

1948

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

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 Appli-
cation No. 16833; Change Appli-
cation 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 RESPONDENT

FILED

MAY 19 1948

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Defendants and Appellants.

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The facts in this case are substantially as stated in the appellants' brief. However, we feel that the statement

of some additional facts will afford the Court a more comprehensive picture of the pleadings and issues upon which the case was tried and the facts upon which the trial Court decided this cause.

Following are the facts in sequence of time:

On July 21st, 1945, one M. C. Hintzen entered into an agreement with John C. McGarry, plaintiff and respondent, to purchase the south 100 acres of the southeast quarter of Section 8, Township 35 South of Range 16 West, Salt Lake Meridian (Plaintiff's Ex. 1).

On August 17th, 1945, Hintzen made application to appropriate 4.0 c.f.s. of water from a well to be located on the ground being purchased from McGarry for the purpose of irrigating said land (Plaintiff's Ex. 5).

On February 26th, 1946, Hintzen assigned this application to McGarry by written assignment, the consideration for such written assignment being a transaction whereunder Hintzen returned 80 of the 100 acres being purchased from McGarry and receiving from McGarry in lieu thereof another 80-acre tract with an approved water application (Reporter's Tr. 5).

Later, on April 6th, 1946, Hintzen gave Thompson a written assignment of the identical application theretofore assigned McGarry. The consideration for this assignment was the doing of some work by Thompson on

the Hintzen ground—not on the ground turned back to McGarry but on the new 80-acre tract acquired by Hintzen from McGarry. It is stated in appellants' brief on page 5 that Hintzen remained on the property described in the sales contract until May or June of 1946 and that Thompson entered into his agreement with Hintzen to take the water assignment, and did the work on Hintzen's ground, during the first part of April, 1946. Such statement is incorrect. Thompson claims to have commenced work on April 1st and to have completed it on the 15th and 16th of the same month (Rep. Tr. 11). Hintzen had already given up possession and moved off the eighty acres exchanged to McGarry, and was residing on the new tract when Thompson took the assignment and did the work for Hintzen (Rep. Tr. 34-35-36).

On the 9th day of August, 1946, Thompson filed in the office of the state engineer a change application by which he proposed to change the point of diversion of waters from the point set forth in the Hintzen application to a new well site and to change the place of use of the entire 4.0 c.f.s. of water.

Thereafter and within the time allowed by law McGarry filed his protest to the granting and approval of the change application, and on March 3rd, 1947, the state engineer, without a formal, or any hearing, approved the change application. (Alleged in complaint and admitted in answers).

That on or before the 31st of March, 1947, an appeal was duly taken from the decision of the state engineer, and the appellants were both personally served with summons and notice of appeal.

On May 7th, 1947, several months after the protest to the change application was filed, and several weeks after the appeal was taken from the state engineer's decision, Thompson commenced work on the well at the new location and under the change application (Rep. Tr. 15 and 17).

The issues upon which this case was tried, presented to the trial court, submitted, argued and determined, are as follows:

The complaint pleads that McGarry became the sole owner of the original Hintzen application by virtue of his assignment dated Feb. 26, 1946; that Thompson claims to have an assignment of the same water application acquired from Hintzen on April 6th, 1946; that the Thompson assignment had no legal effect or value because when given to Thompson the said Hintzen had nothing to convey and retained no right in or title to such application, and consequently Thompson acquired no right, title or interest in the application. The only issue raised by the complaint was the matter of priority of the two assignments (Tr. 1 to 5).

The answer of Thompson squarely meets that issue

by claiming he purchased the assignment for a valuable consideration, made in good faith and without notice; that at the time of such purchase there was no record in the office of the state engineer or in the office of the County Recorder of Iron County, Utah, indicating that McGarry claimed any interest in the application, and Thompson counterclaims by alleging practically the same facts and asking that he be adjudged the owner of the application (Tr. 20 to 23).

The answer of the state engineer by way of defense pleads the priority of the Thompson assignment for the sole and only reason that it was presented to his office for recording about April 16th, 1946, and that the McGarry assignment was filed in his office about December 20th, 1946. The state engineer also pleads in the affirmative defense that he was informed and believes that at the time Thompson accepted the assignment from Hintzen he, the said Thompson, had no knowledge of the existence of any prior assignment by Hintzen to John McGarry and that Thompson paid value for such assignment and received it without notice of any outstanding claims, and for value (Tr. 10 to 15).

The state engineer and Thompson, by their pleadings, defended solely on the proposition of priorities. Even a cursory examination of the pleadings and the proceedings at the trial will conclusively show that the case was not

only pleaded, but was tried and argued and submitted to the trial court on but two propositions, to-wit:

First, did the McGarry prior assignment, as a matter of law, take precedence over the subsequent Thompson assignment, although the Thompson assignment was filed for record in the office of the state engineer prior to the McGarry assignment; and,

Second, the factual situation as to whether or not Thompson was a purchaser in good faith, and without notice.

The trial court held for the respondent, McGarry, on each of those two propositions. If this Honorable Court sustains the trial court on either of those propositions, the judgment of the trial court must be affirmed.

In view of the position now taken by both appellants—and for the first time on this appeal—we urge this Court to bear in mind the issues raised by the pleadings, and being the issues upon which the case was tried, argued, submitted, and determined by the trial court.

ARGUMENT

We shall now address ourselves to the first proposition argued by the appellants, wherein it is contended that an unapproved application to appropriate water is not assignable.

The proposition advanced by the appellants is fallacious and should not now be considered for the many following reasons:

1. It is raised for the first time on this appeal. It was neither pleaded, tried, argued, submitted or determined by the trial court on that issue, nor was the trial court given an opportunity to pass upon that contention.

It is elementary that a case will not be reviewed on a theory different than that upon which it was tried and determined by the trial court.

Furthermore, if the appellants intended to rely on the defense that the Hintzen application was unapproved and therefore not assignable, McGarry should have been given an opportunity to meet that issue at the trial. The appellants state that the Hintzen application was not approved, but the record does not so show.

In the early case of *Aaron vs. Holmes*, 99 Pac. 450, 35 Utah 49, it was said:

“It is also a well settled rule that a theory, assumed and acted upon by the parties litigant in the trial court, must be adhered to upon appeal. One of the most important results of the rule that questions which are not raised in the court below cannot be reviewed in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that such party is restricted to the

theory of the cause of action.”

“Suit to quiet title to water arising from spring on plaintiff’s land having been tried on theory that water was originally public water subject to appropriation, Supreme Court cannot dispose of cause on a different theory.” Holman, et al. vs. Christensen, 274 Pac. 457, 73 Utah 389.

2. If the application from Hintzen to McGarry, even assuming it was unapproved, was therefore not assignable, how does Thompson gain his rights thereunder? Can Thompson acquire more rights under an assignment than can McGarry?

It is argued by appellants that McGarry could acquire no rights under an unapproved application, yet Thompson, according to appellants, could acquire rights under the identical application, and the state engineer can approve a change application based on such identical application and can give Thompson permission to drill a well under the change application filed thereafter and thereunder. According to appellants’ argument and contention, an assignment is good as to one person but not as to another; the application of Hintzen is sufficient for the purpose of assigning to Thompson but not for the purpose of assigning to McGarry.

This Court must assume the approval of the Hintzen application from the very fact that he disallowed the McGarry protest and approved Thompson’s change applica-

tion and granted him permission to drill a well, all without any hearing whatever and most perfunctorily.

3. The state engineer never considered the provisions of Section 100-3-8, U.C.A. 1943, when holding the Thompson application took precedence over the McGarry application, nor are the provisions of that section applicable, either under the issues or otherwise. We fail to see how that section has any application.

Neither appellant pleaded that the state engineer had concluded there was no unappropriated water available on the Hintzen property, that the Hintzen land was unfit for irrigation, that Hintzen or McGarry had no financial ability to complete the proposed well, or even that McGarry had secured the assignment for purely speculative purposes. The appellants could have pleaded such facts and raised that issue, but did not do so.

Moreover, we call attention that the respondent alleged and the appellants admitted that the state engineer allowed the change application and disallowed the McGarry protest without a formal or any hearing.

The conclusion is inescapable that when the state engineer disallowed McGarry's protest and approved Thompson's change application without any hearing it was solely on the basis of Section 100-3-18, U.C.A., 1943, interpreting it to mean that as a matter of law Thomp-

son had a legal priority because Thompson had filed his assignment before McGarry filed his, and even then the state engineer disregarded McGarry's right to prove Thompson was not a purchaser for value without notice. The fact is that the disallowance of the McGarry protest and the approval of the change application without a hearing was rather capricious and arbitrary. However, we would be loathe to believe that the state engineer would, without giving McGarry an opportunity to be heard or to know from what sources he gained the information, find that McGarry did not have the financial ability to complete the well, that his acquisition of the assignment of the application was not in good faith but for speculation or monopoly (he already owned the land upon which the well was to be drilled) or that any of the reasons set forth in said Section 100-3-18 were persuasive to his ruling. We are more loathe to believe that if such reasons existed and such facts believed to be true, the state engineer would withhold them from the trial court and not even plead or attempt to prove them. But—the state engineer does not say such facts and reasons exist; he only says "it may be" so.

He fails to take any position whatever; he does not say any such facts or reasons exist, but wants this court to determine this case for the reason that "it may be" so. He does not even say any investigation was made or that he had the slightest inkling as to any of the facts.

4. An application to appropriate water, at least until it is disapproved, and while it is pending in the office of the state engineer without either approval or disapproval, is a valuable property right and is more than “a mere possibility or expectancy *not coupled with an interest.*”

There can be no question but what an application to appropriate water, when filed in the office of the state engineer, is a valuable property right. Section 100-3-18 which provides that “rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing” makes no distinction between approved and unapproved applications. It has never been contended before, to our knowledge, that an application to appropriate water may not be assigned until after its approval. The state engineer will make no such contention because he has accepted and recognized assignments of applications prior to approval upon innumerable occasions. To so hold would be to be read into the statute something which is not there.

In the case of *Whitmore vs. Murray City*, 154 Pac. (2nd) 748, (107 Utah 445), at page 751, it is said:

“Property rights in water consist not alone in the amount of the appropriation, but also in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream.

Hence, to deprive a person of his priority is to deprive him of a most valuable property right."

The case of Duchesne County vs. Humphreys, 148 Pac. (2nd) 338, 106 Utah 332, discusses an application to appropriate unappropriated water as a "right." It is said: "The first step in acquiring such a right is the filing of an application with the state engineer. The filing of the application does not give the applicant a vested right * * * it merely gives a right to complete the appropriation and put the water to a beneficial use in compliance of the act." And certainly this Court, in speaking of the first step in acquiring a "right" by the filing of an application with the state engineer, had in mind the fact that the application could not be approved until after it was made and filed.

"The first step toward making an appropriation * * * may be protected through a suit to quiet title." Mohave River Irr. Dist. vs. Superior Court, 256 Pac. 469 at page 472 (Cal).

"One may protect his 'incipient right' to water against hostile invasions and claims of others. And the same doctrine is announced in the later case of Merritt vs. City of Los Angeles, 120 Pac. 1064. So here the plaintiffs may safeguard their rights, although water has as yet been brought into close proximity to their lands." Byington vs. Sacramento Valley West Side Canal Co., 148 Pac. 791 at page 794 (Cal).

To the same effect are the cases:

Inyo Consolidated Water Co. vs. Jess, et al., 119 Pac. 934.

Merritt vs. City of Los Angeles, 120 Pac. 1064.

II.

Addressing ourselves to the second proposition advanced by appellants to the effect that Thompson was a bona fide purchaser for value of the Hintzen application, we assert that the court found, as a factual matter, that Thompson was not a purchaser in good faith and without notice, and that such finding is amply supported by the evidence.

On cross-examination Thompson testified substantially to the following:

He came into the country (Iron County) in November, 1945; that he intended to engage in farming in that vicinity (Tr. 24); that he and a Mr. Frailey purchased 960 acres of ground and was advised and assured by McGarry that one well of 4.0 second feet would be sufficient to irrigate 160 acres and that he and Frailey applied for wells of 4.0 second feet each to irrigate each 160 acres. When Hintzen was discussing with Thompson the deal whereby the application would be assigned, Thompson knew that Hintzen had turned back to McGarry 80 of the 100 acres acquired from McGarry and which land was to

be irrigated from the Hintzen well. On March 19th, 1946, Thompson was in the office of the state engineer making inquiry in regards to transferring well permits and whether he could get permission so to do. He examined the book of well permits and checked wells that had not been drilled. (Having made this check he knew, of course, that the Hintzen well had been applied for to irrigate the 100 acres which Hintzen had purchased from McGarry and described as being in the SE1/4 of Sec. 8, Tp. 35 S., R. 16 W., S.L.M.). He returned from Salt Lake and on the following day he had a conversation with McGarry at Cedar City. He made no mention to McGarry of his proposed deal with Hintzen although he had previously gotten the name of Hintzen, as having a well right, from the records of the state engineer. He made no inquiry from McGarry as to whether McGarry had taken back the water rights with the land, although he knew McGarry, and had done business with him and could easily have discussed the matter. Hintzen had given up possession of the acreage which he turned back to McGarry, had moved his house from the McGarry tract to a new tract which had a water right attached thereto, all of which was known to Thompson. The work which Thompson claims to have done was on the new tract and no work was done by Hintzen on the McGarry tract. Thompson knew the Hintzen application was for 4.0 second feet to irrigate 100 acres but testified he knew nothing about the duty of water and had no

idea that 4.0 second feet would be more than sufficient to irrigate the twenty acres which Hintzen had not turned back to McGarry. Thompson testified also that he knew nothing about the duty of water and whether the duty of water was 4.0 second feet for 160 acres or for 40 acres. He testified also that he never questioned Hintzen as to whether Hintzen had turned the application back to McGarry with the land and never questioned the ownership of the well permit, because he never went into anyone's personal business, (Rep. Tr. 22-23).

McGarry testified (Rep. Tr. 37-38) in the fall of 1945, months before Thompson made his deal with Hintzen and prior to the purchase of land by Thompson and Frailey there were discussions about the duty of water and Thompson was advised one second foot was sufficient to irrigate 40 acres and that a well right for 4.0 second feet would irrigate 160 acres; that Thompson made application to the state engineer for well permits to irrigate the 960 acres and made his application on the basis of 4.0 second feet for each 160 acres.

The trial court evidently did not give credence to Thompson's testimony concerning his total and supreme ignorance about water rights and the duty of water and his reasons for not making further inquiry.

Were all of the foregoing facts sufficient to put Thompson on notice that Hintzen might have disposed of

the water to McGarry when turning back the land for which the water had been applied, and thus put Thompson on inquiry? The trial court believed that when the land was turned back to McGarry and Thompson was so advised by Hintzen before the assignment was given to Thompson, and when Thompson knew that the Hintzen application was made to irrigate the premises which had been turned back, and when he knew that even though Hintzen retained 20 of the 100 acres he could not retain and hope to secure a certificate of appropriation of 4.0 second feet to irrigate 20 acres of land, it was sufficient to put Thompson on notice and inquiry. After all, Thompson knew McGarry—knew where McGarry was located and could be contacted; he had had dealings and conversations with McGarry and could easily have ascertained the true situation by a simple inquiry from McGarry—particularly after knowing that Hintzen had acquired from McGarry a new tract of land with an attached and appurtenant water right in exchange for the old tract for which water had been applied. Thompson was a farmer and realized the value of water to land and knew that land in the vicinity in question could not be of much value without water. Thompson undoubtedly from his discussions with McGarry, his application to the state engineer for well rights on the 960 acres being purchased, and his visit to the office of the state engineer, knew, or suspected, or should have known and suspected that the

Hintzen land would not be turned back without the well permit for the irrigation thereof, and he could have ascertained the fact by a simple inquiry. We cannot see how the trial court could have done otherwise than find that Thompson was not a purchaser in good faith and without notice.

The broad rule is laid down in the late case of *Meagher vs. Dean, et al.*, 91 Pac. (2nd) 454, 97 Utah 173, as follows:

“Whatever is notice enough to excite attention and put the purchaser on his guard and call for inquiry is notice of everything to which such inquiry might have led.”

See *O'Reilly vs. McLean, et al.*, 37 Pac. (2nd) 770, 84 Utah 551, wherein it is held “where purchaser had such information as will put ordinarily prudent person on inquiry, purchaser must make such inquiry and is charged with notice which could have been obtained from such inquiry.”

“One who has constructive notice of an outstanding title or right is not a bona fide purchaser. It has been held that constructive notice rests upon strictly legal presumptions which are not allowed to be controverted, while implied notice arises from an inference of facts and is a form of actual notice. Regardless, however, of the technical distinction made by some courts between constructive notice and implied actual notice, it is a general rule that knowledge of such facts as ought to put a prudent man on inquiry

as to the title charges a subsequent purchaser with notice, not only of those facts which are actually known, but also of all the other facts which a reasonably diligent investigation would have ascertained, provided the inquiry becomes a duty and would lead to the knowledge of the requisite facts by the exercise of ordinary diligence and understanding. * * * * In applying the rule each case must be governed by its own peculiar circumstances." 66 C.J. page 1111.

"A purchaser who is put on inquiry does not discharge his duty by making inquiry of his vendor alone but must exhaust all reasonable and available sources of information and hence the fact that the purchaser is misled by the vendor's false statements is not sufficient to protect him." 66 C.J. page 1115.

"If purchasers of realty from corporation holding record title were put on notice regarding corporation's actual status as second mortgagee and did not make reasonable inquiry, purchasers were charged with knowledge of all facts that they might have learned had such diligence been exercised, as regards mortgagor's interest in such realty." Murray vs. Wiley, 127 Pac. (2nd) 112. (Wyo).

The question as to whether Thompson was an innocent purchaser for value without notice, was one of fact for the trial court.

"Where it does not appear by a clear preponderance of the evidence that the trial judge was wrong in his findings of fact, they must stand." Hoggan vs. Price River Irr. Co., 216 Pac. 237, 61 Utah 547, citing numerous Utah cases.

To the same effect see:

Froyd vs. Barnhurst, 28 Pac. (2nd) 135, 83 Utah 271.

Mollerup vs. Daynes-Beebe Music Co., 24 Pac. (2nd) 306, 82 Utah 299.

We are inclined to the view that the instant case is a law and not an equity case, and, of course, in such event the rule is that if there is any evidence to support the court's findings, such findings may not be disturbed by the appellate court. But, even though it is determined that this is an equity case we are convinced beyond question that there is ample evidence to support the trial court's findings and it not appearing by a clear preponderance of the evidence that the trial judge was wrong in his findings, they must stand.

"Obviously, the question as to whether defendant was an innocent purchaser for value without notice was, under the issues, one of fact for the trial court. If there is any substantial evidence which would support the trial court's findings that defendant was not an innocent purchaser for value and without notice, the judgment would have to be sustained." Davis vs. Kleindienst, 169 Pac. (2nd) 78, at page 81.

Moreover, in the above cause of Davis vs. Kleindienst, *supra*, it is held that:

The controversial question in the case was whether defendant was an innocent purchaser for value and without notice. This question is to be de-

terminated under the ordinary rule, by a preponderance of the testimony. 66 C. J. 1201, Sec. 1065, Vendor and Purchaser. The evidence as to this need not be clear, convincing and satisfactory. If, therefore, there is any reasonable evidence to justify the court in finding that the defendant purchased without notice, or was *not* a purchaser for value, then the judgment should be sustained.”

In order to have some basis upon which to insist that McGarry is estopped from setting up his interest, appellant Thompson makes numerous statements in his brief that cannot be sustained by any proof whatever, either actually or by inference. We call attention to statements on pages 20, 26 and 27 of appellants' brief, wherein it is said that McGarry participated in and approved “the plan” for Hintzen to make application in his own name, notwithstanding the land stood in the name of McGarry; that McGarry took part in having the application placed in Hintzen's name for the purpose of holding out to the world that Hintzen was the owner; that McGarry was instrumental in having the water right application placed and permitted to stand in the name of Hintzen, etc. We presume the basis for these statements is the clause in the sales contract between McGarry and Hintzen as follows:

“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 ap-

appropriation to appropriate water from wells located upon said premises and said buyer or assignee 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 thereunder shall be considered as appurtenant to the said premises and in the event of default the title thereto shall immediately pass to the seller.”

The appellants now seek to bolster their position by innuendoes entirely without justification. Respondent submits that the real estate contract was usual, and similar agreements executed constantly; and that under such agreement the buyer, Hintzen, and not the seller, McGarry, would make application to appropriate water, if he wanted water. Furthermore, there is nothing in the contract that required Hintzen to make application to appropriate water. The fact is that the contract was made on July 21st, 1945, and Hintzen did not make application until the 17th of August, 1945, about a month later. There is no proof that McGarry advised or insisted that Hintzen make such application or was at all interested in the application. A clause in a sales contract, providing that in the event improvements be made on premises under purchase and in the event the contract goes into default, such improvements remain as a part of the realty, is indeed very common, particularly when applied to improvements

about which there might later be some contention as to appurtenancy. We are at a loss to know why, under the circumstances, anyone but Hintzen, who was buying the land, would make the application, or why, having been made in the name of Hintzen, the transaction becomes suspect. This situation is not analogous to one where an owner of premises holds out to the world that he is not such owner and has no interest therein, and thereby misleads a third party to his injury. How can Thompson be heard to say that he was misled and McGarry was estopped from claiming an interest in the application, when the record shows that Thompson himself purchased land from McGarry and made application in his own name for appropriations of water. Had the matter of estoppel been pleaded, McGarry could easily have met that issue by showing that Frailey and Thompson purchased 960 acres of land under an almost identical contract with the same provisions written therein.

We are quite in accord with the statement of appellant that if the facts pleaded constitute an estoppel, it is sufficient; but fail to see how any facts pleaded either by Thompson or the state engineer constitute an estoppel or were even intended so to do. Certainly the cases cited by appellant to sustain such a proposition have no application to the instant cause. The only facts pleaded as a defense are those claiming that Thompson was a purchaser in good faith and without notice and that his filing of the

Hintzen assignment in the office of the state engineer prior to the filing of McGarry's assignment gave him a first priority and a good title.

“The law is well settled that the facts relied upon as constituting an estoppel must be pleaded.” Barber vs. Anderson, 274 Pac. 136, 73 Utah 357.

“In an action under Comp. Laws 1907, Sec. 1206, for goods furnished defendant's wife, plaintiff cannot recover on the ground that though the family relation had ceased to exist at the time of the sale, the defendant was estopped by his conduct to deny liability, where such estoppel was not pleaded.” Berow vs. Shields, 159 Pac. 538, 48 Utah 270.

In Utah Pacific Digest, Vol. 15, under Estoppel, Sec. 110, are found innumerable cases from all jurisdictions in the west to the effect that an estoppel must be pleaded to be available and that the facts relied on as showing estoppel must be pleaded. It is true, of course, that in a suit to quiet title, where the plaintiff does not set forth or plead in his complaint the precise claim of title which will be relied on, nor the muniments establishing the title, then facts establishing an estoppel may be proved under the general issue; but it is idle for appellant to argue here that McGarry did not set out the source of his title. He specifically pleaded Hintzen's application, and his subsequent succession thereto by assignment. He specifically set out Thompson's claim of the title and the source thereof, to-wit, the assignment of the Hintzen ap-

plication at a later date to Thompson, Thompson's change application and the state engineer's wrongful approval thereof. Thompson filed an answer raising certain issues, none of which pleaded estoppel or were intended so to do. The estoppel theory is one evolved long after the trial and submission of the issues to the trial court.

We agree that the application here involved is of great value 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. But it has as great a value to McGarry as it does to Thompson. Neither may now secure water from the underground source through filing an application to appropriate water. If it be argued that Thompson had expended moneys in drilling a well under his change application it should be remembered that the well was drilled not only after McGarry protested the change application but *after this action was commenced* to question the ruling of the state engineer in allowing such change application.

III.

The state engineer's chief reliance for the correctness of his position and the construction of Section 100-3-18, U.C.A. 1943, which he contends for, lies in the ruling of the Utah Supreme Court in the case of Wells, Fargo

& Co. vs. Smith, et al., 2 Utah 39, and affirmed by the U. S. Supreme Court in the case of Neslin vs. Wells, 104 U. S. 428.

We cannot agree that the statute under construction by the Utah Supreme Court and the U. S. Supreme Court is a direct parallel to Section 100-3-18. There are numerous differences as to facts, circumstances and status of statutes. The statutes in effect in 1870 were applicable when the facts in the above case arose. The only provisions applicable, aside from creating the office of County Recorder, were the provisions that the recorders should provide themselves with good and well bound books suitable for the purpose and record therein all transfers or conveyances of land or tenements and all other instruments of writing and documents suitable, necessary and proper to be recorded, and that the books should be indexed in alphabetical order and free to examination of all persons, and upon filing of any paper for record the recorder should endorse upon the back thereof the time of receiving it. The statute became effective March 2nd, 1850. The case was never over-ruled expressly, nor could there be any occasion to do so because the case was decided on a statute in effect in 1873 when the Wells Fargo case facts arose, and in 1874 the recording statutes were amended expressly to provide that a failure to record would make a conveyance void as against a subsequent purchaser without notice. However, the case was decided

on a two to one opinion, and the statements and rule of law set forth in the dissenting opinion have since been re-stated and adopted by the Utah Supreme Court as well as every other western jurisdiction when the matter of a recording statute has been in question. The Wells Fargo case has never been cited, so far as we can determine, in any subsequent case, and under recording statutes similar to ours, as authority for the position now taken by the appellants in this cause.

The statute in question, Sec. 100-3-18, provides that "From the time of filing of same" it imparts notice to all persons of the contents thereof. (In his brief the state engineer in commenting on this statute makes no mention of the words "from the time of filing the same"). It fails to provide, as does the statute concerning the recordation of water deeds and the recordation of other instruments "and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice thereof." It simply affirms that from the time of filing, notice is imparted to persons of the contents of the assignment. It was enacted at the same time as Section 100-1-10. Both Section 100-3-18 and 100-1-10 (the water deed statute) were a part of the 1919 Act found in Session Laws of 1919. Section 78-3-2 and 78-3-3 were in effect when the legislature provided for the filing of assignments of rights claimed under applications for appropriations of water in the office of the state engineer,

so the legislature knew, or we must presume it knew, that concerning recording of documents in the office of the county recorder there was a statute providing for a penalty for failure to record; and it knew, or we must presume it knew, that concerning water deeds being recorded (Sec. 100-1-10) there was a provision not only that from the time of filing the same with the recorder notice was given to all persons of the contents thereof, but also a provision "and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice thereof."

Sec. 100-5-12 is the section requiring the filing of notice of underground claims with the state engineer. It is significant that this section also provides "failure to file notice of claim or claims, as provided in this section, shall be prima facie evidence of intent to abandon such claimed right and in the distribution of the underground water of this state the state engineer may disregard any claim not so filed." The legislature expressly provided the penalty for failure to record underground claims but provided no penalty whatever for failure to record assignments of applications. It contented itself with stating that "from the time of filing the assignment notice would be imparted of the contents of the assignment."

When the Wells-Fargo case was decided, it was decided entirely on the basis "it was a common thing, one

of public notoriety, to record mortgages and other conveyances, and that fact that there were offices in each county for the purpose of making such recordations was also a matter of public notoriety.” But there is no assurance that the Territorial Court of Utah would have construed Sec. 100-3-18 as the state engineer would have this Court construe it, in the face of the language contained in Sections 100-1-10, 100-5-12, 78-3-2 and 78-3-3, had such sections or statutes existed at that time. Moreover, it is significant that immediately following the decision in the Wells-Fargo case and in the face of the favorable holding, the legislature in 1874 amended its first recording statutes and provided expressly for the penalty when the instrument was not recorded.

By the overwhelming weight of authority in more recent cases than the Wells-Fargo case, our Supreme Court and other jurisdictions have held that recording statutes are not enlarged by implication. See *Doris Trust Co. vs. Quermbach*, 133 Pac. (2nd) 1003, at page 1006, 103 Utah 120; wherein it is stated: “Constructive notice from a record is wholly a creature of statute. No record will operate to give constructive notice unless such effect is given such record by statute.”

“It is to be noted that constructive notice by record or registration was unknown to the common law. Such notice is a matter of statutory origin and in the absence of statutory provision the record of a chattel

mortgage would not constitute notice for any purpose. When the terms of the statute are compiled with the record becomes conclusive notice, often contrary to the fact. We cannot read into the statutes the harsh rule of constructive notice in the absence of legislative expression." *Bank of America Nat. Trust & Savings Assn. vs. National Funding Corp.*, 114 Pac. (2nd) 49.

"The recording of an instrument is constructive notice to those who acquire interests subsequent to execution of instrument or who, in dealing with property are compelled to search the records in order to protect their own interests, but it does not affect the rights of prior parties." *Ryan vs. Plath*, 140 Pac. (2nd) 968.

"Common-law rule that grantee was not obligated to record deed has been changed in California, but extent of change is expressed in statute." *Noble vs. Blanchard*, 8 Pac. (2nd) 523.

Section 100-3-18 expressly provides that notice of the contents of the assignment filed in the office of the state engineer imparts notice to all persons of the contents thereof "from the time of filing." When there is no penalty provided for failure to record or file a *prior* assignment, the notice is not imparted to a prior assignee, but notice is imparted only from the time of filing or to a subsequent assignee. This proposition has been well settled in the cases of *Askerson vs. Elliott*, 165 Pac. 899; and *Ryan vs. Plath*, 140 Pac. (2nd) 968, and other cases therein cited.

"Furthermore, the deed to that company did not constitute constructive notice to appellant, since she was not a subsequent purchaser or encumbrancer.

The recording of an instrument pursuant to a recording statute such as Rem-Rev. State Sec. 10596, is constructive notice to those persons only who acquire interests subsequent to the execution of the instrument, or who, in dealing with property, are compelled to search the public records in order to protect their own interests; it does not affect the rights of prior parties." Ryan vs. Plath, 140 Pac. (2nd) 968, citing 45 Am. Jur. 470, Records and Recording Laws, Sec. 89.

Are the concluding words in Section 100-1-10 concerning deeds of a water right—"and subsequent purchasers, mortgagees and lien-holders shall be deemed to purchase and take with notice thereof"—of any meaning whatsoever? Or are such words mere surplusage? Such words appear in the general recording statutes. But no such words appear in Sec. 100-3-18. If the contention of the appellants is correct, then the above words in the general recording statutes and in Sec. 100-1-10 are surplusage and have no meaning at all. They would not be necessary to shut out the right of one failing to record.

Thompson admits freely that before he took the Hintzen assignment he was advised by Hintzen that 80 acres of the land for which water was applied had been turned back to McGarry. Likewise, Thompson admitted freely that Hintzen was out of possession of the McGarry ground and had turned the possession back to McGarry. Under these circumstances we believe the rule announced in Neponset Land and Livestock Co. vs. Dixon, 37 Pac. 573,

10 Utah 334, and followed by a long line of decisions in Utah, should apply. The rule there announced is "The failure of a grantee who is in possession of the land to record his deed does not render it void as to subsequent purchasers, as possession is notice to all the world of the holder's rights."

The state engineer asserts that he 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, because a duty has been imposed upon him by Section 100-3-8, which section has to do with the approval or disapproval of an application. And would his alarm be overcome if the assignment is made after the approval of the application, and the assignment is not recorded for some time after?

Section 100-3-18 provides for filing of assignments in the office of the state engineer covering "rights claimed under applications" and makes no distinction between approved and unapproved applications. The legislature did not see fit to *require* that an assignment be filed in the office of the state engineer, or provide for any time within which it *must* be so filed. It did not make void an assignment that was not filed in the office of the state engineer. It did not give the state engineer any power or authority to reject an approved application because the assignee happened to be engaged in the real

estate business. It did not prohibit the assignment of an application to a person engaged in the real estate business.. The legislature did not give to the state engineer any discretionary power to refuse recognition of an assignment or to refuse to permit the assignee to proceed with the drilling of a well, or irrigation of land thereafter.. If the state engineer is so concerned about the provisions of Sec. 100-3-8, he should know that he is required either to approve or *reject* the application. He is not given any right or authority to say to the original applicant, "I will reject the application if you assign it to Mr. McGarry, but I will approve it if you assign it to Mr. Thompson."

We say flatly that the state engineer misstates the facts about his other apprehensions—his right to investigate various matters, and the fact that he approved the application only after it was shown that a different tract of land would be irrigated. He asserts in his brief (Pages 41-42) that it is "unlikely" he would approve an application to irrigate the lands covered by the original application; that the court records show the application was not approved until March, 1947, as shown by Exhibit "C"; that it was approved after the apparent record owner had filed a change application showing an intention to irrigate a different tract of land. He asserts also (Page 44 of brief) that "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.”

The state engineer's entire course of action belies his contentions. He does not say that he made any investigation; much less does he mention the results of any investigation, nor why he did not hold a hearing, nor plead and attempt to prove any facts at the trial to show why he would not approve an application for a well on lands covered by the original application. He does not say nor attempt to indicate the basic differences between the land covered by the original application and that covered by the change application, much less plead or attempt to prove any such facts at the trial. He wants this appellate court to deprive McGarry of his property rights by supposition, innuendo and possibility, without even saying it is a probability, or certainty. What might appear to be true is the statement made in his brief that he might never have approved the application if it had been in the name of McGarry, but for reasons undisclosed and based on facts remaining a secret.

We further call attention that Thompson's testimony is to the effect that the state engineer (Rep. Tr. 32-33) sends an applicant a copper bank with an identifying number which is to be put on the well after it is drilled and that the state engineer sends instructions with each of these bands. He also testified that when he made the deal with Hintzen and received the assignment (Rep. Tr.

23), Hintzen stated a copper band had previously been sent him by the state engineer and he sent it back. The sending of the copper band assuredly indicates that the state engineer had granted permission to drill a well on the ground in which Hintzen was then interested, and that the Hintzen application was approved or intended to be approved. This effectually disposes of the contention that the application might not have been granted excepting for land covered by the change application. Can this Court believe, or uphold the doctrine, that the state engineer may give permission to drill a well at great expense before determining that the land is fit for irrigation, and afterwards take the position that he had not made an investigation and that the land was unfit for irrigation? Can this Court believe that the state engineer sent the copper band without having approved or intending to approve the Hintzen application? We think not.

CONCLUSION

The trial court determined this cause in favor of the respondent on two grounds: First, that the failure of respondent to file his assignment in the office of the state engineer prior to the time when Thompson filed an assignment did not give to Thompson a better title to the application nor did it invalidate the prior acquired title thereto by McGarry. Secondly, that the defendant Thompson was not a purchaser in good faith and without notice.

If the trial court was correct in its determination on either of these theories and grounds, then the judgment must be affirmed.

“If the trial court was correct as to either of two grounds for its decision, the judgment must be affirmed.” *Raymond vs. Union Pac. R. R. Co.*, 191 Pac. (2nd) 137, — Utah —.

We submit, therefore, that the judgment of the trial court should be affirmed.

Respectfully submitted,

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