded that the evidence supported a Finding (which it does not) that the predecessor in title of the plaintiff adversely used the water during the eight years extending from 1891 to 1899, such facts could not aid the plaintiff. Upon the entry of the decree the rights of plaintiff predecessor, Leven Simmons, become fixed by the terms of that Decree. It is of course elementary that such rights as Simmons had in the waters of Spanish Fork River was fixed and determined by the McCarty Decree. To attempt to now make the claim that Leven Simmons acquired some right by reason of the use of water in Spanish Fork River before the McCarty Decree was entered would be to ignore the very essence of the doctrine of Res Judicata. Moreover, the evidence in this case fails to show that any of the predecessors of the plaintiff at any time prior to 1914 acquired any right to one cubic foot per second or any other amount of water in Spanish Fork River by adverse use. We again direct the attention of the Court to the evidence touching the use made of the water on the Jackson property prior to 1914.

The first time that Mrs. Mariah J. Shepherd became acquainted with the property now owned by Jackson was 1909, Trs. 100. She testified that she passed the property frequently from 1909 to 1920, Trs. 102; she further testified that there was always water running in the ditch. She said that at times she saw Simmons irrigating. She didn't know whether the water went back into the river, Trs. 111-112. She did not know how much water was running in the ditch, Trs. 104. Joseph H.

Shepherd the husband of Mariah, also saw water in the ditch along the road on the west of the Jackson property from 1909 to 1920, but he did not know how much water was in the ditch except that it was full, Trs. 127; That he knew the water, at times, was used to irrigate but he didn't know whether it was all used to irrigate, Trs. 138.

James Hicks testified that he worked on the farm now owned by Jackson in 1912 and off and on during the 20's, Trs. 207; that Simmons raised a good crop, Trs. 208; that he travelled the road west of the Jackson property about once a week in the 20's, Trs. 214; that generally grain in the canyon is irrigated three times but such crops can get along with two irrigations, Trs. 216.

David A. Mitchell one of the plaintiff's witnesses testified: that he lived above Thistle a number of years beginning in 1889; that he often saw water running in the ditch west of the Jackson place; that the ditch was generally full; that he did not remember of seeing it dry; that generally average crops were grown on the property, Trs. 179-180. On cross examination he testified that a committee from down in the valley often came up in the Canyon and shut off the water when the river receded, Trs. 182-184; that he had no occasion to notice whether the committee shut off the water from the Simmons place, Trs. 185; that he didn't know whether Simmons was in the deal when he and others leased water from the Strawberry Tunnel, Trs. 185-186.

The foregoing is all of the evidence which supports the finding of the Trial Court that the predecessor in title of the plaintiff adversely used one second foot of the water in Spanish Fork River from 1891 until August 4, 1914.

This is not a case where the water user had no water right. The owners of the property now owned by plaintiff apparently had the same kind of a water right that most of the other people in the Canyon had, namely the water awarded to them under the McCarty Decree. The evidence shows that there was ample water for everyone during the early season and in wet years during most of the irrigation season, especially after the Strawberry water was made available.

There is not one scintilla of evidence in this record that the owner of the property now owned by Jackson, ever claimed any right, title or interest in or to a second foot of water or any water in Spanish Fork River during the period extending from 1891 to 1914 other than the water decreed to them by the McCarty Decree. Nor is there any evidence which shows or tends to show that the predecessors of the plaintiff claimed any right to any of the waters of Spanish Fork River other than the McCarty Decree and the Strawberry water. The first we hear of any such claim by the plaintiff was in 1948, just prior to the time this action was commenced.

There is considerable evidence to the contrary. The evidence shows that after the McCarty Decree was entered, the lower water users frequently went up into the

Canyon when the water receded and turned off the water, Trs. 182. In 1907 when R. A. Hart, water commissioner on the river visited the Simmons place and had a talk with Spencer Simmons about the water no claim was made by Simmons to any water other than that awarded by the McCarty Decree, Trs. 609. Richard Towler who succeeded Mr. Hart was dead and so his evidence was not available, Trs. 610.

Newell Monk became water commissioner in 1909 and served as such for eleven years but at the time of the Trial he was 88 years of age and mentally incompetent. Trs. 355; that in 1914 L. P. Thomas turned the water from the property now owned by the plaintiff, Trs. 356, and so far as appears, the then owner of the property made no claim to any water except that awarded by the McCarty decree. Lorin Jones was water commissioner of Spanish Fork River from 1923 to 1928; that during the irrigation season he went to the place where the water is diverted to the property now owned by Jackson, about once every two weeks, Trs. 380; that he turned the water out whenever the owner of the property was not entitled to use the same, Trs. 382-383; That when he turned the water off he had conversations with Spencer Simmons who was operating the property; that at no time did Simmons claim any water other than the McCarty Decree water; that occurred several times each year, Trs. 384. To the same effect is the testimony of James A. Anderson who was water commissioner in 1929 and 1930. Trs. 411-414; and of Angus D. Taylor who was water commissioner in 1937 to 1940, Trs. 426, 429

and 431; and of Benjamin F. Simmons who was water commissioner in 1943, Trs. 437, 439 and 448; and of Willis Hill, who was water commissioner in 1944, Trs. 455 and 456; and of Orla Stewart who was water commissioner in 1942 and 1945, Trs. 465, 467 to 474; and of Victor P. Sabin who was water commissioner in 1946 to 1948, both years inclusive.

At no time during all of these years is there any evidence that the occupant of the property now owned by Jackson, made any claim to any water not awarded by the McCarty Decree or purchased from the United States under the Strawberry project. Moreover it is made to appear from Defendant's Exhibit 2, that the people in the Canyon, including Leven Simmons and Tuna Simmons, his wife, predecessors in title of the plaintiff purchased 20 acre feet of water because they had an insufficient amount of water for their land.

It is, so far as we are advised, the uniform holding of the Courts that the burden is on the person who claims the right to the use of water by adverse possession to establish such claim. As was held by this Court in the case of *Ephraim Willow Creek Irrigation Company v. Olson*, 70 Utah 95, 258 Pac. 216 that because of the nature of the right sought to be established under the principles of adverse use, the elements constituting it must be proved unequivocally and no doubtful reference will suffice. The presumption is against the acquisition of title by adverse use.

The case of *Zosiel v Kohas* (Mont.) 234 Pac 1089, is a well considered case on the question of the acquisition of a water right by adverse use where a decree has been entered fixing the water rights in a given stream. It is there held that where a decree determined the priority rights to water between plaintiff and defendant, the latter, in the absence of express notice given by plaintiff to them, that she repudiates the decree, had a right to presume she took the water in conformity to the decree. That case also holds as do the authorities generally, including the case of *Wellsville East Field Irrigation Company v. Lindsay Land and Livestock Company*, 104 Utah 448; 137 Pac. 2nd 634; that there can be no adverse use of water when the one against whom the adverse claim is made has no use for the water.

Applying the doctrine as announced in the foregoing cases, it may be inquired:

Is it within the realm of reasonable probability that the committee who went up into Spanish Fork Canyon just after the McCarty Decree was entered (as testified to by D. A. Mitchell) turned off the water from the other water users in the Canyon but failed to turn off any of the water that may have been flowing on the property now owned by Jackson?

Is it probable that Leven Simmons who owned the property in 1919 would have executed the contract with the United States Government for additional water if he claimed and was using one second foot of water for irri-

At 10:00 AM, 10/10/19, the water was turned off from the other water users in the Canyon but failed to turn off any of the water that may have been flowing on the property now owned by Jackson?

gation of the 19 acres of land together with the McCarty decreed water right?

Is it possible that the various owners of the land now owned by Jackson would have submitted to being regulated in their use of the water if they claimed the right to use and had used a flow of one second foot of water on the 19 acres of land in addition to the McCarty decreed water right and the water purchased from the Strawberry Project?

In this connection, we direct the attention of the court to the fact that there is considerable evidence in the record touching the regulation and use of the water after 1939 when the law was enacted prohibiting the acquisition of a water right by adverse use. Laws of Utah 1939 page 177 provides that "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."

Moreover, it is made to appear that since the Strawberry water was acquired the authority to regulate the water was vested in the Clinton Irrigation Company, see Contract dated June 1st, 1915, Defendant's Exhibit 3. It is true that there is some evidence that for a time the Clinton Irrigation Company did not function as it should, but of late years, the stockholders of the Clinton Irrigation Company did not receive more and in most years they did not use all of the water that they were entitled to use, see testimony of commissioner Wayne Francis, Trs. page 563. Thus if the owner of the property now owned by Jackson used more water than they

were entitled to, it must have been water owned by the other stockholders of the Clinton Irrigation Company and not the water of these defendants.

While a water right is not as a general rule liable to assessment for the payment of taxes, yet such water right owner is required to pay his pro rata of the costs of regulating and distributing the water. The plaintiff in this case offered no evidence and apparently makes no claim that either he or his predecessors in interest ever paid any assessments upon the one second foot of water which he claims his predecessors in title acquired by adverse use. That being so, it is quite apparent that no claim was made to the one second foot of water. *Utah Metal and Tunnel Co. v. Grosebeck*, 62 Utah 251, 219 Pac. 248; *Bacon v. Gunnison Fayette Canal Co.* 75 Utah 278, 284 Pac. 1004; *Bacon v. Plain City Irr. Co.* 87 Utah 564; 32 Pac. 2d 427.

POINT TWO

THE EVIDENCE FAILS TO SHOW WHAT QUANTITY, IF ANY, OF THE WATER USED BY THE PLAINTIFF AND HIS PREDECESSORS IN INTEREST SINCE THE ENTRY OF THE McCARTY DECREE IN APRIL 1899 WAS IN EXCESS OF THAT DECREED TO THE PREDECESSORS IN INTEREST OF THE PLAINTIFF BY THAT DECREE AND THE QUANTITY THAT PLAINTIFF WAS ENTITLED TO RECEIVE BY BEING OWNER OF THE RIGHT TO THE USE OF THE DECREED AND PURCHASED WATER.

In his evidence the plaintiff was content to offer evidence which he claimed shows that he and his pre-

decessors in interest used a flow of one cubic foot per second during the time required to establish title of water by adverse use. That much, if not all, of the water so used was McCarty Decreed water is not questioned. When the Court reads the evidence it will look in vain to find any evidence that shows the amount of water flowing in the West Simmons or Jackson ditch at the time testified to which was not water to which the plaintiff was entitled by reason of the decree and purchased water right. Dr. DePew testified that Simmons owned fifty acre feet of Strawberry water right when he first owned the property now owned by Jackson, Trs. 243. Whether Simmons used some or all of that water on the property now owned by Jackson, he did not know.

Mr. Anderson testified that he became Secretary of the Clinton Irrigation Company in 1932, Trs. 264. He further testified that the Clinton Irrigation Company gave a blanket order for Strawberry water and that for such water the Clinton people were permitted to take such water as they desired, Trs. 265. While such evidence is in conflict with the testimony of all the water commissioners who served during the time, Anderson was Secretary of the Clinton Irrigation Company, still if Anderson's testimony is taken as true it would not aid the plaintiff. If such an exchange of water were consented to by the lower users there would be no adverse use.

It is, of course, of the very essence of adverse use that the one whose water is being used by another has a

cause of action against the one using his water. If the lower water users consented to the exchange as testified to by Anderson they were without right to complain of the use by the Canyon people to which they had consented.

There is also some evidence in the record as to the green fields on the property now owned by Jackson at various times prior to 1948. Such evidence makes against rather than in favor of plaintiff's claims to a flow of a second foot of water in addition to his other water rights. Unless the testimony of the water commissioner who served from and after 1922 are to be completely ignored the water used on the property now owned by Jackson, was regulated, frequently turned off and that no water belonging to the defendants was used by Jackson or his predecessors in title. Thus if the fields on the Jackson property were green and good crops were grown thereon, it was the result of the use of the water to which the plaintiff and his predecessors in title were entitled to use because of his decreed and purchased water right.

POINT THREE

THE EVIDENCE FAILS TO SHOW THAT THE PLAINTIFF CAN BENEFICIALLY USE A FLOW OF ONE SECOND FOOT OF WATER IN HIS 19 ACRES OF LAND THROUGHOUT THE YEAR OR AT ALL IN ADDITION TO THE McCARTY DECREED WATER AND THE STRAWBERRY WATER OWNED AND USED BY HIM UPON SAID 19 ACRES OF LAND.

It is the established law in this jurisdiction that one cannot acquire a water right by adverse use or at all

beyond what may be beneficially used, U.C.A. 1943-100-1-3 and acres cited in foot note.

The plaintiff called as his witness one Raymond B. Farnsworth. He testified that crops required from 15 to 48 inches of water during the growing season, Trs. 334. That the average type of farm crops will require one second foot to approximately sixty acres, Trs. 327; that grain requires from 15 to 23 inches per annum; that alfalfa requires about 48 inches per annum, Trs. 339; that in some instances you may have to go as high as six acre feet, Trs. 390.

The Trial Court awarded the plaintiff a continuous flow of one second foot of water for about 19 acres of land throughout the year. A second foot of water flows approximately 2 acre foot of water in 24 hours or 730 acre feet of water which would be approximately 38 acre feet per annum on Jackson property. If we add to this the McCarty Decreed water and the Strawberry water the quantity of water used on the 19 acres would be far in excess of 40 acre feet per acre on the Jackson property. Such a quantity of water would be sufficient to float a battle ship, and is six or eight times as much water as even plaintiff's witness, Farnsworth, testified could be beneficially used on the Jackson property. Needless to say if any such quantity of water is allowed for the irrigation of the lands in Utah, about one tenth of the land now being irrigated in Utah would consume all of the available water. Surely such a waste of water cannot be tolerated.

POINT FOUR ✓

THE EVIDENCE FAILS TO SHOW THAT THE DEFENDANTS OR EITHER OF THEM IS LIABLE FOR DAMAGES, IF ANY, WHICH THE PLAINTIFF SUSTAINED BY REASON OF THE WATER COMMISSIONER OF SPANISH FORK RIVER TURNING OFF THE WATER FROM THE PROPERTY OF PLAINTIFF.

It is the duty of a water commissioner to regulate the water of a stream as provided by the existing decrees adjudicating water rights. That duty continues even where the State engineer is engaged in the process of making a proposed determination. U.C.A. 1943-100-5-1 and U.C.A. 1943-100-4-11. If, as the statute provides, the State Engineer and his assistant water commissioner are required to distribute water as by law required, it necessarily follows that neither he or his deputies are liable because they perform the duties imposed upon them by law and likewise one who requests the commissioner to perform his duties is likewise not liable. If a water user claims he has a water right not covered by a decree, his recourse is to the Courts and neither the water commissioner nor one who claims a right to the use of a water right may lawfully ignore the provisions of a decree of a Court of competent jurisdiction so long as the same remains in effect. To hold otherwise would be to permit a water user who thinks he is not bound by a decree to take the law into his own hands. Plaintiff Jackson was wholly without rights to help himself to any of the water of Spanish Fork River contrary to the

rights decreed to him. To hold otherwise would be to place in the hands of a water user the right and power to change or modify a court decree.

POINT FIVE

THE EVIDENCE SHOWS THAT THE TRIAL COURT WAS WITHOUT AUTHORITY OR JURISDICTION TO ENTER A JUDGMENT OR DECREE AMENDING OR CHANGING THE McCARTY DECREE WITHOUT HAVING BEFORE IT ALL OF THE PARTIES OR OTHER SUCCESSORS IN INTEREST TO SUCH A DECREE.

It will be noted that in the McCarty decree several persons were parties to that decree other than the defendants. Also that the defendants, Spanish Fork West Field Irrigation Company and the Spanish Fork Southeast Irrigation Company, together with Spanish Fork City, which is not a party to this proceeding, were jointly awarded water rights to be diverted through what is commonly known as the Mill Race.

We are mindful that this court has decided that an adjudication of a water right as to a part of a natural stream of water may be had without having before the Court all of such owners, but we have been unable to find a case where a Court has in effect, amended a decree fixing water rights without having before it all of the parties to such a decree.

Upon principle, it would seem that in such case all of the parties to such a decree are necessary parties especially where as here, three of the parties, namely

Spanish Fork West Field, Spanish Fork Southeast Field and Spanish Fork City were jointly awarded a part of the waters of Spanish Fork River by the McCarty decree. If the decree here brought in question is to stand how can the water be divided by the defendants in this case, namely the irrigation companies and Spanish Fork City which is not a party? Is the one second foot of water to be taken entirely from the irrigation companies who are parties to this action or is it to be taken from the entire flow of the river? Obviously if Jackson is entitled to a continuous flow of one second foot of water by reason of adverse use, then such adverse use has been acquired against all of the lower users and not merely against the defendants herein. Of course water users who were awarded a water right by the McCarty decree but were not parties to the present decree are not bound by the decree appealed from. So also under the evidence in the present case by no stretch of imagination may it be said that the second foot of water claimed to have been used by the plaintiff was exclusively the water decreed to the defendants herein by the McCarty decree. Under such a state of the record it is appellant's contention that the Court below was without jurisdiction to determine whether or not plaintiff and his predecessors were entitled to one second foot of water in the absence of the other parties to the McCarty decree and particularly Spanish Fork City, being parties to the present action. In support of such contention we refer the Court to the following cases, and authorities:

The law in such particular is thus stated in 47 *C. J.* at page 88. A person who has title to or interest in the property in litigation which may be adversely affected by a judgment or adjudication therein is a necessary party to such action in respect of personal or real property. In addition to the cases cited in the foot note to the text, see the leading case of *United Shoe Manufacturing Corporation v. United States*, 258 U.S. 451-662 and 708; 42 S. Ct. 363.

In the light of the provision of the McCarty decree and the decree entered in this case, it is difficult to see how the water commissioner can distribute the water of Spanish Fork River in conformity with both decrees.

In connection with the general doctrine above mentioned, the attention of the Court is directed to the provisions of U.C.A. 1943-104-3-25 where it is provided that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in."

POINT SIX

THE COURT ERRED IN STRIKING THE TESTIMONY OF L. P. THOMAS.

The court struck the testimony of L. P. Thomas because he held the title to some water stock in one of the defendant companies. The record is not entirely clear as to just what part of the testimony of Mr. Thomas was stricken. Certainly Thomas was not incom-

petent to testify that he turned off the water from the Simmons property in 1914, Trs. 368-371-372. Moreover Spencer Simmons, son of Leven Simmons was not the owner of the water right at the time of the conversation testified to by Thomas. See abstract Plaintiff's Exhibit 1, entry 45.

For the reason herein pointed out it is submitted that the Judgment appealed from should be reversed and appellants awarded their costs.

Respectfully submitted,

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