1953

Utah Copper Company v. Hays Estates : Response to Petition for Rehearing

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

In the Supreme Court of the State of Utah

UTAH COPPER COMPANY,
a Corporation,
Plaintiff and Respondent,

vs.

STEPHEN HAYS ESTATE, Inc., a Corporation of Utah, JULIA HAYS HOGE, STEPHEN J. HAYS, LAWRENCE J. HAYS, MRS. LOU GOREY, MRS. ETHEL V. REILLEY and MARY LOUISE O'DONNELL,
Defendants and Appellants.

No. 5302

Appellants' Answer to Petition for Rehearing

Respondent's petition for rehearing is inaccurate from the very beginning. The opening sentence contains a misstatement. It is not true that respondent "respectfully" petitions for a rehearing.

The court is under no obligation to convince the respondent. If the court decides the issues in accordance with the law and the facts it has performed its entire duty. Respondent in its brief attempts to usurp the functions of the court and to determine the facts and announce the law. It is for the court with all of the evidence before it and a knowledge of the law, after

considering the opposite contentions of the litigants to define the true nature and legal effect of the action brought by the respondent and to say who has "misconstrued" and who has "overlooked" and whether or not the effect of the action brought by the respondent would be to obtain title to copper solutions owned by the appellant. The court has the power and the duty to protect its dignity and restrain its officers within the bounds of decent respect and professional propriety, and we cannot refrain from the suggestion that if the lofty superiority manifest in the presentation of the respondent's contentions had been transmuted into an appreciation of the fundamental principles involved in this controversy, it would have been more in keeping with the dignity of the profession and the duty of the advocate, and there can be no mistake that the suggestion in respondent's brief (page 74) that respondent is solicitous that the decision of the court "in this cause be understood and approved by all after sober analysis," while a generously professed suggestion, is in fact limited to a poignant urge that the decision be made to conform to the interests and desires of the respondent.

The petition for rehearing filed by respondent is a studied insult to the court and to the appellant and strongly indicates the impossibility of respondent appreciating the significance and weight of facts or law which would deny to it "a great industry," anything it demands regardless of the rights of others whom respondent cannot refrain from describing as anything but "an interloper" (page 7).

We turn to the points attempted to be raised by the petition for rehearing.

I.

Respondent's point I. is not a point. It would make absolutely no difference in this case whether respondent dumped its *overburden* in the surrounding gulches as waste or whether they entertained some intention that the Almighty would cause meteoric waters to fall upon the dumps and that they would give off into the surrounding country some solutions which respondent might perchance collect. Respondent's purpose in this alleged point is to attempt to take a general statement by the Chief Justice, regardless of its materiality, and criticize it in the hope that thereby the decision in this case may be weakened. They feel that it is better to argue something, be it ever so immaterial, which they regard as vulnerable rather than to attack the real questions in the case.

However, the Chief Justice was right and respondent is wrong even in this immaterial matter. It is clearly inferable from the record that this low grade copper ore was dumped, at least originally, as waste, with no thought of treatment to extract therefrom what small quantities of copper were contained therein, exactly as the Chief Justice said.

Respondent's first dump, according to the record in the case, was in Ingersol Gulch which was commenced in 1907 (Abs. 124) and the first precipitating tank built by respondent for the systematic commercial precipita-

tion of copper was in 1927, the year following that in which the dump in Dixon Gulch was commenced. J. D. Schilling, mine superintendent of the Utah Copper Company, testified (Abs. 126) that this *overburden* is placed in these gulches "*primarily* to get rid of it and *possibly* secondarily so we can treat them by the leaching process."

No one testified that the occurrence of copper solutions in Dixon Gulch was as much the deliberately planned result of "plaintiff's elaborate preparation therefor as the production of copper concentrates is the carefully calculated accomplishment of plaintiff's milling operations" or that it is a "manufactured product as are the concentrates from plaintiff's mills." No witness testified that plaintiff deposited material upon that site "for the purpose of oxidizing and leaching it" by processes "for many years employed successfully by plaintiff in the leaching of its many other dumps." Such statements by counsel in the petition for rehearing are not only at variance with the record in this case and a figment of imagination, but are utterly lacking in truthfulness, and since respondent has seen fit to go outside of the record for the purpose of misdescribing this situation we take the liberty of quoting the following from the 1928 report of the Utah Copper Company (two years after the dumps in Dixon Gulch were started) made to its stockholders and the public (see page 9):

> "In the last annual report mention was made of the fact that the capping removed since inception of operations and deposited on surface ad-

joining the mine had oxidized to a point where meteoric waters were dissolving a very appreciable amount of copper. These percolating waters average about 15 pounds of copper per thousand gallons. There was leached in this way during the year and deposited in improvised precipitating plants 1,933,235 net pounds of copper at a cost of 6.2 cents per pound. Profiting by this experience, a large central precipitating plant has been erected at a point low enough to receive all such waters carrying copper in solution that are not tributary to the smaller plants.

In connection with this it is interesting to realize that the large yardage of capping, *formerly rejected as worthless,* now promises a copper production of approximately one billion pounds—assuming a 70% recovery as possible."

We have examined the annual reports of the plaintiff for many years prior to the institution of this action. Though these reports contain references to removal of "overburden," which is also referred to as "strippings" and "cappings" and the reports of 1925, 1926 and 1927 refer to "small tonnage" and "small poundage" recovered in form of precipitates from "*mine waters,*" limited to the open cut mine of the plaintiff, there is absolutely no reference to the dumps as a source of possible copper solutions, and all of these death-bed declarations which would make the dumps the principal source of expected values is just so much attempt to read back into the past an appreciation of the dump, which never existed and which was as much a surprise to the plaintiff as to everyone else in the mining district and for which the plaintiff had never taken any steps to prepare.

So much for this alleged point and so much for the value which may be placed upon such bold statements of respondent. The floundering desire of respondent in its present desperate straits to find some straw to grasp should not lead those with short memories into attempting to take others to task for claimed inaccuracies. The veil of charity should be drawn over this portion of counsel's brief in the hope that it was said in ignorance.

In support of respondent's contention that respondent has always had in view the recapture of copper solutions, reference is made to Exhibit 36, a water filing application in the office of the State Engineer, dated June 11, 1926. It will be noted, however, and this is significant, that the plaintiff by that application sought to file on its own water and not on public water, and on such waters, not after such waters had entered the land of another, but on its own land and in its own dump. No one in all the history of this litigation has ever contended that the plaintiff does not have a right to capture its own waters in its own dump, and it is only because plaintiff now contends that it has a right to capture the defendants' water on the defendants' land that we have this dispute. At the time exhibit 36 was introduced counsel for plaintiff expressly repudiated any suggestion that they attempted to found any right thereon (see Abs. 200). No one has attempted to limit plaintiff's right to capture copper solutions while in the dump. The position of the defendants has always been that it made no difference what plaintiff *intended* as to copper solutions, that the law predicates no rights on

mere intention unconnected with capture and control. I may intend anything I want with regard to water in the clouds or descending from the clouds, and even with waters in my own land, but unless I *capture and control the waters* while in my land such intention in and of itself amounts to absolutely nothing whatever. This whole matter is discussed on pages 5 to 11 of "Respondent's Reply to Appellants' Reply Brief" and its reinsertion in the petition for rehearing is just thrashing of old straws as to which we are entitled to an end.

When the filing in the office of the State Engineer, Exhibit 36 (Abs. 342, 345) was offered in evidence by plaintiff the court sustained defendants' objection thereto as a basis of any right. Paragraph 9 of the filing is in the record because defendants subsequently offered it for the purpose of showing that the exhibit indicates that respondent in 1926 understood the law to be that respondent must capture any copper solutions it claimed while in its dump in order to own them, and that they then figured they could capture all of their waters on their own land at the point of diversion, the *west* entrance to the drain tunnel. This old point is discussed at length in Respondent's Brief, pages 6 to 11, and in Appellants' Reply to Respondent's Brief, pages 30 to 33.

II.

Respondent's second point is worded as follows: "The judgment in condemnation relates back to the order to occupy entered June 13, 1928 and by that judgment no waters were nor could any waters be condemn-

ed." Respondent reiterates its old saw that "all opinions in this case are that until the copper solutions had crossed the boundary between the property of the plaintiff and that of defendants, title to these solutions was in plaintiff." Title in what sense? The right to capture on its own ground the waters therein and to exclude others from its own ground. The same right appellants have and which they assert in this action. Respondent has never squarely faced and always evades this issue. Title to water is not an absolute, unqualified one, as is ordinarily the case with property, but has that peculiar inherent, ineradicable quality which attaches to water, its migratory incident which limits ownership to the right to capture and take into possession while on one's property and burdened with the penalty of a termination of ownership the instant it leaves such property. It is also true that the order of condemnation entered on June 13, 1928 *could not affect title to any water.* Plaintiff's pleadings do not cover title to water and the trial court has repudiated any purpose of giving plaintiff title to water; and plaintiff should be compelled to stand on its pleadings and on its declaration and should not be permitted to acquire water through acquiring land. If we forget for a moment that this controversy concerns water in which there is a small quantity of copper, which is immaterial as far as the law of waters is concerned, and consider the situation of an ordinary controversy about water, would a person at a higher level through whose ground water must percolate or flow be permitted for one instant to urge to a court that he had

a right to condemn the land of a neighbor at a lower level from which he intended to take water in the future because the water he would take in the future was not at the time of filing the suit in the land sought to be condemned? There can be no question that such a suggestion would have any support from the authorities or the court. When the order of condemnation was entered on June 13, 1928 even on the theory of the respondent there were certain solutions then in the tract condemned which belonged to the appellant. We make no particular point as to the value of these solutions, their value is negligible, but *in that instant* there was *potentially* in the tract which respondent was attempting to condemn all of the water which in all of the years to come will reach that particular tract, and it was this water acquiring capacity that the plaintiff was attempting to secure, without paying anything for it. Land does not produce water in any sense, so that it is poor science and poor logic for plaintiff to urge that the dumps produce any water. The dumps produce no more water than did the drainage district prior to the location of the dumps. Respondent in its brief says, "On June 13, 1928 when plaintiff by court order was put in possession of the easement it sought to condemn, title to the solutions yet to cross that property was in plaintiff." This statement as a matter of fact and of law is inaccurate and highly misleading. Only an infinitesimal part of the solutions were then owned by the plaintiff in that limited sense only in which solutions may be owned—the right to capture on one's own land. Practically all of such solu-

tions which were yet to cross that property existed only in potential character, the elements being scattered almost throughout the universe. Someday through laws of nature moisture would be created, precipitation would take place upon the water shed which water would find its way by seepage and percolation into appellants' land. Respondent by its action seeks to preempt and patent for its exclusive ownership the laws of nature and these products, and to appropriate to itself those processes and bounties. It is ridiculous to talk about the respondent owning all of these solutions at the instant the order of condemnation was signed. As respondent says, they were not all in existence in the dump, and when for a brief time they mingled with the materials in the dump respondent would have the opportunity of capturing them on its own land, but only for that brief time, and only during such brief moments would respondent have any kind of ownership, and the instant such waters crossed into appellants' land appellants would have the same fleeting opportunity of capture and perfection of ownership. Respondent could not acquire by condemnation of appellants' land a right to capture solutions which respondent had failed to capture on its own land and which could only have a real ownership by capture and would belong to the owner of the land in which it was captured. Respondent should be compelled to eat its own theory. That theory is that respondent is not by this action attempting to quiet title to waters but only to land. Respondent cannot, therefore, acquire in law or fact the right to capture water after the same

leaves its land. What respondent is attempting to do is to avoid the limitation on the ownership of water, which restricts the right to capture to one's own land, by acquiring the right to capture water owned by the appellant because such water actually is captured on appellants' land, whereas it never has been captured in respondent's land.

This alleged second point is an old friend. It has been with us from the beginning. It has been thrashed back and forth until it is threadbare. The defect, as we think, in respondent's position is that respondent refuses to recognize the fact that ownership of water of this character is not absolute, but qualified and is bound by strong legal ties to the owner of the land through which it is passing. A man cannot say that he owns water unless he reduces it to possession and controls it upon his premises, and it is a figment of the imagination to suggest that the respondent has reduced to possession meteoric waters which fall on the dump and then permitted to escape into adjoining land. Such waters are at all times on their way to be owned in the absolute sense only by those who capture them in a literal and not in a figurative sense. Otherwise we are reduced in the last analysis to a conclusion that waters belong to the owner of the land at the highest elevation in the water shed, and that such highest owner may successfully condemn the land of all lower owners and capture waters thereon simply on proof of probability that such waters fall on and pass through his land. Such a doctrine has no place in the law. You cannot apex water.

Whether appellants have or have not the right to compel the continued passage of these waters is not in this case, and we see no reason for crossing that bridge in this case, but it is important and vital that the fundamental doctrine of the law relating to waters that it is migratory and not stationary, the same as wild animals and other liquids and gases, and is owned only in a qualified sense, which is principally a right to capture on one's own ground and not absolutely until actually reduced to possession be adhered to, and such fundamental law ought not to be overthrown simply because "a great industry" regards its neighbor on a lower level who claims equal right to water on its lands, as an "interloper." This being true, an order giving respondent possession of appellants' land without prejudice and only until a determination of the issues, does not change the ownership of the water coming into appellants' land any more than it changes the ownership of the land. Land and water are one. Appellants ask for no different title to the water than they are willing to concede to the respondent, but insist upon equality. It is conceivable that a situation might arise where the respondent would own a dump at a lower level than some other dump at a higher level owned by some other mining company and we can conceive the indignation of respondent if required to defend itself against the arguments used by respondent in this case were the owner of the dump at a higher level attempting to condemn respondent's dump. "There should be nothing peculiar about

the law applicable to its (Dixon Gulch) waters." (P. 39 of the Petition for Rehearing).

The law is the same as to all, great and small, above and below, as to such migratory elements. The order of condemnation did not change the relations of the parties at all as far as title to water is concerned. The respondent still had the right to capture the water in its dump and still lost such right to that water as soon as it passed from respondent's dump. The respondent by the order of possession without prejudice preliminarily and only until the matter was determined by the court was given the right to go upon appellants' land and as a trustee, under the duty to act as the court should hold if the order of condemnation was not in accordance with law, and in such capacity to take possession of the water in appellants' land. Otherwise, the order of condemnation becomes exactly what respondent repudiates, a transfer of title, and which respondent admits could not be its legal effect.

Respondent says "we do not desire, it is not our purpose to acquire title to the copper solutions owned by the appellants," but the reply of the court is, "it makes no difference what you declare your desire or purpose to be, the legal effect of upholding your contention is to transfer title of copper solutions belonging to the appellants to the respondent, if we uphold the right of the respondent to condemn the land of the appellants and collect the copper solutions on appellants' land."

It has always seemed to us a mockery of justice to

suggest that the order of condemnation was equivalent to the miracle of the Red Sea whereby the waters seeping and percolating from higher levels to lower levels were for that magical instant of the signing of the decree stopped in their course and Tract D became bone dry so that the condemner stood on nothing but earth and having acquired only the dry land, so as to cause the waters which thereafter came from the higher level to belong to the condemner thereof. We know of no decision supporting any such doctrine and not a single case from any court so holding has respondent been able to produce, and as stated before, the logic of such a law would be to ultimately and finally decree the ownership of water to be in the person at the highest level so that he could by the trick of condemnation acquire the right to follow the water once in his land wherever it might go, under the fiction that at the instant the order of condemnation is being signed the natural laws governing the downward course of water are suspended and thereby the condemner acquires only land, so that the right to water subsequently appearing in the condemned land continues in the condemner thereof, such water being there captured physically and actually for the first time. Such a sophistry in our judgment sweeps away the very foundation of the law of water rights, and all migratory substances.

Respondent pretends to find difficulty in the suggestion of the Chief Justice that the effect of upholding the right of condemning in this case would be to condemn water because, says respondent, the water which

it is claimed would be condemned under such circumstances are not yet in existence. This is equivalent to saying that when a person condemns a piece of land because of the water right attached to the land, they should be required to pay only for the land and the water physically in the land at the instant of condemnation, because the water which will be in the land next year is now in the ocean or in the clouds or it may be in land far distant at a higher elevation. When you condemn land to collect water on the land you condemn the capacity of the land to acquire water and that capacity exists, not in the actual presence of water at the instant of condemnation, but in the probability that water naturally and according to the laws of gravitation will reach such land, and can there be captured or used, and the condemnation action in this case is subject to no different incident.

The respondent pretends to suggest that it is possible to shut off the copper solutions before they reach the appellants' land. On the trial the respondent took two inconsistent positions on this question. It was first suggested that it would be easy and comparatively inexpensive so to do, and when the appellants then argued that if it was easy and comparatively inexpensive then their good faith in seeking this relief was open to question, respondent took the other stand and insisted that it would be from an engineering standpoint impossible to shut off the solutions, both because of the expense and because of the fact that the waters were seeping and percolating, and hence diffused and not subject to col-

lection. Now, in their petition for a rehearing, we have the argument that because the court has announced a doctrine as old as the hills that you must capture water on your own land before it is yours, that in this particular case, because this universally applicable law applies to the respondent, that since they could do this, therefore, the court should uphold the order of condemnation because it would be an idle thing to compel respondent to actually run the tunnel to the face of its dump and there collect the waters. The trouble with the argument is that the owner of water does not cease, by reason of the fact that the court may point out how the respondent may not lose title to water, to lose title by permitting the water actually to escape into the lands and premises of others. If respondent can so easily capture the water upon its own premises, let it do so and end the controversy. The very reason it has sought this remedy is because, as stated in the argument under Point V, there were waters in the gulch before the dump was placed there, which obviously are not from the dump and cannot, therefore, be captured in the dump. The waters in Dixon Gulch are not *all* from this "reduction works" as now finally admitted in Point V—just as appellants have always contended—and for this reason they have sought to take appellants' land instead of capturing their portion of such comingled waters upon their own land, as they now say it will be merely a gesture to do. We invite this solution of the problem.

It may produce cold chills of horror down the back of the respondent but the law is that every drop of water

regardless of whether it be blessed with some copper or cursed with sulphur or salt, is held only by a defeasible right and the ownership of the respondent is strictly limited by the necessity of physically capturing and controlling the same while it is actually in the dump. Each particle of water has stamped on it by fundamental law the basic scientific doctrine of evolution — use me now at least to the extent of actually capturing me while on your land, or lose me. Each drop of water in respondent's dump is ticketed for an ultimate destination beyond the ownership of the respondent and unless it is actually captured this right of ownership is actually lost.

After having taken the copper solutions of the defendants for over six years and excluding the defendants from the possibility of themselves taking their own copper solutions on their own ground, it comes with poor claim from the illegal appropriators to suggest that the owner of the copper solutions would never have used them anyway. Respondent is obsessed with the strange hallucination that to get an order of occupancy is the end of controversy, whereas in fact an order of occupancy in a case of eminent domain is one which the condemner is under strict duty of justifying. For this purpose a bond is required, so that in case the order is not legally issued the owner of the property will be able to secure damages arising from the conduct of the plaintiff while he under authority of law occupies the property. The occupier is a trustee. He must account for all that he does and everything that he takes. If the court

holds, as it has in this case, that the property cannot be condemned, and in the meantime the occupier has taken from the premises valuable property of the owner, he must respond in damages. The order of occupancy does absolutely nothing in the way of interfering with title and it is idle for the respondent to suggest that an order secured "without prejudice" had the effect of transfering title to solutions then or thereafter to be in the defendants' land, which the plaintiff admits would have belonged to the defendants had the order not been entered. It is a beautiful theory, but we have never felt that it could impose itself upon the court.

We sympathize deeply with the inability of the respondent to reconcile the opinion of the court in this case with respondent's theory. The pain which respondent feels in this matter is due to the fact that respondent has never been able to admit wisdom, logic, or law in any position that did not support respondent's contentions. The perplexity which respondent professes does not arise from the absence of either clear statement, sound logic, or abundant authority in support of the opinion of the court, but because that opinion does not support the position of respondent. This difficulty is inherent and ineradicable and if respondent would recognize this necessary divergence and its inescapable quality, it would sooner show a respectful attitude toward the functions of the court and recognize that where court and counsel differ, it is the court and not counsel that decides.

In the decision of this court, discussed on page 12

of Respondent's Petition for Rehearing, respondent is confronted with the proposition that eminent domain does not permit the respondent to take appellants' land for the purpose of doing exactly what the appellants have the right to do and will do. In other words, eminent domain is not for the purpose of monopolizing mining and is not operative to exclude the appellants so that the respondent can take values which appellants have the right to take. Again we have the argument that respondent could not rightly be held to be attempting to interfere with the right of the appellants to collect copper solutions in the future because such copper solutions were not in existence at the time the order of occupancy was entered, but that the order of occupancy would permit the respondent to collect such copper solutions in the future on the land of the defendants when such copper solutions reach such land in the future. There is a failure on the part of respondent to recognize that what the court is dealing with is a *right to collect* and not with actual, specific, identified, actualized drops of water. This is because of the peculiar character of rights in water, as hereinbefore discussed. Respondent again refers to its contention that the owner of Tract D can have no right to a continued flow as to the future copper solutions from a higher level. Defendants are not asking in this case for a right to a continued flow. A right to a continued flow was not an issue in this case. It is a right to collect on their land the water that actually percolates and appears there. Appellants claim the ownership of a present right extending through all time to

collect waters that percolate, seep, or flow in Tracts C and D, and it is this right that the respondent is attempting to take away and is attempting to support by the sophistry that the court cannot deal with the right to collect water in the future because the water is not now in the land. We defend no rights different from those of the plaintiff and we demand a recognition of the same rights in our own land. This issue is presented by appellants' answer and has been raised at every opportunity, and the law is without dissent, as argued in the briefs heretofore presented.

The respondent is unable to see, so respondent says, what the court refers to in its opinion where it is held that eminent domain will not be operative where property is "being held or devoted to a public use by one person," and "may not be taken by eminent domain proceedings, as a general rule, by another to be used for the same purpose in the same manner." Is it, says the respondent, the "easement" or the "copper solutions" to which the court refers as being at present used? And respondent says, "we think it should be clear that it is not copper solutions, because there were none." Perhaps the court might take the respondent at its own word, and permit the respondent to condemn the dry land at Tract D, but not to collect any solutions on or in that tract but to turn such solutions over to the defendants. The respondent would promptly request a clarification of such an order so as to permit it to collect and take appellants' water for itself. The same is true with regard to the suggested uncertainty as to the

easement. Of course, with regard to the easement, "no one had theretofore suggested that the public use for which Tract D was being held by the defendants was the conveyance of the plaintiff's solutions from plaintiff's dumps to defendants' facilities, there to be appropriated by defendants, and that that prospective 'public use' precluded plaintiff's condemnation of such an easement for the conveyance of the solutions plaintiff had produced to plaintiff's facilities, the result of its industry and investment to be thereby retained as its own." No one has suggested such a proposition because the entire suggestion is simply an absurd concoction of the respondent, and is easily resolved and dissipated by the basic fact that solutions in Tract D never have, do not now, and never will belong to or be owned by the plaintiff. They inhere in and are a part of Tract D, and the right to capture and control is the very essence of the ownership of Tract D.

Tracts C and D were, however, being used by appellants at the time of the commencement of this action for the passage of appellants' solutions, with the clear, unabandoned and unforfeited right of capture by appellants, which is exactly what respondent desires to take away and use for exactly the same purpose.

We respectfully suggest that the court should not feel any responsibility for the professed incapacity of the respondent to comprehend the proposition that while the respondent has always professed that it was not attempting in any degree to acquire title to copper solutions by the condemnation of the defendants' land that

in law and in fact such would be the effect of the success of the respondent in this case. It makes no difference what respondent declares. We are not interested in the name that respondent shall give to what it is attempting to do. The question is what would be the actual and the real effect of condemning Tract D under the guise of a mere easement and turning it over to respondent to collect copper solutions therein. If plaintiff's success in its efforts would not be in legal effect and reality a transfer of title to copper solutions in Tract D there is no such thing as ownership of water and the appellants in this case in turn could legally seek an order condemning an easement into respondent's dump to there collect copper solutions on the theory that such solutions are not now in existence and, therefore, cannot now belong to respondent, since the right to collect solutions would be in no way associated with the ownership of land; and appellants could in turn say that a decision of a question which does not conform to the views of the respondent is incomprehensible to respondent and "we must say, with all due respect, is beyond our comprehension, as we think it will be beyond the understanding of all others who may be called upon to analyze or construe this opinion." This is not the law relating to water and we are sure will never become such.

When we read respondent's analysis "pleadings in this case and considering the issue raised," we are reminded of a statement by the late Senator Ben Tillman of South Carolina in the Senate of the United States, when he said "I do not care how much the colored man

votes, just so you let the white man count the votes." It is an idle thing to have pleadings if we are to permit the respondent to be the only one to interpret them. The affirmative answer of the defendants covers pages 56 to 64 of the Abstract. It is not confined to the issue that the water claimed by the defendants arises from distant and deep subterranean sources, (though a geological issue raised by the defendants made such a contention), but in the pleadings the irreducible issue always insisted upon was that from whatever original sources the waters came when they actually reached Tract D they were owned by the defendants. (See paragraphs XII and XIII of defendants' answer, Abs. 47-51, and the further answer and counterclaim set forth at pages 56 to 64). The real issue was that ownership was not confined to origin but to location when captured, and the suggestion that there was no issue that the defendants intended to use Tract D for the same purpose that the respondent would use it, is utterly false. Tract D and Tract C, as we will point out under another heading of this brief, are both of them situated strategically at the *only point* where appellants' waters can be collected in Dixon Gulch on defendants' ground, and the respondent is attempting to mislead the court in its suggestion that the objection made by the appellants in this action is not and has not always been that the respondent was not attempting to obtain an easement but that such attempt was merely a guise under which they were attempting to acquire the only land on which appellants' solutions can be captured in Dixon

Gulch, and thus actually get for itself these waters by taking appellants' land.

It is a misstatement as to the position of the court for respondent to say in its brief (page 21) that the opinion of the court must be founded on a contention that "the solutions here involved were the result of a comingled supply from many unknown sources, coming to the surface of defendants' property within Tract D from subterranean and unknown sources." It is title, not source, that was the principal bone of contention on the trial, though most of the time was spent on geological issues not involved in the appeal; and title was not dependent upon source. And the suggestion that the defense pleaded to the taking of Tract D was not that the defendants intended to put Tract D to the same use as respondent is also inaccurate. Among other places see defendants' answer, page 62 of the Abstract, as follows: "That if the plaintiff is permitted to condemn and to use and occupy the defendants' said property, as set forth in plaintiff's complaint * * * plaintiff will damage the defendant in many thousands of dollars * * * and will prevent defendant from collecting its waters in said gulch containing copper in solution and extracting the copper therefrom * * * "

III.

Point three is based on the fact that plaintiff has ousted defendants during six years from the possibility of collecting the defendants' copper solutions in Dixon Gulch, and says therefore defendants should not be per-

mitted to assert that defendants intend to use the Tracts C and D for the same purpose plaintiff would use them, and therefore plaintiff ought to be permitted to exercise the right of eminent domain; that the likelihood of defendants collecting copper solutions in Dixon Gulch is very remote and the court should not refuse the exercise of the power of eminent domain simply because the owner of land may at some remote and indefinite and uncertain time desire himself to use the land for a public purpose.

Respondent goes outside of the record to say that the Valentine Scrip was entered as an agricultural and not a mineral entry, but it makes no difference. Under the law then existing, which rights are now preserved, the mineral rights belong to the patentee, and no issue was presented with reference thereto for decision by the court. Respondent says (page 24 of its brief) "Under the findings in this case which this court has affirmed, were a dam to be constructed across Dixon Gulch on bedrock, Tract D would forthwith become dry, all copper solutions would be held back on plaintiff's property, and all members of this court agree that plaintiff has the right at any time to make any diversion or disposition of those solutions on plaintiff's property plaintiff may desire. That fact in our opinion precludes any real or serious intention on the part of the defendants themselves to treat these solutions." This has nothing to do with the decision of this case. We have already in this brief and in the original briefs discussed the source of the water and the possibility of shutting it off. This

comingled source is at last admitted by respondent in discussing Point V, but it makes no difference what respondent may or may not do in the future. Defendants' good faith is not open to question, and their expressed intention and future conduct will determine whether the intention of the defendants to collect copper solutions on defendants' property is "a mere gesture." The collection of copper solutions by the defendants is not "contingent, uncertain or problematic," it is absolute and certain. Ever since the fact of commercial value in the copper solutions in Dixon Gulch has been known by the defendants they have intended to at once capture them and it is only because of the illegal and unwarranted interference of the plaintiff that this has not been done.

The cases cited by respondent with reference to this matter are not in point. They refer to the condemnation of property being held by a person who was not then using the same for public use, or where such public use reasonably could not be contemplated in the immediate future. It would be interesting to have counsel find some case where a mining company had condemned the mining ground of another mining company to remove the values therefrom for mining purposes. The authorities cited by appellants at pages 111 to 119 of "Brief of Appellants" are directly in point, and a complete answer to this question.

No question of abandonment by defendants of these waters or of forfeiture of their right thereto has ever been made in this case either by pleading or otherwise. On the contrary respondent has throughout conceded

that solutions and waters which were in the premises up to the time of their taking by respondent belonged to defendants.

IV.

Respondent's point IV is the newest thing in the petition for rehearing. This is a complete departure from the theory upon which plaintiff based its case, diametrically opposed to the evidence presented, and destructive of any possible relief for plaintiff in this case.

The point is:

> "*If* the law of water applies, then it should be governed by the law of public waters."

Why should there be any question as to the law of waters applying? Plaintiff seeks to condemn a ditch within which to course *waters*. If there is any question about the law of waters applying, then respondent has no standing in court at all, because the very condemnation act under which plaintiff is seeking recourse has to do with waters.

Respondent says these are public waters. If, then, these are public waters, respondent stands in the peculiar position of seeking to condemn private property for the conveyance of public waters in which plaintiff has absolutely no right, title, or interest.

Both positions are wrong. The waters are privately owned seeping and percolating waters within every definition of the law, and within the uncontradicted evi-

dence in the case, and respondent is now seeking to switch theories at this late date after having tried the case upon the theory that they are privately owned waters.

When respondent offered Exhibit 36 (the filing with the State Engineer) in evidence (Ab. 199-200) defendants objected upon the ground that it was incompetent, irrelevant, and immaterial and not germane to any issue in the case; this upon the theory that a mere filing meant nothing, and that the filing called for capturing the waters upon respondent's own premises, and hence outside of the issues in this case.

The court thereupon called upon respondent to explain what it claimed for the paper. Thereupon Mr. Parsons stated as follows:

> "MR. PARSONS: It is an application to appropriate the waters of this stream and *I would say to your Honor that we do not predicate our claim to title to these waters upon any theory that they are public waters or within the jurisdiction of the State Engineer.* I am bringing out by this witness that the purpose of this application was simply to safeguard the plaintiff's property in the event anybody or the State Engineer or the Court might rule some day that these waters are public waters within the State Engineer's jurisdiction and could be appropriated. I understand the State Engineer in one case involving copper waters from these dumps has so held.
>
> *"I will say very frankly that that is not our theory of plaintiff's title. In our opinion these waters are not public waters and are in no way within the jurisdiction of the State Engineer."*

The court did not immediately rule upon the admissibility of the document, so respondent, in an attempt to further justify the introduction in evidence of Exhibit 36 took further evidence, and Mr. Goodrich, chief engineer, testified (Ab. 201):

> "We do not believe that the State Engineer has jurisdiction over waters of this character," etc.

Mr. Goodrich further testified (Tr. 644) that on the day previous to giving this evidence they had filed an amendment to the application so as to change the point of diversion. The filing had not ripened into any right, and the court (Tr. 690, Ab. 203) sustained the objection of defendants to the admissibility of the application for any purpose in the case, from which ruling respondent never appealed. Obviously the court was right in sustaining the objection because the mere filing of an application means nothing in contemplation of law as a basis of right, the time to contest the same not having expired, and the application before the amendment was filed had absolutely nothing to do with the case. In the absence, therefore, of any semblance of right in any public water, respondent chose the theory of private water, which was obviously correct.

This was respondent's theory during the trial, and we quote the following from "Respondent's Brief" at page 11 to show that this was still their theory upon appeal:

> "It must be further borne in mind that it is not the contention of either party that any of the

waters of Dixon Gulch are public waters or capable of appropriation."

Having therefore tried the case upon a theory of private water and attempted to sustain the judgment upon the theory of private water, respondent would now in desperation seek to abandon that theory entirely and shift to the theory of public water after having expressly repudiated it, and notwithstanding the fact that there is not a vestige of evidence of any title in the plaintiff to any public water.

The decisions of this court are unanimous and uniform in holding that litigants cannot try cases upon one theory and then shift theories upon appeal, particularly in a petition for rehearing.

Respondent was right, however, in contending that these were privately owned waters, and the decision of this court was right in holding that these are seeping and percolating waters, and the evidence of both parties showed such to be the case. There was not even a conflict upon the question. The following excerpts from the evidence presented by the Utah Copper Company give a fair sample of what was proven by their own statements:

PARSONS (Ab. 72): "And take the waters from this dump as they *seep* down the bottom of that gulch to that portion of the surface of defendants' property on bedrock and above as a medium through which these waters *percolate,* for a conduit to convey these waters *"

SCHILLING, Mining Superintendent (Ab. 129): "It is our theory that these waters escape from the dump

up above, and we intend to capture them some hundreds of feet below in the Valentine Script." This water *seeps* or finds a course through the railroad fill. (Ab. 130). The course of the water is unknown.

H. C. GOODRICH, Chief Engineer (Ab. 136): "We expect certain of the water will percolate through the portion of the land lying on the right hand side of the gulch going up, and they should percolate through all the railroad fill." It is my opinion the waters come through everywhere in all that area (Tract D). I know of no other well defined channel than the entire Tract D. (Ab. 141).

J. J. BEASON, geologist (Ab. 501): These copper solutions eventually percolate through a semi-impervious seal at the toe of the dump. The waters percolate downward through that and into the fill and percolate out through the fill, and they reach the bottom of the gulch. (Ab. 502). This extends across the entire upward toe of the fill. I know of no particular channel in which these waters course down through the fill. These waters are seeping and percolating in the fill, in the soil beneath the fill, and above bedrock. I observed the water percolation between bedrock and the collar of the raise in the catchment tunnel. (Ab. 503). That is the same general character of water seepage and percolation which I have described in my evidence and is the way the water leaves the dump and comes down to the point where it accumulates for the making of the Hays Spring.

GEORGE C. EARL (Ab. 463): I also believe that the water is spread out over a considerable area. I do not believe myself this water comes down the bottom of that gulch. (Ab. 464) By that I mean that the water *percolates* laterally as well as perpendicularly downward.

Defendants' witnesses were to the same effect. They all testified that if any solutions whatsoever arrived into defendants' ground from respondent's dump in Dixon Gulch that it did so by seepage and percolation. The occasional use of the word "flow" did not change the character of the water. No one described any channel other than the entire gulch.

With reference to the findings of fact referred to on page 35 of respondent's petition it will be observed that plaintiff has italicized the word "flowed" but has entirely ignored the word "percolated," which also appears in the findings.

The case of Chandler v. Utah Copper Company has absolutely nothing to do with this case. That was a clear example of an underground stream, having all of the characteristics of current, dimension, banks, bed, and comingling of the water particles, which characteristics are, as stated by the majority opinion in this case, entirely absent from this water occurrence which the Utah Copper Company is seeking to take. We have already discussed the so-called experiments by the pouring of water upon the dumps. This entire subject matter was handled in appellants' reply brief, commencing at page 49.

V.

Point V has been thrashed over so often that it deserves no extended attention. It is noticeable that plaintiff has the solemn presumption of manufacturing its own facts and then quoting the alleged facts as authority. On page 46 this effort on the part of the plaintiff to support the plaintiff occurs. "The dump has been frequently described as a huge sponge or reservoir." By whom? All of this talk about artificial production amounts only to this, that defendants threw out in the gulches a lot of material that they wanted to get rid of and the rains descended and the floods came. They would have come and descended had the plaintiff never done anything. And as time passed on copper solutions appeared, and now the plaintiff contends that the product is an artificial and manufactured one. It might just as well be contended by the city administration that the gases from the municipal garbage heap are artificial increments added to the atmosphere. This whole matter is discussed at the following places in briefs heretofore filed and there is nothing in the discussion under this point in plaintiff's petition for rehearing that is in any way new, interesting, or convincing: "Respondent's Reply," pages 16-18, 22-23, "Appellants' Reply to Respondent's Reply," pages 1-12.

The criticism of the opinion of the court that the statement in the majority opinion that the plaintiff has added no water to Dixon Gulch is childish and inaccurate. What the court manifestly means is that the

plaintiff has brought no new stream of water into the water shed in Dixon Gulch. It has no reference to the piddling experiments performed by the plaintiff during the course of the trial and referred to on page 43 in the petition for rehearing.

A complete reversal of the position of the plaintiff will also be noticed on the question of whether or not there were always waters in Dixon Gulch. On the trial plaintiff insisted that Dixon Gulch was bone dry until plaintiff established its dump, and then the dump became a reservoir. Now plaintiff takes the position that waters have always flowed in Dixon Gulch. It is interesting to note the inconsistency of the position that there have always been waters in Dixon Gulch, with the former suggestion that the waters all originate in the dump. The truth of the matter is that there was always some water in Dixon Gulch, both before and since the dump has been established, and it is also true that the plaintiff has added no new water to Dixon Gulch. The dumping of waste material by the plaintiff in Dixon Gulch has slowed up the runoff, but the total amount of water has not been increased by one drop.

For the purpose of this point counsel for respondent seeks to shift theories by blandly stating now something which they have heretofore denied, to-wit, that there were waters in Dixon Gulch before respondent's dumps were placed there, and hence all of the waters in Dixon Gulch and within Tracts C and D could not possibly have come from their dump. We beg leave to quote the following from Mr. Parsons (Ab. 206):

> "MR. PARSONS: (Tract D is a natural channel) For conveying the water from our dump. I will concede, if there be any—I cannot conceive of the possibility of being any waters that do not come from our dump—if there be any we cannot take them in this proceeding."

It therefore seems to us that counsel, by admitting the facts stated in the argument upon this point, and by relying thereon—trying to draw the cloak of developed water over themselves—that they admit having played a trick upon the trial court, which found as a fact—but which was not a fact—upon the insistence of respondent, that *all* the waters in Dixon Gulch come from the dump.

By making this argument they bring themselves squarely within the doctrine relating to comingled waters discussed by defendants in "Brief for Appellants," commencing at page 128.

VI.

Under this point the plaintiff again attempts to mislead the court as to the exact nature of Tracts C and D and as to the position which the defendants have *always* taken as to these tracts. Tracts C and D are necessary, vital, and indispensable to the activity of the defendants if they are to have any use of their property in Dixon Gulch. This Tract C is the place where all waters passing through Tract D are gathered into respondent's pipeline. (See the evidence of Chief Engineer Goodrich, Abs. 146). Tract C is not necessary to plaintiff. The drain tunnel waters can be piped across Tract D and taken into the pipeline on Tract B the

same as the waters from Tract A after amendment of the complaint requesting such right as heretofore granted by this court, so as to avoid the comingling of defendants' and plaintiff's waters on Tract C. The same thing is true with regard to the pipeline over Tracts A and B which convey waters from outside the drainage area in Dixon Gulch. The defendants have no objection to the plaintiff condemning Tract A, *except that the plaintiff cannot under the guise of condemning Tract A dump the waters from the pipe on Tract A into the catchment at Tract C, and then claim plaintiff's waters from Tract A and defendants' waters making in Tracts C and D with which they would be mingled, when it is entirely possible and just as convenient for the plaintiff to continue its pipe down the gulch instead of dumping at catchment C.* Defendants have no objection to plaintiff conveying waters from the drain tunnel and from outside the drainage area of Dixon Gulch through pipes which enclose such water before entering plaintiff's property down to the mouth of Dixon Gulch, but they do object to plaintiff misleading the court as to the character of Tract C and Tract D. These tracts are absolutely indispensable to the exercise of defendants' rights. Defendants cannot collect the waters in any other place than in these tracts. They were purposely selected because they are the only places that defendants' waters may be collected in Dixon Gulch. They are not at all essential to the plaintiff except as their use would absolutely destroy the possibility of the defendants collecting their own copper solutions. The opinion of the court on this point is correct.

VII.

As far as point seven is concerned there is so much error and so little facts or law in it, and there is so much of an attempt to lead the court into possible future contingencies not now before the court that the discussion thereof is premature and futile, to say the least. The suit for condemnation is an entirety, and is conclusive upon the issues presented, namely, as to whether Tracts C and D can be condemned for the purposes claimed. If it operates at all it operates from the date of its filing. The weird suggestion that while the action of the court may be right in denial of the plaintiff's right to condemn Tract D for the collection of solutions up to the date of filing respondent's petition for rehearing that such a conclusion should in no way affect the right of the plaintiff to collect solutions in Tract D for the next hundred years, has the prize for originality. The suggestion that the court has pointed out how the plaintiff may legally acquire Tract D is inaccurate. No one has ever contended that as to bone dry ground the plaintiff may not condemn such ground through which to run a ditch or in which to lay a pipe to convey copper solutions from plaintiff's dump to its precipitating plant. But this view does not originate with the Supreme Court. There is nothing novel or new about it. Such a use of Dixon Gulch is already being made as far as Tract A and the drain tunnel waters are concerned, but it is when the plaintiff contends for a right to collect the defendants' copper solutions in the

defendants' premises without paying for their value or to prevent the defendants from collecting such solutions by occupying the only ground in which they can be collected without paying for the damage plaintiff would thereby do, that objection is made.

It is not true that the only issue raised is as to the right of respondent to condemn the land of the defendants. The further answer and counterclaim of defendants is contained in paragraph XXXIII, stating among other things as follows:

"* * * that the said plaintiff is now appropriating and taking waters belonging to this defendant and for a period of about two weeks prior to the commencement of this action has so taken the same, without defendauts' consent and to the damage of this defendant to the extent of several thousand dollars, and for all of which said waters containing copper in solution taken and appropriated or hereafter taken and appropriated by the plaintiff from this defendant, the defendant demands an accounting and payment for the value of such copper in solution, as a part of defendants' further damages." (Abs. 63) The prayer of the answer properly demanded affirmative relief. Whether this allegation and prayer amounts to a counterclaim is not now before this court, but the record shows affirmatively that it was treated by the parties and the trial court as a counterclaim, and it certainly contains all of the elements of a cause of action for unlawfully taking defendants' waters and if deficient in any respect is subject to the same right of amendment as is accorded to respondent. The memor-

andum opinion of the trial judge contains the following: "Because of the contention of the defendants to the effect that they are entitled to an accounting of all the waters collected by plaintiff during the pendency of the suit whether the source thereof is in plaintiff's dump or not, this expression of the opinion of the court is voiced at this point," etc., etc., (Abs. 589). It is quite evident that the trial court regarded the pleading of defendants as a counterclaim demanding an accounting of values taken by respondent.

It is a new contention that a condemnation suit which has no merit and in which the condemner has been required to file a bond and in which the defendants after denying the plaintiff's right to condemn, ask for damages because of the unlawful taking of defendants' property, are confined in the action merely to a determination of the issue as to whether or not there is a right to condemn. Respondent says, "title to waters presents no issue in the present aspect of this case." (Petition for rehearing, page 58). From the very start the question of title to waters was insisted upon as *the* issue. In his opening statement and in the statements of issues which occurred thereafter at the very outset, on page 79 of the abstract, will be found a statement by counsel of respondent as follows: "That question must be determined by the court. If we do not own that water there I do not know very well how we could take theirs." On page 89 of the abstract will be found the following remarks by the same counsel: "They (the defendants) have raised this issue, this is in their pleadings, they

have set out as a defense to the action in challenging our right to condemn, that these waters we seek to recover are theirs, and that we have no property there to recover. * * * Now, in calling upon your Honor to determine those questions, incidentally your Honor will pass upon the title, of course, which we submit is a question for the court and not a question for a jury, that once your Honor has determined that question, the issue can then readily be framed, that is to ultimately go to the jury, but once determined by the court, of course the jury will not be called upon again to determine it." To which counsel for the defendants replied: "That is exactly what I thought; the question they are trying to present to your Honor and have your Honor determine is the facts as to title."

The suggestion that plaintiff may as a physical possibility capture solutions in its own dump, is an interesting one but not a legal one in this case, and is probably intended to disturb someone. This action has only to do with the *right* of respondent to take defendants' property for the purpose of capturing waters at that point.

VIII.

It seems to us that the insertion of this point is rather a belated effort on the part of respondent to inject a Federal question into the case in the hope that this "bogeyman" might tend to frighten someone.

As we understand this attempted point it is: That since defendants did not seek to quiet title by way of

counterclaim that the question of title was not in the case, and this court having found title to these waters to be in defendants, such finding has no foundation in the pleadings and is null and void; and hence subject to reversal by some Federal court to which respondent threatens to appeal if this court does not conform to respondent's desires. Apparently counsel for respondent thinks that the only cases in which the question of title to property is presented are suits to quiet title. Title is involved in practically every case involving property rights, and is particularly involved in condemnation cases where defendants question the right to condemn and in this case title is in issue because the waters for which plaintiff is seeking a ditch right do not belong to the condemner, and here also the condemner is seeking, without compensation or damages, to take waters belonging to defendants.

The question of title is squarely within the issues presented by the pleadings. It was raised in paragraph XI, XII, XIII of the answer, and in the further answer and counterclaim in paragraph XXXIII; together also with the various denials set forth in defendants' answer (Ab. 42-64).

The question of title was the first thing we ran into in the trial of the case, plaintiff insisting that the question of title was one for the court, and defendants, on the other hand, insisting that they were entitled to a jury trial; and both parties agreeing that it was the paramount issue in the case. (Ab. 76-92) After having insisted that the question of title to these waters was

included within the matters and things to be found by the court as a necessary element under the statute, it comes with rather poor grace at this late date to urge that the court transcended the issues in determining title. A typical example of counsel's contention is contained at page 79 of the abstract:

> "MR. PARSONS: My notion about this thing is our opponents are entitled to a jury trial only upon one question, that is the question of damages, the value of the right-of-way and the damage to the ground due to the taking. *The question of the title of the water I think goes to the right of eminent domain. That question must be determined by the court. If we do not own that water there I do not know very well how we could take theirs.*"

In fact both parties agreed that this was the paramount issue in the case.

The suggestion on page 64 that "That court could properly indulge only one presumption, namely, that plaintiff would do whatever might be necessary to preserve its title as its copper solutions crossed the boundary between the respective properties of the parties to this action, that with the changing times and conditions and metallurgical processes waters and chemical solutions from new sources might, and in all probability would, be sprayed upon plaintiff's dumps in Dixon Gulch and that it was reasonable to presume that the easement sought to be condemned across Tract C not only could, but would be used for the purpose for which it was to be condemned, namely, the transportation of copper solu-

tions produced by plaintiff in plaintiff's reduction works by whatever process or processes the then state of the art might indicate, and that therefore, the judgment should be affirmed," should be set off against the equally emphatic statement of respondent in respondent's reply to appellants' reply, page 6, where it is stated that "plaintiff cannot in the case at bar drive a tunnel beneath the top of bedrock to intercept by its raise and wings plaintiff's copper solutions at plaintiff's boundary, because such diverting structures under the circumstances there existing would not only be prohibitive in initial cost but would be impossible of maintenance at any cost."

Respondent blows hot and cold upon this issue, as it has upon practically every other issue in the case. If their good faith is questioned upon the ground that it will be a simple matter for them to take their own water upon their own lands and premises and leave the lands and premises of the defendants alone, they say it is an impossibility to collect their own waters upon their own lands and premises. On the other hand, if they desire to argue our good faith in seeking to capture these waters, they state that it will be a "mere gesture" for them to shut the solutions off.

In face of this assertion of physical impossibility to collect copper solutions in plaintiff's dump, plaintiff's own theory under point eight and at other places in plaintiff's brief that the court will not require the mere "gesture" of a compliance with the law, dissolves into thin air. It is emphatically not true, as the respondent

has stated in its petition on page 65 that "This case was tried on the theory that if there were *no* solutions other than those defendants had alleged were coming to the surface at the Hays Spring out of the synclinal basin from subterranean sources," etc. The case was tried on that theory and also on the theory that wherever the waters came from when they reached defendants' lands, if collected by defendants, they belonged absolutely to defendants.

The two Utah cases referred to on page 65 of Respondent's Petition are in no way in point. In the case at 56 Utah 53 it was held that where the right to condemn is sustained, that in such action the defendant may not recover judgment on a counterclaim for an independent trespass committed by the condemner prior to the condemnation proceedings. In the second case at 22 Utah 43, it was held that where an action is brought for an injunction to restrain a trespass, the trespass may not be justified on the ground that it was committed for a public purpose or that a right of condemnation existed unexercised in the trespasser, and that condemnation may not be prayed for in a counterclaim in such action. It seems to us manifest that the principle of these cases does not apply where, as in this case, the right to condemn is denied and there remains, therefore, nothing for the court to do but to assess the damage done by the

condemner during his unwarranted and unlawful possession of the premises of the defendants. If respondent by these two cases is attempting to make the point that a counterclaim of this kind is not properly pleadable in this action, then we respectfully suggest that there is a proper way for respondent to raise that point in the trial court, and if the ruling is not satisfactory to respondent they have a right of appeal upon that question. This particular phase of the case is not now before this court. The only point which is raised is as to whether the question of title was within the issues raised by the pleadings and as to this we respectfully urge that it was within the issues raised by the answer, further answer, and counterclaim.

The authorities quoted on pages 67 to 70 that the court is bound in its determination to the issues raised in the pleadings have no point in this case as heretofore pointed out. The plaintiff sought to condemn and defendants denied the right to condemn and asked for damages because of the unlawful taking of the copper solutions owned by the defendants. All of these issues were properly in the pleadings and covered by the judgment of the trial court and properly covered by a reversal of the determination of the trial court and a remanding of the action for a determination of the damage done the defendants.

We respectfully submit that notwithstanding the disappointment of our brothers on the other side, the conclusion reached by the court in the carefully considered opinion filed in this case was the only one that could be reached in accordance with the facts and the law, and that the petition for rehearing should be denied.

Respectfully submitted,

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