

1948

John C. McGarry v. Jerold E. Thompson and Ed. H. Watson, State Engineer of the State of Utah : Brief of Appellants

Utah Supreme Court

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In the
SUPREME COURT
of the
STATE OF UTAH

IN THE MATTER OF THE APPLICATION OF JEROLD E. THOMPSON, to change the Point of diversion and place of use of 4.0 c.f.s. acquired by Application No. 16833; Change Application No. a-2017.

JOHN C. McGARRY,

Plaintiff and Respondent,

vs.

JEROLD E. THOMPSON and ED. H. WATSON, STATE ENGINEER OF THE STATE OF UTAH,

Defendants and Appellants.

Case No.
2528

Brief of Appellants

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Defendants and Appellants.

Case No.
2528

Brief of Appellants

STATEMENT OF CASE

This proceeding originated in the office of the State Engineer of Utah. The appellant, Jerold E. Thompson, filed in that office an application to change the point of

diversion and place of use of underground water applied for in application No. 16833, which application was made by one Martin C. Hintzen to appropriate four cubic feet per second from a well to be drilled on the Southeast Quarter of Section 8, Township 35 South, of Range 16 West, Salt Lake Meridian in Iron County, Utah.

The application to change the place of use was made by the appellant Jerold E. Thompson, as assignee of Martin C. Hintzen. Such application is designated as change application No. a-2017.

The respondent John C. McGarry filed an objection to the application of appellant Jerold E. Thompson upon the grounds that he, John C. McGarry, was the owner and holder of application No. 16833, as the assignee of Martin C. Hintzen.

The state engineer granted the application of Jerold E. Thompson and made its order permitting him to change the place of use to another tract of land which the wife of Jerold E. Thompson was purchasing from the state of Utah.

The respondent John C. McGarry prosecuted an appeal from the order of the State Engineer to the District Court of the Fifth Judicial District in and for Iron County, Utah. Upon pleadings filed in such District Court a trial was had and the District Court reversed the order of the State Engineer and held that John C. McGarry was the owner of the Hintzen application and that the appellant Jerold E. Thompson was not the owner of such application and therefore was not entitled to change

the point of diversion and use of the water applied for by the application No. 16833 made by Martin C. Hintzen.

Jerold E. Thompson and Ed. H. Watson, State Engineer of the State of Utah prosecute separate appeals to this court from the judgment made and entered by the District Court of Iron County. This brief is filed for and on behalf of both of the appellants.

There is no substantial conflict in the evidence which establishes the following facts:

Under date of July 21st, 1945 a Uniform Real Estate Contract was entered into (Plaintiff's Exhibit 1) which contains, among others, the following provisions:

“This agreement made in duplicate this 21st day of July, A.D. 1945 by and between John C. McGarry, his assignee or assigns of Cedar City, Utah, hereinafter designated as the seller and M. C. Hintzen, hereinafter designated as the Buyer of Los Angeles, California, Witnesseth: That the seller for the consideration herein mentioned agrees to sell and convey to the buyer and the buyer for the consideration herein mentioned agrees to purchase the following described real property situated in the County of Iron, State of Utah, to wit:

The South 100 acres of the South East Quarter (SE $\frac{1}{4}$) of Section eight (8) Township 35 South, Range 16 West, S.L.M.

It is agreed that in the event the buyer or any assignee or assignees shall make application to appropriate water or shall procure a certificate of appropriation to appropriate water from wells located upon said premises and said buyer or as-

signee or assignees shall thereafter default in this contract the seller shall immediately become the assignee of any such application or applications and the State Engineer of the State of Utah is hereby authorized to recognize said seller as the assignee of any such application and in the event a certificate of appropriation has issued to the buyer the water rights hereunder shall be considered as appurtenant to the said premises and in the event of default the title thereto shall immediately pass to the seller."

So far as appears that contract was never recorded. Mr. Hintzen paid the full purchase price of the property as provided for in the contract. (Tr. 8) Mr. McGarry never gave a deed to Hintzen to the property. At the time that the above mentioned contract was entered into Hintzen filed the water right application which forms the subject matter of this controversy but so far as appears nothing was done by Hintzen to dig a well pursuant to the application. The application to appropriate water so filed by Martin C. Hintzen was never, so far as the record shows, approved by the State Engineer, (Plaintiff's Exhibit 5) except by the approval of the exchange application filed by appellant.

In the latter part of February, 1946 McGarry exchanged 80 acres of the 100 acres of land described in the Uniform Sales Contract above mentioned for another 80 acres of land and at the same time received from Hintzen a purported assignment of the application involved in this controversy. (Tr. 10). The assignment however was not recorded nor filed in the office of the State

Engineer. (Tr. 4) (Plaintiff's Exhibit 2.) The assignment was, however, filed for record in the office of the County Recorder of Iron County, Utah on November 2, 1946. Mr. Hintzen remained on the property described in the Uniform Sales Contract until May or June, 1946. (Tr. 8) The Uniform Sales Contract between McGarry and Hintzen was merely handed back to McGarry and McGarry gave Hintzen a deed to another 80 acres of land. (Tr. 10)

During the first part of April, 1946 the appellant, Jerold E. Thompson, entered into an agreement with Martin C. Hintzen whereby Martin C. Hintzen agreed to assign to Thompson the application to appropriate water here involved and Thompson agreed to remove the brush from 80 acres of land for Hintzen. Pursuant to such contract Thompson during the first part of April, 1946 did remove the brush as agreed. (Tr. 11) The reasonable value of such labor was \$10.00 per acre. (Tr. 13 and Tr. 30) In consideration for the labor in clearing the brush from the 80 acres of land Mr. Hintzen assigned to appellant Thompson the application to appropriate water which is involved in this controversy. (Tr. 11 and 12) (and defendants Exhibit "A")

Prior to the time appellant Thompson entered into the agreement with Hintzen he, Thompson, went to the office of the State Engineer of Utah for the purpose of ascertaining how he might acquire a water right. He had recently come to Utah from California and was not familiar with the laws touching the procedure necessary

to be followed to secure a right to drill wells for the purpose of developing water for irrigation purposes. He secured from the office of the State Engineer the names of a number of people who might be the holders of a water right application that could be purchased. Among the names of the persons which was given to Mr. Thompson was that of Mr. Hintzen (Tr. 12). The appellant, Thompson, contacted Mr. Hintzen and entered into the agreement with him to remove the brush from the eight acres of land for the water right application here brought in question. Under date of April 6, 1946 Martin C. Hintzen and his wife, Margarite C. Hintzen, assigned application 16833 to appellant Jerold E. Thompson and on April 16, 1946 the assignment was filed in the office of the State Engineer. (Defendants' Exhibit "A"). The State Engineer granted the change application on March 3, 1947, which approval required that work must be commenced within six months after the approval date and diligently prosecuted to completion. (Defendants' Exhibit "C") So far as appears the assignment of the water right application to the respondent John C. McGarry, nor a copy thereof, has never been filed in the Office of the State Engineer of Utah.

Soon after the State Engineer approved the exchange application appellant Thompson caused a well to be drilled on the land which his wife was purchasing from the State of Utah and the well was finished on the last of May, 1947. (Tr. 15) Mr. Thompson expended \$1975.00 in having the well drilled. (Tr. 16) Mr. Thompson did not know of any claim of Mr. McGarry to the water filing

ASSIGNMENT OF ERROR

In checking the final draft of the brief as it was returned from the printer it is noted that the Assignments of Error made by the State Engineer have been omitted. This Addendum is added to constitute the Assignments of Error by the State Engineer.

The State Engineer assigns the following as error upon which he relies for the reversal of the judgment on appeal. Said Assignments of Error are made separately and independently of those assigned by appellant Jerold E. Thompson.

(1) The court erred in holding that Sec. 100-3-18 does not require the recordation of the assignment of a water right in the office of the State Engineer and in holding that the failure to so record has no legal effect.

(2) The State Engineer adopts the Assignments of Error and each of them made by the appellant Jerold E. Thompson.

in dispute until he received a notice of the protest which was on December 20, 21 or 22nd, 1946. (Tr. 17)

At the time Mr. Hintzen agreed to make and when he did make the assignment to Thompson of the application to appropriate water Hintzen stated that he still owned the filing, that he paid for and that he still owned a portion of the ground where the original application designated the well should be drilled. (Tr. 17) Mr. Hintzen told appellant Thompson that he, Hintzen, had turned back to McGarry eighty acres of the land which he had purchased from respondent McGarry but that he Hintzen retained 20 acres of the land which he had originally purchased from McGarry. Hintzen further informed appellant Thompson that he Hintzen was going to have his father and mother come over here from Germany and that they were going to live on the twenty acres retained by Hintzen. (Tr. 19) Mr. Thompson further testified that he was not familiar with the amount of water necessary to irrigate land. (Tr. 20)

The foregoing is in substance the evidence upon which the trial court found the issues raised by the pleadings in favor of the respondent and against the appellant.

ASSIGNMENTS OF ERROR

The appellant Jerold E. Thompson assigns the following as errors upon which he relies for a reversal of the judgment appealed from and for a mandate of this court directing the trial court to enter a judgment in favor of the appellant Jerold E. Thompson awarding

to him all water rights that he might acquire under exchange application a-2017.

1. The trial court erred in making the parts of its findings numbered 4 to 5 wherein it is in effect found that the plaintiff is the owner of application numbered 16833 to appropriate 4 cubic feet per second of water. That such findings are without support in the evidence and are contrary to the evidence in that at the time Martin C. Hintzen executed the purported assignment of such water right application the same had not been approved by the State Engineer and the said Martin C. Hintzen had no assignable interest in such application. (pages 2 and 3 of complaint. R. 33-34.

2. The trial court erred in making that part of its finding numbered 13 wherein it is found: "that the said Thompson knew that the well referred to in Hintzen's water application was, by the terms of said application, to be drilled upon the lands covered by Hintzen's contract with McGarry and that water developed therefrom was to be used for the irrigation of said land." That such finding is without support in the evidence and is contrary to the preponderance thereof. (Complaint page 4, R. 35)

3. The trial court erred in making that part of finding numbered 13 wherein it is found that: "Said Thompson knew or should have known that an application to appropriate four second feet of water would not be granted for the irrigation of twenty acres of ground." That said finding is without any support in the evidence. (Complaint page 4, R. 35)

4. The trial court erred in making that part of finding numbered 13 wherein it is found that: "Said Thompson could easily have made inquiry from McGarry concerning the status of the Hintzen application and could have learned easily that such application had been previously assigned by Hintzen to McGarry" for the reason that such finding is immaterial. (Complaint pages 4-5, R. 35-36)

5. The trial court erred in making its so-called finding of fact number 14 and the whole thereof for the reason that the same is without support in the evidence, that the same is contrary to the evidence and the preponderance thereof. (Complaint page 5, R. 36)

6. The trial court erred in making its conclusion of law numbered 1 and the whole thereof. That such conclusion of law is without support in the findings of fact and is without support in the evidence. (R. 36)

7. The trial court erred in making its conclusion of law numbered 2 in that such conclusion of law is without support in the findings of fact and is without support in the evidence. (R. 36)

8. The trial court erred in making its conclusion of law numbered 3 in that such conclusion of law is not supported by either the findings of fact or the evidence. (R. 36)

9. The trial court erred in making its conclusion of law numbered 4 in that such conclusion of law is without support in the evidence and is contrary to the law applicable to the facts as shown by the evidence. (R. 36)

10. The trial court erred in making its conclusion of law numbered 5 in that such conclusion of law is not supported by the findings of fact and is contrary to the law applicable to the facts as shown by the evidence. (R. 36)

11. The trial court erred in making its conclusion of law numbered 6 in that such conclusion of law is without support in the findings of fact and is contrary to the law applicable to the facts shown by the evidence. (R. 36.)

12. The trial court erred in making its conclusion of law numbered 7 in that such conclusion of law is without support in the findings of fact and is contrary to the law applicable to the facts disclosed by the evidence. (R. 37)

13. The trial court erred in making paragraph 1 of its decree in that said portion of the decree is without support either in the evidence or the findings of fact. (R. 38)

14. The trial court erred in making its paragraph 2 of its decree in that said portion of its decree is without support in either the evidence or the findings of fact and is contrary to law. (R. 39)

15. The trial court erred in making paragraph 3 of its decree in that such paragraph is without support in either the evidence or the findings of fact and is contrary to law. (R. 39)

16. The trial court erred in making paragraph 4 of its decree in that said part of the decree is without sup-

port in either the evidence or the findings of fact. (R. 39)

17. The trial court erred in failing to affirm the order made by the State Engineer of Utah wherein and whereby the State Engineer approved the exchange application of the appellant Jerold E. Thompson.

QUESTIONS PRESENTED FOR REVIEW

While the appellant Thompson has made 17 assignments of error the questions presented for review may be reduced to three, namely :

1. May one who has merely made and filed in the office of the State Engineer an application assign such application to another and thereby transfer to such assignee a vested interest in such application prior to the approval of such application by the State Engineer?

2. Does the evidence in this case support the finding and conclusion of the trial court to the effect that the appellant Jerold E. Thompson was not a bona fide purchaser for value of the application to appropriate water which was filed by Martin C. Hintzen.

3. May an assignee of an application to appropriate water defeat the right of a subsequent assignee of such application where the first assignee fails and neglects to place his assignment of record in the office of the State Engineer prior to the time the subsequent assignee has secured his assignment and placed the same of record in such office, especially where the first assignee has

participated in the plan to have the application placed in the name of the applicant?

We shall discuss the first two questions above suggested and adopt the discussion made by the State Engineer touching the third question. If this court should conclude that the purported assignment of the application to appropriate water by Hintzen to McGarry is and was a nullity it will probably not be necessary to consider the other two suggested questions.

I

THE PURPORTED ASSIGNMENT OF THE HINTZEN APPLICATION TO APPROPRIATE WATER TO MCGARRY WAS AND IS A NULLITY.

While we have been unable to find an adjudicated case dealing with the question of whether or not an unapproved application to appropriate water may be assigned it is a well established rule of common law that the mere possibility or probability that a right may come into existence at some future time is not assignable. The law in such particular is thus expressed in 4 Am. Jur. Sec. 4, page 232:

“A mere possibility or expectancy not coupled with an interest cannot, at common law, be made the subject of a valid assignment or transfer. It is the general rule of law, in the absence of any statutory modification, that in order that a right or interest can be assigned, it must have at the time of the assignment either an actual or a po-

tential existence. A distinction is made between what was termed a mere possibility and a "possibility coupled with an interest'."

Numerous cases will be found collected in a foot note to the text which under various circumstances support the general rule. We shall not burden the court with an analysis of those cases because none of them are directly in point, but the principles of law therein announced lend some support to the view that the unapproved application of Hintzen was not assignable because he had no vested interest to assign. Moreover to permit such an assignment would offend against the provision of our statutory law relating to the appropriation of water.

"It shall be the duty of the state engineer, upon the payment of the approval fee, to approve an application if: (1) There is unappropriated water in the proposed source; (2) The proposed use will not impair existing rights, or interfere with the more beneficial use of the water; (3) The proposed plan is physically and economically feasible unless the application is filed by the United States bureau of reclamation and would not prove detrimental to the public welfare; and (4) The applicant has the financial ability to complete the proposed works and the application was filed in good faith and not for the purposes of speculation or monopoly; *provided*, that where the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or min-

ing development or manufacturing, or will prove detrimental to the public welfare, it shall be his duty to withhold his approval or rejection of the application until he shall have investigated the matter. The cost of such inquiry shall be paid by the person making the application, as provided by Section 100-2-14, if such application is approved. If an application does not meet the requirements of this section, it shall be rejected.” U.C.A. 1943, 100-3-8.

It will be observed from the provisions of the statute just quoted that before an application to appropriate water may properly be approved by the State Engineer it becomes his duty to make the investigation provided for in the portion of the section of the statute just quoted. If the statute has not been complied with the application may not be approved.

In the absence of a showing to the contrary it must be assumed that the State Engineer did his duty in such particular and refused to approve the application unless and until it was amended so that the water applied for might be put to a beneficial use as by statute provided. A few illustrations might be suggested to illustrate what we mean. If the State Engineer did what the statute required he might well have determined that there was no unappropriated water for use on the 100 acres covered by the contract between McGarry and Hintzen. It is a matter of common knowledge that even though there may be underground water available from a common source to irrigate say 1000 acres of land if an attempt is made to pump all of the available water from, at or

near one point it may well be that the water from distant points could not be made available. In this connection it will be observed that the proposed place of use provided for in Hintzen's filing was that the South East Quarter of Section 8, Township 35 South, Range 16 West, while the place where Thompson proposes to use the water is the South West Quarter of Section 14, Township 35, South, Range 17 West. (Trs. Plaintiff's Exhibit "B") Thus the two tracts are separated by a very substantial distance. It may be that the State Engineer in the performance of his duty concluded that there was no unappropriated water available on the Hintzen's property but there was unappropriated water available on the property purchased by Iola M. Thompson, the wife of appellant Jerold E. Thompson. If that were so it was the duty of the State Engineer to withhold approval of the application until such time as the application was amended to change the point of diversion to a place where water was available.

Again it may be that the land where it was first proposed the water should be used was unfit for use as irrigated farm lands because it consisted of sand dunes or gravel or rocks or other reasons. If that were so the State Engineer would be derelict in his duty if he approved an application to appropriate water on such land. Again it may be that the State Engineer concluded that the applicant did not have the financial ability to complete the proposed works, or that the application was not filed in good faith or that it was filed for purposes of speculation in which case the application should not be approved

until these objections had been removed. That the appellant Thompson was acting in good faith cannot be open to question because he expended nearly \$2,000.00 to construct a well within the six months period allowed by the State Engineer to begin construction. The State Engineer may well have concluded from an investigation and from other evidence available to him that respondent McGarry was not acting in good faith when he secured the assignment of the Hintzen application or that he secured the assignment for purely speculative purposes. He was engaged in buying and selling real estate.

So far as appears neither Hintzen nor McGarry ever did anything towards drilling a well on the 100 acres of land described in the McGarry-Hintzen contract. For some reason known only to Mr. McGarry he kept the alleged assignment of the Hintzen application in his possession without filing the same with the State Engineer. The State Engineer could not intelligently perform the duties imposed upon him by sub-division 4 of U.C.A. 1943, 100-3-8 without being advised as to the owner of the application at or prior to the time that he approved or rejected such application.

In connection with the provisions of U.C.A. 1943, 100-3-8 above mentioned it may be well to consider that part of U.C.A. 1943, 100-3-18 wherein it is provided that:

“Prior to issuance of certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing. Such instru-

ments, when acknowledged or proved and certified in the manner provided by law for the acknowledgment or proving of conveyances of real estate, may be filed in the office of the state engineer and shall from time of filing of same in said office impart notice to all persons of the contents thereof. Notices of claims to underground water filed pursuant to the provisions of section 100-5-12 may be transferred or assigned by instruments in writing in the manner herein provided."

While the statute last quoted does not expressly refer to an approved application for the appropriation of water it does speak of *rights claimed* under such an application. The language *rights claimed* must necessarily apply only to an approved application because until the application is approved there can be no rights. The only possible right that an applicant to appropriate water has prior to its approval is the right to have the State Engineer pass upon the application by either approving or rejecting the same. Whether the same shall be approved or rejected depends upon the status of the applicant or his assignee at the time of the approval; that is to say, whether the holder of the application is entitled to an approval pursuant to the provision of U.C.A. 1943, 100-3-8, heretofore quoted. When Mr. Hintzen, by the assignment of his application to Mr. Thompson, informed the State Engineer that he had parted with any right he may have in the application the State Engineer was called upon to act upon the application as the same then existed. That is what the State Engineer

did when he approved defendant's Exhibit "C" designated as the "Change Application Approved."

There is nothing in the pleadings or in the evidence, or in the findings of fact or conclusion of law which show or tend to show that Mr. McGarry had or could have met the requirements of U.C.A. 1943, 100-3-8 to entitle him to have the original application of Mr. Hintzen approved and thereby breath life into his so-called assignment of the Hintzen application.

The entire case presented by the respondent is bot-tomed on the false assumption that the mere filing of an application to appropriate water gives the applicant a vested right in some water. If that be so our statutory laws, and particularly Section 100-3-8, is rendered meaningless. If the mere filing of an application gives the applicant a right to the public waters of this state then indeed would it be an easy matter to secure a monopoly of the public waters of this state contrary to the provisions of U.C.A. 1943, 100-3-8.

We do not wish to be understood as contending that the State Engineer may arbitrarily or capriciously refuse to approve an application to appropriate waters but we do contend that the assignment of an unapproved application does not give the assignee a vested interest in such unapproved application and that before the assignee of an unapproved application to appropriate water has any standing in court he must show that he meets the requirements of section 100-3-8.

Moreover, before a court is authorized to reverse the State Engineer in refusing to recognize as valid an assignment of an unapproved application to appropriate the water such assignee must show at least that he meets the requirements of U.C.A. 100-3-8. That in the absence of such a showing the action of the State Engineer is not vulnerable to attack by such purported assignee. In the absence of proof to the contrary the courts will assume that the State Engineer has performed the duties imposed upon him by law.

II

JEROLD E. THOMPSON WAS A BONA FIDE PURCHASER FOR VALUE OF THE HINTZEN APPLICATION TO APPROPRIATE WATER.

If we are right in what has heretofore been said there would seem to be no occasion to be concerned about the other two questions heretofore suggested in this brief. If the respondent acquired no vested interest cognizable in a court of law by reason of the purported assignment of the Hintzen application to appropriate water then and in such case the respondent had no grounds to complain of the order of the State Engineer granting the application of appellant Thompson to change the place of the diversion and use of the Hintzen application. On the other hand if Thompson is not entitled to prevail on such ground then it becomes necessary to consider the other propositions.

There can be no doubt that appellant Thompson per-

formed labor for Hintzen in clearing brush from 80 acres of the land owned by Hintzen and that the value of such labor was \$10.00 per acre or a total of \$800.00. The evidence so shows and there is no evidence to the contrary.

There is no evidence which shows or tends to show that the appellant Thompson knew that Hintzen had assigned the application to Mr. McGarry. The evidence is that Mr. Hintzen assured Mr. Thompson that he had not assigned the application to Mr. McGarry and that he, Thompson, did not know of any such claim being made until he, in December 1946, received notice of the fact that Mr. McGarry had filed a protest to the granting of Thompson's application to change the place of diversion and use of the Hintzen application to the lands which had been purchased by Mrs. Thompson, the wife of appellant Thompson. Apparently the basis for the trial court's finding that Thompson was not a bona fide purchaser was because Thompson knew that McGarry had sold the 100 acres of land for the irrigation of which Hintzen had made an application with the State Engineer to appropriate water and that Hintzen had returned a part of such land back to McGarry.

It will be noted from the statement of the case heretofore set out in this brief that it was McGarry who participated in and approved the plan for Mr. Hintzen to make the application in his own name, notwithstanding the land stood in the name of Mr. McGarry.

It will also be recalled that Thompson was not familiar with the procedure necessary to acquire the

right to the use of underground water and that before making the deal with Hintzen he went to the office of the State Engineer to ascertain how and from whom he could secure a water right and that Thompson was, at the office of the State Engineer, given the names of a number of persons who, according to the records of the State Engineer, had filed applications to appropriate water, among them being Mr. Hintzen. That with this information in mind Thompson took up negotiations with Hintzen for the purchase of the Hintzen application with the result that he acquired from Hintzen an assignment of his application.

In its finding numbered 13 the trial court seems to attach considerable importance to the fact that the Hintzen application was to appropriate four c.f.s. We are at a loss to understand the significance of such finding. If a stream of four cubic feet per second is the most economical stream to be used in the irrigation of lands in the area here involved such a stream would be the proper size of a stream to use for the irrigation of 40 acres or 20 acres of land as well as for the irrigation of 160 acres of land. We are not familiar with the practice of the State Engineer in the matter of allowing application for a water right in the vicinity of the lands here involved but we do venture the statement that if the State Engineer allows a filing of 4 c.f.s. for 160 acres of land and proportionately reduces the filings for smaller acreage so that only $\frac{1}{2}$ of a second foot of water may be used for the irrigation of 20 acres of land it is high time that the State Engineer revised his rulings in such particular.

It is doubtful if $\frac{1}{2}$ of a second foot of water would be of any substantial value in irrigating 20 acres of land or any other quantity except possibly a garden. We know of no valid reason why a stream of 4 c.f.s. may not be allowed for the irrigation of 20 acres of land as well as 160. Of course we can well appreciate that the person with 160 acres of land would have the use of 4 c.f.s. for a period of eight times longer than the person with 20 acres of land. To conclude that Mr. Thompson is chargeable with notice that Mr. Hintzen had parted with his claim to the filing which stood in his name in the office of the State Engineer because of the stream applied for by Hintzen would be to charge Thompson with knowledge of something which few, if any, farmers who irrigate their lands would know or ever suspect.

In paragraph 2 of the court's findings of fact there is set out that part of the contract between Hintzen and McGarry, wherein it is provided that in the event the purchaser M. C. Hintzen made application to appropriate water from wells to be drilled on the said premises and thereafter defaulted in the performance of his contract the seller should immediately become the assignee of said application and in the event a certificate of appropriation had issued to the buyer the water right represented thereby should be considered as appurtenant to the said premises.

We are at a loss to see wherein such provision aids the respondent. It is not claimed and there is no evidence which shows or tends to show that appellant knew that

there were any such provisions in the Hintzen-McGarry contract. Hintzen did not default in his contract and no certificate of appropriation ever issued. Moreover, water may not be made appurtenant to land, especially as to third parties by an unrecorded contract. This court is committed to the doctrine that an application to appropriate water is not appurtenant to land. *Duchesne County, et al, vs. Humphreys, et al.*, 106 Utah 332; 148 Pac. (2d) 338.

It does not appear in the case just cited whether or not the application to appropriate water had been approved. It is there also held that "no vested water rights were ever acquired and therefore could not have passed to the county as appurtenant to land which it obtained by its tax sale." In this case no application was ever approved permitting the appropriation of water to the land described in the Hintzen-McGarry contract. Thus no right to the use of water on such land was ever initiated. There was nothing, except the mere filing of a paper in the office of the State Engineer, that could become appurtenant to the land.

The above mentioned provision of the Hintzen-McGarry contract contemplates that an attempt would be made to secure water to irrigate the land described in such contract. That respondent McGarry sought to have Hintzen make an application in his own name to appropriate water for the land in question is readily conceded. By such means the respondent held out to the world that Martin C. Hintzen was the owner of the application. Re-

spondent is chargeable with knowledge of the various provisions of the law which requires that the office of the State Engineer is required to keep public records of the owners of water rights within the state of Utah. Respondent must also have known that one who seeks to ascertain who are holders of applications to appropriate the public waters of this state would of necessity seek such information in the office of the State Engineer. That is the only public office in the State of Utah where such information may be had. Respondent is not only chargeable with such knowledge because it is the law of this state but the fact, as he testified at the trial, of his being in the real estate business in and about Cedar City and Iron County for 14 years, makes it obvious that the respondent was in fact familiar with the law in such particular. Notwithstanding the respondent is chargeable with and had actual knowledge of the method and manner of filing on the public waters of this state the respondent caused and permitted the only public records of the State of Utah to proclaim to every one that Hintzen was the owner and holder of the application to appropriate water involved in this controversy. That state of facts continued until after Thompson had performed labor of the value of \$800.00 for Hintzen in clearing land in consideration of Hintzen's assigning to Thompson the application to appropriate water. Indeed that state of facts continued to exist until after Thompson made his application to change the point of diversion of the water applied for in Hintzen's application.

It is the position of Thompson that such a state of

facts precludes McGarry from now asserting that his assignment is superior to that of Thompson.

The cases dealing with estoppel in its various phases and kindred rules of law are exceedingly numerous and it has frequently been said that each case must depend upon its own facts. There are, however, well defined principles of law that serve as a guide to a proper conclusion in any particular case, among them being:

“A party may be estopped to insist upon a claim, assert an objection or take a position which is inconsistent with an admission which he has previously made and in reliance upon which the other party has changed his position.” 19 Am. Jur. Sec. 63, page 681.

“The doctrine of estoppel by negligence is an application of the general principle of equity which is further discussed under this title, that when one of two innocent persons—that is, persons each guiltless of an intentional moral wrong, must suffer a loss it must be borne by that one of them who, by his conduct, has rendered the injury possible.” 19 Am. Jur., Sec. 67, page 695.

Our Supreme Court referred to and applied this doctrine in the case of Harrison vs. Auto Security Co., et al, 257 Pac. 677, 679:

“An estoppel will arise against the real owner however where he clothes the person assuming to dispose of the property with the apparent title to it or with apparent authority to dispose of it when the person setting up the estoppel acts and parts with value or extends credit on the faith

of such apparent ownership or authority." 19 Am. Jur., Sec. 68, pages 696 and 697.

"When the record title to real property stands in the name of one man another, who is the real owner, may be estopped from setting up his title or interest." 19 Am. Jur. Sec. 112, pages 764, 765.

Cases will be found cited in foot notes to the foregoing texts in support thereof. An instructive annotation will be found in 50 A.L.R. 730, 731.

The respondent in this case took part in having the application to appropriate water here in question placed in the name of another, thereby holding out to the world that such other was the owner of the application notwithstanding the legal title to the land where the water was to be appropriated stood in the name of respondent. He for reasons known only to him failed to record the purported assignment from Hintzen. Under such a state of facts respondent may not now successfully claim his assignment superior to that of Thompson.

It may be argued that appellant, not having pleaded estoppel, may not rely upon such doctrine. There is no magic in the use of the word "estoppel" in a pleading. If the facts pleaded constitute an estoppel that is sufficient. That is especially so in a suit to quiet title. In effect this is such a suit. *Haskins vs. Tulley*, 29 N.M. 173; 270 Pac. 1007. *Campbell vs. S. and Tr. Co.*, 63 Utah 366; 226 P. 190; *Gibson vs. McCurren*, 37 Utah 158; 106 Pac. 669. If Thompson may not rely upon the principles of estoppel because not pleaded by the same

token respondent may not rely upon his claim of notice because not pleaded.

It seems to have been the view of the trial court that Thompson should have made further inquiry as to whether or not McGarry claimed any interest in the application. He, Thompson, did make inquiry at the office of the State Engineer where Hintzen was the record owner of the water right application in question and further learned that Hintzen was willing to assign or transfer the same to Thompson upon his clearing the lands claimed by Hintzen. In light of the fact that respondent had been instrumental in having the water right application placed and permitted to stand in the name of Hintzen the situation was similar to a case where one states that he is not the owner of land and has no interest therein and later without revoking such statement comes into court and there seeks to escape the consequence of his statement by saying that he had changed his mind before the injured person acted upon such statement; that before one may safely rely upon such statement he must seek out the person making the statement to ascertain if he had changed his mind. Possibly such procedure would incense the person making the statement and cause him to retort that if and when he changed his mind he would let that fact be known by placing his assignment of record in the proper office.

If Thompson had gone and made inquiry at the office of the county recorder of Iron County or had secured an abstract of the property standing in the name of the

respondent he would have found nothing to enlighten him. He would doubtless have learned that respondent owned or claimed to own the land upon which Hintzen held an application to appropriate water and nothing more. That was the situation when Hintzen made the application by and with the consent, approval and instigation of the respondent.

A situation not unlike the one here presented was involved in the case of *Wooley vs. Dowse*, 86 Utah 221; 41 Pac. (2d) 709. It is there held that purchasers of water stock may rely on the stock record unless they have actual knowledge that stock has been mortgaged, pledged or disposed of or unless there is some other circumstance which would charge them with notice other than mere knowledge that some previous owner declared water to be appurtenant.

“That one who buys water stock actually knew that former certificate stated that water represented by certificate belonged to certain tract of land when he knew that no water was being used on such land would not charge him with duty of searching chain of title to land to see whether instruments on county recorder’s record dealt with such water.”

The foregoing quotation is from the syllabus of the case above cited and reflects the opinion of the court.

The facts in the foregoing case were much weaker, as we read the opinion, in support of the conclusion that the purchaser of the water stock was a bona fide purchaser, than are the facts in this case in favor of a hold-

ing that defendant Thompson was a bona fide purchaser of the application to appropriate water which forms the subject matter of this controversy.

It should be noted that the reason the application here involved is of great value to Thompson is because the Governor of Utah has issued a public proclamation pursuant to Sec. 100-8-1, U.C.A. 1943, declaring that no more water may be appropriated in the area where Hintzen filed his application to appropriate water.

III

THE RESPONDENT McGARRY WAS REQUIRED TO FILE HIS ASSIGNMENT WITH THE STATE ENGINEER IN ORDER TO HAVE PRIORITY OVER THE RECORDED ASSIGNMENT TO THOMPSON.

Most of the points of law involved in the instant case have no general importance and the state engineer has no interest in the result reached by the court in deciding them. There is one proposition, however, which the state engineer considers of utmost importance to the administration of his office. For that reason an appeal was taken. Let it be said at the outset that the state engineer is not interested in which of these two individuals ultimately succeeds in getting this water. The state engineer does not as a policy come to the aid of one water claimant as against another in litigation of this type. It is for this reason that he did not participate in the submission of the evidence in the trial court. Where, however, an important principle of law is involved which

will affect the administration of his office the state engineer deems it advisable to join in the appeal and to submit his views for the consideration of the court.

The principle point with which the state engineer is concerned is the holding that Sec. 100-3-18 does not require the recordation of an assignment of a water right. Plaintiff asserts that his failure to record is of no consequence whatever because the statute itself does not expressly provide any penalty for failure to record or file with the state engineer. It is not often that cases directly in point from the same jurisdiction are available and reasoning must often be done by analogy. Here, however, there is a Utah Supreme Court opinion which also was appealed to and affirmed by the United States Supreme Court which is directly in point. We are at loss to explain why the trial court should attempt to overrule it. Before analyzing this Utah case we desire to call specific attention to the language of Sec. 100-3-18, U.C.A. 1943, and to the general statutory pattern in Utah for the recordation of water rights.

Sec. 100-3-18, in part provides :

“Prior to issuance of certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing. Such instruments, when acknowledged or proved and certified in the manner provided by law for the acknowledgment or proving of conveyance of real estate, may be filed and recorded in the office of the state engineer, *and shall from the time of filing the*

same be recorded in said office impart notice to all persons of the contents thereof." (Emphasis added)

This is only one of several Utah statutes relating to the recordation of water rights. Sec. 100-1-10 and 100-1-11 provide for the recordation of perfected rights. Similar provisions have been in the law since 1905, with various amendments since that time. In 1945 Sec. 100-1-10 was amended. See Chapter 134, Laws of Utah 1945. As amended this section requires the county recorder to transfer to the state engineer copies of all transfers of water rights recorded under the provisions of 100-1-10 with the county recorder.

Sec. 100-5-12, U.C.A. 1943, (enacted in 1935) requires registration of all claims to underground water. These are to be recorded with the state engineer. Thus diligence rights to underground water are by this last cited Sec. (100-5-12) to be recorded; all transfers of perfected water rights are to be recorded with the county recorder, and by the provisions of 100-1-10, as amended in 1945, certified copies must be filed with the state engineer. These cover all diligence rights to underground water and all *perfected* rights to any kind of water. Section 100-3-18 completes the statutory pattern by providing for the recordation of transfers of *unperfected* water rights.

In Sutherland Statutory Construction, 3rd Edition, by Horack, published in 1943, certain rules of construction are set forth for interpreting recording statutes.

This material is contained at Section 7003, page 362, Vol. 3. It is there stated:

“Recording statutes are enacted for the protection of the public, so that subsequent good faith creditors will be put on notice of prior transactions which may affect their title or security interest, and these statutes are usually given a liberal interpretation to accomplish this purpose * * *. The recording statutes are generally construed so that the subsequent purchaser in good faith is protected against prior purchasers although the subsequent purchaser has not recorded his transaction. Likewise, the technical formalities in recording are some times overlooked to accomplish an equitable operation of the statute.”

This same concept is expressed in 53 Corpus Juris, page 606, which provides as follows:

“Although it has been held that recording acts cannot be extended by implication, but must be construed literally in absence of ambiguity or language requiring judicial interpretation, recording statutes are remedial and should be liberally construed so as to attain the object intended by them. The design of recording laws is to prevent fraud in transactions by securing certainty and publicity in such dealing; their whole object is to permit and require the public to act with the presumption that recorded instruments exist and are genuine; and they should not be construed to produce fraud, but sa as to prevent it.”

To the same effect see *Lewis v. State*, 32 Ariz. 182, 256 P. 1048; *Clark v. Green*, 73 Minn., 467, 76 N.W. 263; *Akerberg v. McCraney*, 141 Minn., 230 169 N.W. 802.

THE UTAH CASES

Sec. 100-3-18, as quoted above, was enacted in 1919 and has remained substantially unchanged. In approaching the Utah case which we think is squarely in point, the court should keep in mind that Sec. 100-3-18, expressly provides that an assignment filed with the state engineer will constitute notice to all persons of its contents. If it were not the intent of the Legislature to require recordation for the protection of good faith purchasers what possible use would be the provision that such recordation shall impart constructive notice? This thought played an important role in the Utah case discussed immediately below.

The case which we think is directly in point is *Wells, Fargo & Co. v. Smith*, 2 Utah 39. The case was appealed to the U.S. Supreme Court and was there affirmed. See *Neslin v. Wells*, 104 U. S. 428.

This Utah case involved the construction of early territorial statutes which provided for the recordation of transfers of land. Until 1874 the territorial statutes contained no provision whatever prescribing the *consequences of failure to record*. In this regard the statute under construction by the Utah Supreme Court and by the U. S. Supreme Court is a direct parallel to Sec. 100-3-18. Both statutes are silent as to the consequences of a failure to record. The cases are also alike in this: The statute under construction in the *Wells, Fargo* case did not use mandatory language to require the transferee to record the transfer. The statute merely *per-*

mitted him to file and provideed that in event he did file the recorded instrument could be introduced in Court as evidence of the transaction. Sec. 100-3-18 is much stronger and could well be construed as making recording mandatory. Let us however assume, for the purpose of argument, that it is only directory because it provides that such a transfer of an application “*may*” be filed. The use of the word “*may*” might lead the court to construe the statute as being permissive rather than mandatory. Concede this to be true and even then the case is a direct parallel to the Wells, Fargo case, as both the Utah court and the U. S. Supreme Court held that the statute under construction for recording of land transactions was merely permissive rather than mandatory.

We then have two direct parallels in this case and the Wells, Fargo case. (1) neither statute being construed contained any proviso enumerating the consequences of failure to record and, (2) neither statute required a filing; the language used indicating that filing was merely permissive.

The statute in question, Sec. 100-3-18, is stronger for us than was the statute in the Wells, Fargo case, in that it expressly provides that an instrument recorded pursuant to the statute will impart constructive notice to the world. The statute in the Wells, Fargo case left such conclusion to inference.

The facts of the Wells, Fargo case were as follows: one Smith was indebted to Wells, Fargo in the sum of

\$17,000, represented by a promissory note dated July 15, 1873. Smith induced one John W. Keer to indemnify the payee on said note, and to secure Kerr, Smith gave him a mortgage dated September 27, 1873, and Kerr assigned the mortgage to Wells, Fargo as collateral security for the note of Smith held by them. Neither Kerr nor Wells, Fargo had any actual notice of any prior liens on the mortgaged land. They recorded their mortgage on September 29, 1873. Smith was in possession of the mortgaged premises and he continued in possession. On November 27, 1872, Smith had delivered to one Neslin a prior note for \$7,000 and a prior mortgage on the same property described in the later mortgage to Kerr. Neslin did not record his mortgage until after the mortgage to Kerr had been recorded. We thus had a situation exactly like that presented in the instant case. *Neslin held the first mortgage but failed to record it. Thereafter Kerr obtained a mortgage on the same premises and recorded it.* The Supreme Court said that the single question in the case was “whether, under the laws of Utah in force at the time of the transaction a junior mortgage, taken without notice of a prior mortgage, actual or constructive, and first recorded, is to be preferred in its lien to a mortgage prior in execution but subsequently recorded.” The statutes which were then in effect are analyzed by the United States Supreme Court decision in some detail so that I will not requote them here. Suffice it to say that the statutes in question were territorial statutes enacted in 1855. The statute *permitted* recordation of a mortgage but did not require it. It provided no

consequence for failure to record. Both the Utah Supreme Court and the United States Supreme Court held that the failure to record under such a statute took from Neslin any advantage he gained from the fact that his mortgage was executed a year earlier than the mortgage of Kerr. The United States Supreme Court said:

“The Legislation on the subject prior to 1874, it will be observed, did not require that the mortgage should be recorded in order to be valid, and did not in terms declare what should be the legal effect of recording or omitting to record it.

“That Legislation cannot, however, be assumed to be without significance, and its precise meaning must be determined, not only by what it expresses but by what it necessarily implies.

“There can be no reasonable doubt, we think, that the records which the county recorder is bound to keep, which private persons are authorized to employ for recording their instruments and evidences of title, and which the public have a right to inspect, have all the qualities that attach to public records.

* * * *

“It is a mere corollary from this datum that these records are, by construction of law, notice to all persons of what they contain. (In Sec. 100-3-18, this is expressly provided). Their contents are matters of public knowledge, because the law requires them to be kept, authorizes them to be used, and secures to all persons access to them, in order that the knowledge of them may be public, and, therefore, imputes to all interested in it that knowledge the opportunity to acquire which it has provided. The law assumes the fulfilment and not

the defeat of its own ends. It will not permit its policy to be gainsaid, not even by a plea of personal ignorance of its existence or extent. * * * * The provisions of the law in reference to these records either have no purpose at all,—which we have no right to assume,—or their purpose was, that the public might have knowledge of the titles to real estate of which they are the registers. It would utterly defeat that purpose not to presume with conclusive force that the notice which it was their office to communicate had reached the party interested to receive it; for, if every man was at liberty to say he had failed to acquire the knowledge it was important for him to have, because he had not taken the trouble to search the record which the law had provided for the express purpose of giving it to him, then the ignorance which it was the public interest and policy to prevent would become universal, and the law would fail because it refused to make itself respected.”

It must be emphasized that the reasoning of the Supreme Court to reach the result of constructive notice is not really needed here because Sec. 100-3-18 expressly provides that the instrument recorded pursuant to the section will impart notice of its contents.

The single question left is whether or not the failure expressly to provide a consequence for failure to record makes the failure to record of no consequence. As noted by the Supreme Court there simply could be no purpose in this statute in imparting constructive notice to all persons unless all persons are to have the right to rely on the public record. It would be the rankest injustice to hold that this statute imparts notice to the world and is

binding on all if recorded and yet to hold as did the trial court that the public could not rely on the record made. Why bind the public to take notice of the record if, after having taken notice of it, they cannot rely on it? Of what possible good would such a statute be except as a trap for the public? If they check the public record and find title to be of record in the name of John Doe they should with perfect safety be allowed to take from John Doe and to pay him value therefor. Such was the conclusion reached both by Utah Supreme Court and the United States Supreme Court, for the United States Supreme Court went on to say:

“The statutes under consideration, it is true, *do not in express terms make it obligatory upon one taking a conveyance of or incumbrance upon real estate to record it.* The recording is not made essential to its validity as between the parties; *nor is it declared that the failure to record shall postpone its operation in favor of a subsequent bona fide purchaser for value without notice.* And yet the implication is very strong that the latter effect must be intended by it. Otherwise what valuable and sufficient purpose is there in construing the record to be constructive notice of its contents, except to protect such a purchaser? If, without recording, the conveyance is not only valid between the parties, but good also as against the works, with or without notice, of what public value or use is the provision for keeping such a record and declaring it to be public, open to the examination of all persons? On that supposition, its only purpose would be in the private interest of proprietor to furnish a convenient and cheap mode of supplying proof, by certified copies, in case of

the loss of destruction of title-papers. But even that purpose is not expressly declared. It is only an inference based on the nature of the record as public, and the objects which, under the system of registration adopted in this country, in colonial times, and which has since prevailed universally in all the States, have been sought to be attained by it. The chief of these is to secure that publicity in respect of the transfer of titles which, in the earlier history of the common law, was effected by livery of seisin, and later, by the substituted enrolment of conveyances by way of bargain and sale; and which had in view, as its principal purpose, the protection of innocent purchasers from frauds which might be practiced by means of secret conveyances.

“To hold otherwise would be to declare that land should cease generally to be the subject of sale; for no amount of diligence on the part of a purchaser would insure his title. He would, of course, demand of the vendor an inspection of his title-deeds. From them he would learn the chain of title.”

The United States Supreme Court discussed this concept for about eight pages. It clearly holds that the only purpose that there could possibly be for making public records constructive notice of their contents is to protect innocent purchasers dealing with the record title holder. The Utah Supreme Court held exactly the same thing. There was a dissenting opinion based upon the doctrines argued by the plaintiff in this case. Those contentions were expressly over-ruled and the position taken by the state engineer in this case was expressly affirmed.

There has been no need for a further decision by the Utah Court construing our statutes regarding recordation of land transfers, for in 1874 the statute under consideration in the Wells, Fargo case was amended expressly to provide that the failure to record would make a conveyance void against the subsequent purchaser without notice. I have Sheppardized the Utah case and state that it has not been over-ruled. I have also checked the United States Supreme Court case in Sheppard's Citator and find that it has been cited by some state courts with approval and that it has never been over-ruled.

WHY IS THIS OF INTEREST TO THE STATE ENGINEER

The state engineer is alarmed over the holding that some third party may hold title to an unapproved application without ever recording that assignment with the state engineer. By Sec. 100-3-8 the Legislature has imposed certain duties upon the state engineer. Those duties cannot be faithfully discharged unless the state engineer knows who the owner of the water application is. For example the state engineer has to determine whether or not it will be detrimental to the public welfare to approve an application. Certainly a determination of this question will often require knowledge concerning the owner of the application. If the owner were a speculator who never intended to farm the land himself or to drill a well the application might well be denied in favor of a pending application filed by a farmer who

certainly would develop and beneficially use the water. There is no possible way that the state engineer can ascertain whether or not the approval of the application might prove detrimental to the public welfare unless he knows the applicant.

Further he is required to determine whether or not the applicant has the financial ability to perfect the application. Sec. 100-3-8 expressly so provides. If the application can stand of record in one name and yet be owned by someone else it is a fraud on the State Engineer. An application held by a large corporation might readily be approved even though the proposed plan of development were costly and, on the other hand, be denied if it were known to be held by someone who was a bankrupt or a speculator.

The State Engineer has to determine whether or not the approval of an application will create or tend to create a monopoly. This can only be known if the applicant or owner of the application is known. There are literally dozens of similar problems all of which require that the applicant be known.

Further the State Engineer is required by statute to investigate an application to ascertain whether or not the lands to be irrigated are suitable for irrigation. It is unlikely that the State Engineer would approve an application to irrigate the lands covered by the original application. The court records will show that this application was pending in the office of the State Engineer without approval from the summer of 1945 until the applica-

tion was approved in March of 1947. See defendant's Exhibit "C." It was only approved after the apparent record owner had filed a change application showing an intention to irrigate a different tract of land. The record in this case indicates that the plaintiff McGarry is a real estate agent and that he has dealt with the sale of land and the appropriation of water in the office of the State Engineer. He might well have occupied an entirely different position in the eyes of the State Engineer had the application been filed in his name, or had it been transferred to his name before approval.

McGarry in this case caused the application originally to be filed in the name of Hintzen even though he had some contract by which he, McGarry, attempted to retain some control over the application which Hintzen filed. Nothing was done to bring this fact situation to the attention of the State Engineer. Thereafter Hintzen purported to assign the water right to McGarry and McGarry continued to let the record show that Hintzen owned the water right. Thompson, as a member of the public, came and examined the records in the office of the State Engineer. From those public records, which, by Sec. 100-3-18, impart notice to the world of their contents, Thompson ascertained that Hintzen was the owner of record. He paid \$800 in service to acquire the application. Thereafter he recorded his application and for all the State Engineer knew he was the owner thereof. He filed an application to change the point of diversion and the place of use and this change was granted and permission was given to drill a well.

It would be an open and palpable fraud on the office of the State Engineer and on Thompson to permit McGarry to obtain an approved application in this manner. Such a procedure deprives the State Engineer of the opportunity to investigate the various things which the Legislature has told him by Sec. 100-3-8 to investigate.

It is contrary both to the spirit and to the letter of the law to permit McGarry to be the secret owner of this application and have the State Engineer approve the application after investigating the financial responsibility and other matters relating to Thompson. McGarry gets an approved application because of the financial picture and other pictures presented by Thompson; he gets an approved application for a tract of land which may have been, in the opinion of the State Engineer, unfit for cultivation. It has deprived the State Engineer of an opportunity even to investigate such conditions. It is contrary to the holding of the Utah Supreme Court and of the United States Supreme Court. If this opinion of the lower court be affirmed it will constitute a license to speculators to cause applications to stand of record in the name of dirt farmers in hopes that the same will be approved while knowing that they might not ever be approved if they stand in the name of the speculator. This, of course, could be done anyway, but if the speculator elects to conceal the fact of ownership from the State Engineer and from the public he should bear the burden and the risk of loss because some innocent third party purchased the water right not knowing of the secretly reserved interest.

Such is exactly what is happening in the instant case. Thompson examined the records to ascertain who the true owner was. McGarry, for reasons not reflected in the record, elected to conceal the fact of ownership by him. Thompson expended \$800 to acquire a right and all the time was dealing with the record owner. The State Engineer followed the last enunciated policy of the State Supreme Court set forth in the Wells-Fargo case and treated Thompson as the owner. By so considering Thompson to be the owner the State Engineer approved an application which might never have been approved had it remained on the old land and in the name of McGarry.

CONCLUSION

The obvious pattern of the Utah statute is to make the office of the state engineer a place of record for water rights. Before the office of the state engineer was created there was much informality in transfers of water rights and in their recordation. See for example Kinney on Water Law, page 1769. Existing statutes require that the state engineer be given a record of any transfer of a water right which is recorded in the office of the county recorder. All perfected rights must by express statute be recorded or they are void as to subsequent purchasers. Section 100-3-18 permits the transfer of an unperfected right; provides for its recordation, and also provides that when recorded it will impart constructive notice to the entire world. These statutes are designed to make of public record all water rights and all

transfers of water rights. An exactly parallel situation was presented prior to 1874 in the recordation of transfers of land. The statute as it then existed did not expressly require recordation. It contained no provision to the effect that a failure to record would render the transfer void as to a subsequent purchaser. It even failed to provide that an instrument recorded thereunder would impart constructive notice. Our Utah Court and the United States Supreme Court both held that it must necessarily be presumed from such a statute that an instrument recorded thereunder would impart constructive notice and further that the failure to record would render the transaction void as to a subsequent purchaser without actual notice. The holding by these two courts is in accord with usual rules of construction of statutes which provide for recordation. That philosophy is that recording statutes are remedial and were designed to protect bona fide purchasers and that they should be liberally construed to that end. There is no sense whatever in the provision of Sec. 100-3-18 making recordation constructive notice to the whole world unless the failure to record will carry with it the consequence of losing the right as against subsequent purchasers. Such is the exact basis of the opinion by the United States Supreme Court. After noting that the statute failed to declare a penalty for failure to record in favor of a *bona fide* purchaser the court expressly said that "the implication is very strong that the latter effect must be intentional otherwise what value and purpose is there in construing the recordation to be constructive notice of its contents, except to

protect such a purchaser." Since such a square holding is found from our own Supreme Court, affirmed by the United States Supreme Court, and in complete harmony both with the administrative practice of the state engineer and the spirit of recordation statutes, we think it not necessary to go to the cases from other states.

PART IV

WAS THE WATER APPURTENANT TO THE LAND

It is noted from part of the brief filed by defendant Thompson that the question of whether or not the water was appurtenant to McGarry's land is of some importance. In this regard we wish to note that this Supreme Court has held in a suit to which the state engineer was a party that an undrilled well could not be appurtenant to land. (See *Duchesne County v. Humphreys*, 106 Utah 332, 148 P. 2d 338). Further, it has been unequivocally held that water owned by one party cannot be appurtenant to land owned by another. In the instant case the land was owned by McGarry and the application was filed by Hintzen for use on McGarry's land. With such a diversity of ownership the water could not have been appurtenant to the land even had the well been drilled. Such was the holding of the Utah court in the case of *Utah Metal & Tunnel Co. v. Groesbeck*, 62 Utah 251, 219 P. 248. The water was not appurtenant to the land and Thompson should not be held to have received any constructive notice based upon some erroneous concept that

the water was appurtenant to the McGarry land. If he knew the law, and he was presumed to know it, he would have known that since the well had not been drilled it was not appurtenant to McGarry's land, and would likewise have known that the transfer (giving back) of the land by Hintzen to McGarry would not carry with it any water right because the water was not appurtenant to the land.

Respectfully submitted,

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