1984

Theodorius E. McKean v. A. Adolphus Lasson : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT of the STATE OF UTAH

THEODORIUS E. McKEAN, FRANK M. SPENCER and R. L. MITCHELL,

Plaintiffs and Appellants,

— vs. —

A. ADOLPHUS LASSON, GLEN D. LASSON, BERNARD G. LASSON, NIELS OSCAR LASSON, and GEORGE A. SILER,

Defendants and Respondents.

RESPONDENTS' BRIEF

ELIAS HANSEN
721 Cont'l. Bank Bldg.
Salt Lake City, Utah
Attorney for Defendants and Respondents

INDEX

CASES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

THEODORIUS E. McKEAN, FRANK M. SPENCER and R. L. MITCHELL,
Plaintiffs and Appellants,

— vs. —

A. ADOLPHUS LASSON, GLEN D. LASSON, BERNARD G. LASSON, NIELS OSCAR LASSON, and GEORGE A. SILER,
Defendants and Respondents.

Case No. 8448

RESPONDENTS' BRIEF

ADDITIONAL STATEMENT OF CASE

This Brief is filed on behalf of only the respondents Lassons. In the main the so-called Statement of Facts contained in appellants' Brief are correct so far as they go, but some of such statements are in the nature of a statement of evidence when viewed in a light most favorable to the appellants.

To avoid repitition, we shall postpone the discussion of the evidence until we take up the Points raised in ap-

pellants' Brief. At the outset, however, we believe it will aid the court to direct its attention to some of the characteristics of the area involved in this litigation. The land upon which the water here involved is located in the Thistle Fork of Spanish Fork Canyon and extends for a distance of about six miles through the canyon from the Sanpete-Utah County boundary line northerly to where Nebo Creek empties into Thistle Creek.

There was received in evidence two maps marked Defendants' Exhibits 1A and 1B. Exhibit 1A is a map of the northern part of the land and Exhibit 1B is the southern part of the land here involved. The most northerly place of diversion of the water from Thistle Creek shown on the map, Defendants' Exhibit 1A is the McKean-Spencer Dam which diverts water to the lands of the plaintiffs McKean and Spencer and defendant A. Adolphus Lasson (Tr. 63-71). There are two diversion points farther down the river to the north referred to in the evidence as the McKean-Siler Dam and the Siler-Mitchell Dam. The evidence is all to the effect that at all times the McKean-Spencer Dam has been water tight, that is to say that all of the water which finds its way down to the McKean-Spencer Dam is diverted into the McKean-Spencer Ditch, except in case of very high water which passes over or around that dam (Tr. 71-115). Thus the only water that finds its way down to the next lower or McKean-Siler Dam is the overflow into the creek below the McKean-Spencer Dam and likewise the McKean-Siler Dam is water tight and the only water available at the Siler-Mitchell Dam is the make of the

creek below the McKean-Siler Dam (Tr. 71-103-115).

The maps, Defendants' Exhibits 1A and 1B are drawn to the scale of one inch to 200 feet. It is so shown on the maps and so testified to by Glen Lasson (Tr. 184). Glen Lasson who drew the maps was a licensed engineer in the employ of the U.S. Reclamation Service stationed at Boulder, Nevada (Tr. 182). If the scale is applied to the maps, Defendants' Exhibits 1A and 1B, it will be seen that the strip of land upon which the water here in controversy has been applied at the McKean-Spencer Dam, which is one of the widest places of the strip, is slightly in excess of 1600 feet or about ⅓ of a mile. Most of the land to the south of that dam is much narrower. Applying the scale to the length of the strip of land, it will be seen that the same is more than three miles long from the McKean-Spencer Dam southerly to the Sanpete-Utah County line, which is the southern boundary of the land upon which the water here involved has been applied. All of the land farther down the river to the north of the McKean-Spencer Dam is not shown on the map and as above stated, the McKean-Spencer Dam has, at all times within the memory of the witnesses, been a water tight dam and the two points of diversion farther down and to the north of the McKean-Spencer Dam have used only such water as finds its way back into the creek by seepage below the McKean-Spencer Dam.

Defendants' Exhibits 1A and 1B also contain the number and locations of the check and diversion dams

along the creek South of the McKean-Spencer Dam, together with the number and location of the borings made in the fall of 1954 to determine the distance of the water table below the surface of the ground. We shall probably have occasion to refer to these maps later in our Brief, but as above stated we can probably reduce repetition to a minimum by confining our discussion to the evidence and to the various Points urged by the plaintiffs as a basis for their claim that the judgment appealed from is in error. We shall take up our answer to the Points raised by the appellants in the order in which the same are discussed by them.

POINT ONE

THE TRIAL COURT DID NOT ERR IN FINDING AND DECIDING THAT THE DEFENDANTS HOLD RIGHTS TO THE USE OF WATER OF THISTLE CREEK AND ITS TRIBUTARIES WHICH ARE PRIOR TO THE RIGHTS OF THE PLAINTIFFS.

The respondents have no occasion to question the doctrine announced in the case of *Gile v. Tracy,* 80 Utah 127, 13 Pac. (2d) 329, cited on page 11 of appellants' brief, but on the contrary the judgment rendered in this case is in accord with the law announced in that case.

The evidence in this case, including that of the plaintiffs established these facts. The water of Thistle Creek has always been used in the same or substantially the same manner that it was being used immediately prior to the date of the trial. That is the testimony of the plaintiffs and their witnesses and the defendants and their wit-

nesses (Trs. 32, 34, 41, 47, 48, 49, 50, 51, 53, 59, 61, 63, 65, 66, 67, 75). It will be noted from the above references that Mr. Spencer made no complaint because the original check and diversion dams were put in and used to divert the water from Thistle Creek. The only complaint he makes is that during the last few years he received less water than he did before that time and that the Lassons from time to time put in additional check dams to prevent erosion and that such additional check dams may have caused the lessening of his water. The testimony of plaintiff McKean is to the same effect (Tr. 87, 88, 89, 92, 93, 95, 99, 101, 103, 108, 109). Plaintiff Mitchell testified that he never went up Thistle Creek to bring down any water. He did testify that he acquired his property in 1942 and the flow of the water at his point of diversion had decreased (Tr. 112). That there has always been a water tight dam where the McKean-Spencer Dam divert the water, and also where McKean and Siler divert the water and likewise where he and Siler divert their water (Tr. 115). Arthur Lasson, a witness called by the plaintiffs testified that the water of Thistle Creek had been used in the same manner that it was used at and just before this action was commenced. It was so used as far back as he could remember or since 1900 (Tr. 145, 146, 149, 150, 152, 155, 159, 163). Such also is the testimony of plaintiffs' witness George F. Peterson, age 66, who owned and operated some of the property now owned by the defendants Lassons in 1914 to 1918 (Tr. 168). That the method of irrigation of the land was the same as that followed when he was a boy or as far back as 1905 or maybe 1904

(Tr. 170, 172, 173, 174, 175). The testimony of the defendants is to the same effect. See testimony of defendant, Glen D. Lasson (Tr. 219); Testimony of Arthur D. Lasson, who was also called as a witness by plaintiffs (Tr. 245 to 249); Testimony of Bernard Lasson, (Tr. 268, 272-274); Testimony of A. A. Lasson (Tr. 311).

By the testimony above referred to it is clearly established: That during the early spring, that is from about March 1 to June 25 of each and every year, the defendants Lassons have maintained numerous water tight earthern and rock dams in Thistle Creek by which the waters of said creek are diverted and rediverted from the creek onto the upper meadow lands of the Lassons. The Trial Court so found the facts.

In their brief, pages 11 to 19, the plaintiffs quote at some length from defendants' testimony. They apparently attempt to create the impression that during the three or four years immediately before this action was commenced, the defendants deprived the plaintiffs of some of the water to which they, plaintiffs, were entitled. Said claim is apparently based upon a claim that the Lassons raised better crops than did the plaintiffs. There is an absence of any substantial evidence that the waters of Thistle Creek were regulated differently during the four years immediately preceding the commencement of this action than they had been regulated during the half a century prior thereto.

The respondents Lassons do not and have not contended that the appellants are without a right to some

of the water of Thistle Creek. They do contend that such rights are fixed by the manner in which such waters have been used since the entry of the Smith Decree in 1894 and particularly during a period of more than half a century prior to the commencement of this action. It is also the contention of the respondent Lassons that any substantial change in the manner of the regulation and use of the waters of Thistle Creek would wreck or at least destroy the full use of the waters of that creek.

In addition to the facts already recited, the evidence shows that in the early spring there is more than sufficient water to supply the needs of all the water users of Thistle Creek. It is in effect so alleged in plaintiffs' Complaint in that it is there alleged that the flow of that stream varies from 5 to 20 cubic feet per second and that the high water season extends from about March 1st to June 15th and the low water season extends during the remainder of the year (R. 9). The evidence shows that by actual measurement that there was a flow of 37.98 second feet at the head of the creek on May 17, 1949 (Tr. 132). Other measurements will be found testified to in Tr. 130 to 135, from which it will be seen that the flow during the time covered by the measurements fell as low as .51 of a second foot (Tr. 135). On June 21, 1949 the total flow reached as low as .24 of a second foot (Tr. 372). The evidence also shows without conflict these additional facts:

That the land here involved has a very substantial slope downstream that is towards the North and also

for the most part, a slope towards the creek. These check dams are necessary to prevent erosion (Tr. 196 to 205 and 348). The trial court so found and appellants do not attack such findings (Tr. 7). The evidence also shows that the water applied to the meadows which if not consumed by the vegetation or evaporation finds its way back into the creek for use of the lower users. Mr. Cottrell placed the amount which returned to the creek at 50% (Tr. 197). Mr. Glen Lasson placed the amount of water applied on the upper meadows that returned to the creek at 60% when 50 second feet was diverted, when 20 second feet was diverted 50% would return and when five second feet was diverted, no water would return to the creek by flow from the surface. There would, however, be water returned by seepage, the amount of which Mr. Lasson did not state (Tr. 327). Elmer Jacob placed the percentage of the water applied to the meadows which found its way back into the creek at 60% in the early part of the season and 30% in the later part (Tr. 362). The Court below found "that probably one-half of the water applied on the lands here involved finds its way back into Thistle Creek for use on the lands at lower elevations." (Tr. 64). No attack is made by appellants on that finding. The evidence further shows, without conflict, that the application of large quantities of water on the upper meadow lands is a distinct advantage to the lower users and particularly to the lands of the plaintiffs and other cultivated lands. Such benefit being that the water so applied upon the upper meadow is stored and serves to supply the irrigated lands later in the season

when the water is needed to irrigate the cultivated lands.

The plaintiff McKean places the amount as being two second feet that finds its way back into the creek below the McKean-Spencer Dam (Tr. 99). He also testifies that he had a fairly good supply of water at his lower point of diversion that is the McKean-Siler Dam. See also testimony of plaintiff McKean (Tr. 106). Mr. Cottrell expressed it as his opinion that the application of large quantities of water on the upper meadows was a distinct advantage to the lower users (Tr. 207, 208, 214). The testimony of Bernard Lasson is that the substantial flow of water continues for about a week after the water is taken off the upper meadows and a continuous flow after that (Tr. 278). Elmer Jacobs testified that the water which would run from the surface of the meadows would find its way to the lower lands almost immediately, but the water which goes into the soil would not reach the lower lands for several days (Tr. 363).

The evidence also shows without conflict that the meadows here involved consist for the most part of native or wild grasses with some narrow strips of alfalfa and that such vegetation requires a high water level because of the shallow root system of the grasses. That where the water table is not near the surface there is a meager growth of vegetation. Testimony of Mr. Cottrell (Tr. 194). To the same effect is the testimony of Mr. Jacob (Tr. 359-360).

It was suggested by one of the plaintiffs that it may be that the presence of the check dams through the upper

meadows may have caused a decrease of the flow of the waters to the lower irrigated lands. The evidence falls far short of establishing any such claim. Most of the check dams have been in the creek for the entire time within the memory of the witnesses. When it is observed that a new ravine is being cut through the meadows a check dam is constructed to prevent the same from cutting deeper. The location of these check dams are shown on defendants' Exhibits 1A and 1B. They are thus described by Glen Lasson: The check dams are basically constructed of rock. They are built in a U shape with the center of the dam a foot and a half up to three feet below the banks, and then, of course, in order to prevent a cutting around the dams, they extend out into the banks. That these check dams do not divert the water out onto the land unless it is during high water. That from 5 to 10 second feet, and maybe 25 to 30 second feet of water will pass over the check dams without forcing the water out of the creek (Tr. 217-218).

In light of the contour of the land here involved, it would seem obvious that these check dams are an absolute necessity not only for the preservation and irrigation of the meadows, but also for the lower irrigated lands. If the creek should be deepened and widened by erosion, it would make it difficult to divert the water onto the meadows. Not only that, but it would require the filling up of the eroded creek with water before any water could be diverted onto the land. Moreover, if the creek channel were deepened and the water table of the meadow lands

lowered to any considerable extent, the meadows would, according to the evidence, be destroyed.

Thus the only possible basis for complaint of those who divert water at the McKean-Siler Dam and at the Siler-Mitchell Dam must be because the plaintiffs McKean and Spencer have not during recent years been given the amount of water to which they are entitled at the McKean-Spencer dam. Plaintiff Mitchell admitted that is the only basis of his complaint (Tr. 118). Apparently Mr. Siler did not believe he had any just cause to complain, because he refused to join with the other plaintiffs and hence was made a defendant. So also the waters to which plaintiff McKean is entitled to at the McKean-Siler Dam is his portion of the water that finds its way back into the creek below the McKean-Spencer Dam and above the McKean-Siler Dam. The issue which thus divides the parties is the quantity or proportion of the waters of Thistle Creek that are deliverable at the McKean-Spencer Dam.

The evidence shows that plaintiff Spencer owned 34.8 acres of land under the Spencer-McKean ditch and that plaintiff McKean irrigated 45.5 acres of land under that ditch. Of the 45.5 acres of land so irrigated by McKean, 18.3 acres were on what is referred to as the Stevenson place which was recently brought under cultivation and irrigated from dry creek, but which Stevenson property could be irrigated from the water of Thistle Creek. The defendant, A. A. Lasson irrigates 7.7 acres from the waters diverted at the McKean-Spencer Dam. The plaintiffs McKean and Spencer irrigated 62 acres of land

under the McKean-Spencer Dam. There is thus a total of 69.7 acres of land irrigated with the waters of Thistle Creek diverted at the McKean-Spencer Dam (Tr. 326-328).

The relative amount of land irrigated by the plaintiffs McKean and Spencer is borne out by the further fact that A. A. Lasson who owns 7.7 acres of land irrigated with the water diverted at that dam has the use of the water for 1½ days out of every 11½ days.

About 8 acres of the cultivated land irrigated by Spencer is irrigated with water after it flows over the lands of A. A. Lasson (Tr. 337-339-328). Of the 476.4 acres of land irrigated by the defendants Lassons 141.3 is cultivated land and the remainder is meadow (Tr. 227-228). Of the cultivated land 34.1 is now partly in grass and is located near the Sanpete County boundary line (Tr. 226), and 19.7 acres is irrigated from springs (Tr. 228).

The evidence of the witnesses, both for plaintiffs and defendants, show that during the low water period the water used for irrigating the cultivated lands and the lower meadow land has been divided as near as could be done without actual measurements at the upper Wimmer Dam so that between one-fourth and one-fifth of the water available at that point should be permitted to flow down the creek to the McKean-Spencer Dam for the use of plaintiffs, McKean and Spencer and the defendant A. A. Lasson. See testimony of Glen Lasson (T. 233). Defendant Spencer testified that the water was diverted at the

Wimmer Dam so that about one-fourth of the water went down to Spencer and McKean after the 25th day of June (Tr. 49).

Defendant Spencer further testified that when they began taking turns with Indianola, he took one-fourth of the water that came down to the Wimmer Dam (Tr. 51). Mr. McKean testified that until the 15th of June the water of Thistle Creek was turned over the meadows; that the water that came down the creek was divided at the White House Dam ordinarily or at the Lasson Dam. The witness and Spencer took what they figured was their share (Tr. 87). Defendant Bernard G. Lasson testified that he had looked after the diversion of the water on Thistle Creek particularly as to the water used on the cultivated lands below the upper Wimmer Dam since 1933. He testified that fairly early in the Spring all of the water of the Creek was diverted onto the meadow land. The water to irrigate the lower meadow was taken out at the New House Dam (Tr. 268). Sometimes as early as April 1st water was diverted at the Upper Wimmer Dam and continued to be so diverted until May 15. There are about 80 acres of cultivated land irrigated with water diverted at the New House Dam (Tr. 269). That the water taken out at the New House Dam is used to irrigate the lower meadow and was so used until May 15th, when there became need for water to irrigate the land under the McKean-Spencer Dam. Prior to May 15th there was ample water in the creek below the New House Dam to supply the water users below that point (Tr. 272). That about 1/5 of the water

in the creek at the New House Dam was turned down to the lower users between May 15th and June 15th. All of the water in the creek during the period extending from June 15th to September 1st has been used and is claimed by Bernard Lasson. No water was diverted onto the lower meadow during that period, that is from June 15th to September 1st. That on September 1st, the water was again diverted onto the lower meadow at the New House Dam and continued to be so diverted until the next spring (Tr. 273). That he Bernard Lasson claims the right to maintain a water tight dam at the New House Dam up to May 15th. There is usually ample water for everyone until that date. That during all the years that the witness has been familiar with the manner in which the waters of Thistle Creek have been regulated he has never known of the water users below the New House Dam getting any water other than the make of the river below that dam and such water as may have flooded over the same until May 15th (Tr. 297). That when Spencer or McKean came up to inquire about the water, the witness would adjust the stream at the Upper Wimmer Dam so that one-fifth of the water would pass that dam during the period extending from May 15th to June 15th (Tr. 301).

A. A. Lasson who owns 7.7 acres of land irrigated with the water diverted at the McKean-Spencer Dam and who uses the water there diverted during 1½ days out of every 11½ days, testified that he owns lands irrigated under the Wimmer ditch and up near the Utah-Sanpete County line, and that he has no complaint about

the amount of water he has received for the land irrigated with water diverted at the McKean-Spencer Dam (Tr. 312). That during the years just preceding the commencement of this action, the land under the McKean-Spencer ditch considering the whole season, has been better watered than the land under the Wimmer Ditch. That there is always a stream of water in the McKean-Spencer ditch, but that is not so in the upper Wimmer ditch (Tr. 313). That up to May 15th all of the water in the creek has been diverted at the New House Dam. The only water available at the Mc-Kean Spencer Dam is that which overflows the New House Dam and the inflow back into the creek below that dam. That at times the inflow back into the creek below the New House Dam is substantial. At other times, it is not (R. 314). The inflow depends upon the amount of water that is applied on the land above the Wimmer Dam. By applying the scale on the map, Defendants' Exhibit 1A, it will be seen that it is in excess of ⅓ of a mile from the New House Dam to the McKean-Spencer Dam and about ¾ of a mile from the McKean-Spencer Dam to the upper Wimmer Dam, so that there is a substantial portion of the creek between these dams to drain back into the creek. It will also be noted that the Lassons were awarded ¾ of the water avilable at the upper Wimmer Dam during the period from June 25th to June 30th and from July 10th to July 15th and to 4/5 of such water during the remainder of the time extending from May 15th to July 15th. It will thus be seen that during the time that the Utah County water users have their turn under the Smith Decree, the Lassons

have ¾ of the water available at the Upper Wimmer Dam and during the time that the Indianola water users have their turn, the Lassons have 4/5 of such available water (Tr. 72).

Some question is raised about the waters of the Panawats Slough. Arthur Lasson testified that during the time he was familiar with and used the land near the Utah-Sanpete boundary line from and after 1911, he used the waters from that Slough at all times except when the Utah County water users had their turns under the Smith Decree; that during such turns the Panawats Slough water was turned in to augment the other waters (Tr. 159-160-163). The evidence of A. A. Lasson is to the same effect (Tr. 309, 370). He also testified that even if the water from Panawats Slough were permitted to flow down the creek when there was no other water in the creek, it would probably never reach the lower users except possibly when the creek was wet (Tr. 310-311). There is no evidence to the contrary.

There is some testimony in the record that new lands have quite recently been brought under cultivation and some of the lands here involved have been condemned for a highway quite recently. However, as far as appears, such facts have not, so far as the evidence shows, affected the manner in which the waters of Thistle Creek have been used. In this case it is quite obvious that the defendants are as much interested as are the plaintiffs in following a practice conducive to the regulation of the waters here in question so that the cultivated lands may

be properly cared for. They believe that the practice followed throughout the years is the best practice that can be found. In that particular the two expert witnesses called to testify in this case are in agreement with the defendants.

Fred W. Cottrell, a witness called by the defendants testified in substance as follows: That he has been engaged in engineering work for upwards of 44 years. That during that time he has done road work in Canada, coast and Geodedic Survey work in the United States and 17 years as Chief Deputy State Engineer, and the rest of the time in engineering for private corporations (Tr. 190). That he is familiar with the area involved in this controversy having recently visited the same in September and November; that he assisted in collecting some of the data on defendants' Exhibits 1A and 1B; that in his opinion the method of construction, operation and maintenance of the irrigation system here involved has been and is excellently done (Tr. 196-198).

Mr. Elmer Jacob was also called as an expert witness by the defendants. He in substance testified that he has attended the Agricultural College of Utah, Brigham Young University and was graduated from the University of Wisconsin in Civil Engineering in 1913. That he has served for a period of 15 years as City Engineer of Provo, Superintendent of utilities for nine years, with irrigation companies in Utah for 16 years, Bureau of Reclamation for two years at Denver, Deer Creek Engineer for two years and miscellaneous private

work for about four years, making a total of about 48 years. That during most of the 48 years his work has been with matters relating to irrigation; that he has recently gone over the territory here involved on two occasions. That he has verified the data shown on Exhibits 1A and 1B and Exhibit 4 and found the same accurate. That the manner in which the irrigation system here involved is handled, is in his opinion, being handled in accord with the custom of handling water under similar circumstances; that it would be very difficult if not impossible to handle the water here involved by distributing the same in turns or in rotation because it would be necessary to have the turns from ten days to about two weeks apart; that if they were to take one-fourth of the low water stream to carry over all of these dams, one could not be sure that one-fourth went over all of the dams. It would require putting in weirs at the various dams and the constant attention of a water master. To use a rotation method would be very damaging to the Lassons area because of the matter of erosion in that a larger stream would cause more erosion, it would tend to deepen the channel, it would lower the ground water which would be very damaging to meadow crops if not be entirely ruinous. According to the evidence the stream fluctuates substantially, sometimes within a few hours, which would make it impossible to do much about turns during the freshets because the gates would be flooded, the lower users would not only have sufficient water, but would probably be unable to handle the same; that if sufficient water should come during the

freshets to create two or three streams what would happen with your attempt to rotate the turns of water? (Tr. 366). Mr. Jacob explains in somewhat greater detail the difficulties that would be encountered in attempting to distribute the water here in question by rotation on pages 367 et seq of the transcript. He expressed it as his opinion that the method used in distributing the waters of Thistle Creek between the parties was probably the best that could be followed (Tr. 3375 et seq).

POINT TWO

THE TRIAL COURT DID NOT ERR IN FAILING TO PLACE REASONABLE RESTRICTION ON THE USE OF WATER.

In our discussion under the foregoing Point, we have attempted to make a summary of the evidence offered at the trial of this cause. Such summary will serve as a basis for an answer to the other points raised by the appellants. On pages 19 to 25, much of the evidence which we have heretofore summarized is referred to and it is argued that under the law announced in the *McNaughton v. Eaton* cases the Lassons may not lawfully divert more water from Thistle Creek onto their meadows than is necessary for the beneficial irrigation thereof. We have read and reread the McNaughton cases, but are unable to find anything therein said or decided that condemns or tends to condemn the methods used in the irrigation of the lands of the parties to this proceeding. It is said in the last case of *McNaughton v. Eaton,* 291 Pac. 886, 887 that:

> "Detailed regulation of the right to use water should be imposed with great caution for usually the parties can agree upon the necessary regulations to meet the necessities as they arise and therefore it is better to do this than for the court to impose hard and fast regulations which cannot be changed to meet emergencies."

The language just quoted is especially applicable to the facts in this case. The plaintiffs make no complaint as to the manner in which the water of Thistle Creek was regulated, except during the three or four years just before this action was commenced. The evidence shows that during the low water period there were rains that cause large quantities of water to flow down Thistle Creek and when that occurred it was necessary to act promptly in order to save the crops during that season (Tr. 274-275). One such rainstorm occurred in 1953. Plaintiff Bernard Lasson thus described what occurred at the time of that rainstorm:

That a little water was available during the year 1953 to irrigate the crops on the cultivated lands, but during a storm a very sizeable stream of water came down. That the Lassons had good sized ditches and water was diverted through two or three of the ditches leading to the cultivated lands. If it hadn't been for that freshet the lands would not have been irrigated that season. That Mr. Lasson made two trips to Spencer and Ercanbrack and told them that their ditches were not carrying the water that they could carry; that they made a feeble attempt to fix it, but it washed out again and Mr. Lasson went back and told them again. By the

time the ditch was fixed more or less permanently, the freshet had passed by. It was that freshet that saved the Lasson crops in 1953 (Tr. 303-304).

There is nothing said or decided in the McNaughton cases which would require the Lassons from refraining from diverting more water out onto their meadow in order to store as much as the ground would absorb so that it would be held back for use on the cultivated lands later in the season; so also is there an absence of anything said or decided in either of the McNaughton cases that would prevent the Lassons from putting diversion dams at various points in the creek to divert and redivert the waters onto their upper meadows. So far as appears, that is the only practical way to properly irrigate the upper meadows. The doctrine of the McNaughton cases do not condem the practice of putting in check dams where, as in this case, it is necessary to do so to prevent erosion and to maintain the water level of the adjoining land so that the meadows thereon will not be destroyed. The facts of the McNaughton case do not show that the practice therein followed has been, as in this case, followed since the memory of man runneth not to the contrary.

In this case it is, to say the least, extremely unlikely that the Lassons would follow the practice that has, throughout the years, been followed in irrigating the meadow lands if such practice were detrimental to the irrigation of the cultivated lands of the Lassons. The evidence shows that the practice followed is a bene-

fit to both the meadow and cultivated lands of the parties hereto. Apparently the plaintiffs do not seriously contend to the contrary. Their only complaint is directed to the three or four years prior to the commencement of this action, and the Lassons submit that such claim is without substance. Such evidence as was offered merely shows that the plaintiffs did not raise as good crops as did the Lassons. There is no evidence that the appellants did not get the same proportion of the waters of Thistle Creek that they had received throughout the years since 1894 when the Smith Decree was entered. So far as the portion of the creek that appellants claim was filled in, there is no reason why they may not clear out the same if they so desire. The testimony shows that the high water of 1952 is responsible for the filling up of that portion of the creek (Tr. 235). So far as appears the appellants have not attempted to clean out that portion of the creek and no request has been made to the Lassons to assist in doing so.

POINT THREE

THE TRIAL COURT DID NOT ERR IN DECREEING THAT THE DEFENDANTS COULD MAINTAIN A TIGHT DAM AT THE UPPER WIMMER DAM UNTIL MAY 15th OF EACH YEAR.

Under Point Three of appellants' Brief, page 26 thereof, attention of the court is directed to the testimony of Arthur Lasson (Tr. 245) and Bernard Lasson (Tr. 272). As heretofore pointed out Bernard Lasson testified that he took control of the water at the Wimmer and New

House dams from and after 1933. This evidence is supported by the defendant, Spencer (Tr. 54-56).

Plaintiffs Spencer and McKean did testify that they at times not mentioned went up to the upper Wimmer dam and took more water, but the court will look in vain to find any evidence as to the amount of water that was taken or the relative amount of water that flowed into either the upper Wimmer Ditch or the New House ditch as compared with the amount that was available at the McKean-Spencer Ditch or the two lower ditches. So far as appears the water permitted to flow past the upper Wimmer Dam and the New House Dam when added to the inflow into the creek below those dams and above the McKean-Spencer Dam exceeded the water available at the upper Wimmer and New House Dams.

In their pleadings and brief, the plaintiffs seem to contend that the waters of Thistle Creek should be divided upon the basis of the land irrigated. If such a practice should be attempted, it would result in serious injury to the entire project and the probable destruction of the irrigated lands. If all of the water available during the low water season were distributed over the entire project, it is doubtful if there would be enough water to be of benefit to anyone. Certainly the cultivated lands could not be made to produce crops if they were required to share the available water with the meadows on the basis of the total area of the meadows and the cultivated lands.

POINT FOUR

THE COURT DID NOT ERR IN GIVING TO SPENCER AND McKEAN ONLY ONE-FIFTH OF THE WATER ACCUMULATING AT THEIR DAM.

Appellants misconstrue the decree when they say that it awarded to the appellants only one-fifth of the water accumulated at their dams. The decree awards to the appellant and respondent, A. Adolphus Lasson, "one-fourth of the total flow of Thistle Creek and Panawats Slough from June 25th to June 30th and from July 10th to July 15th of each year, and to one-fifth of the total flow of said creek and slough measured at the upper Wimmer Dam during the remainder of the period extending from May 15th to July 15th of each year and to maintain a water tight dam at the point where the McKean-Spencer Dam and their other points of diversion are now located and to the use of the water that is available for use at said points."

It must be kept in mind as heretofore pointed out that there is a substantial inflow into Thistle Creek below the upper Wimmer Dam which according to A. A. Lasson who owns land irrigated from water diverted at each of the dams testified that the cultivated land irrigated from the McKean-Spencer Dam was as well if not better provided with water than were the lands under the upper Wimmer Dams.

It is held in the case of *Richlands Irrigation Co. v. West View Irrigation* Co., 94 Utah 403, 80 Pac. (2d)

458 that the rights of appropriators of water under a river system extend throughout its entire course. That being so, the evidence here shows that the cultivated lands of the appellants during the time complained of were at least as well taken care of with the available water as were the cultivated lands of the Lassons. The only evidence tending to show the contrary was that the Lassons had better crops than did the appellants during the years complained of. Needless to say the amount of water applied to land is not the sole test of the size of the crops grown.

POINT FIVE

THE COURT WAS NOT REQUIRED TO DETERMINE THE VARIOUS ELEMENTS OF THE DOCTRINE OF APPROPRIATION.

It will be noted that under the pleadings and the evidence no one raised the question or offered any evidence touching the so-called elements of appropriation. The water here brought in question had way back in 1894 been decreed to the parties to this litigation. No one questioned or could well question the validity of that decree. It awarded to the predecessors of the parties to this action all of the waters of Thistle Creek described in the decree. There can be nothing uncertain about such an award. The appellants made no claim of any uncertainty, indeed, they relied upon that decree as the source of their title. The controversy was solely concerning the diversion of the water. In such case it is indeed difficult to see how the court below should or

could have rendered a decree such as is indicated by the argument under Point 5 of the appellants' Brief.

POINT SIX

THE COURT DID NOT ERR IN AWARDING COSTS AGAINST APPELLANTS.

The costs awarded in this case amounted to only $71.70 (R. 55). That is only a fraction of the actual costs incurred by the respondents. It has been the uniform law in this state that in equity cases, the court may award such costs as are deemed equitable. The award here made falls well within such doctrine.

It is submitted that the judgment appealed from should be affirmed with costs.

Respectfully submitted,

ELIAS HANSEN
721 Cont'l. Bank Bldg.
Salt Lake City, Utah
Attorney for Defendants and Respondents