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# West Union Canal Company v. Provo Bench Canal and Irrigation Company, et al : Brief of Appellant

Utah Supreme Court

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**In the Supreme Court of the  
State of Utah**

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WEST UNION CANAL COMPANY,  
a corporation,  
Plaintiff and Respondent,

vs.

PROVO BENCH CANAL AND  
IRRIGATION COMPANY, a  
corporation; et al,  
Defendant and Appellant

**CASE  
NO. 7190**

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**APPELLANT'S BRIEF**

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and Appellant

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## APPELLANT'S BRIEF

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(Numbers in parentheses preceded by "JR", refer to pages in Judgment Roll file; plain numbers in parentheses refer to pages in Transcript).

### PRELIMINARY STATEMENT

Sometime between about 6 o'clock p. m. of May 27th, and 5 o'clock a. m. of May 28th, 1946, during heavy rain-

fall, the pipe line of the West Union Canal Company at "Skinner's Hollow" in Orem, Utah County, Utah, was washed out. The West Union Canal Company, plaintiff and respondent herein, brought action against the Provo Bench Canal and Irrigation Company, and numerous individual defendants, claiming that they negligently caused or permitted excess water to flow into the West Union Canal, thereby causing damages in the sum of \$2,500.00.

All defendants except Provo Bench Canal and Irrigation Company, appellant herein, were eliminated from the cause by non-suit granted in their favor at the close of plaintiff's evidence (JR 65; 235). From a judgment for damages in the sum of \$699.25 entered against Provo Bench Canal and Irrigation Company, it takes this appeal (JR 69).

### THE QUESTIONS PRESENTED

So that the statement of facts can be reviewed conveniently in the light of the legal questions presented for determination herein, such questions will be first set out.

In passing, it may be noted that various errors were committed by the trial court in respect of the reception of evidence. Some relate to the general rules of evidence (399, 400). Others are predicated upon the view of the learned trial judge that the damages sought to be established were legally attributable to the appellant (41-43, 65, 155). The former are overshadowed by basic legal questions of far-reaching importance. A decision as to the latter is dependent upon the law governing the responsibility of irrigation companies, and the elements of proof essential to show actionable negligence and proximate cause, all more directly raised by other assignments. None of the evidentiary questions in and of themselves appears determina-

tive. In order that the fundamental issues may not be obscured, we are limiting our presentation to them, viz:

I. Must an irrigation company, distributing water to laterals maintained and controlled by stockholders of such company, and others, under a system of turns arranged by such stockholders, assure, at its peril that all such laterals and branches thereof to, and beyond, the lowest user, shall have means for the disposal of excess water in the event that any user fails to take his turn, or water beyond the control of the company otherwise gets into, or flows through the laterals and their branches; or, in other words, does there exist such a legal duty of construction as concluded by the trial court?

II. Is water allocated to certain stockholders and diverted from the canal of an irrigation company with other water into laterals under the control of such stockholders the water of such irrigation company not only up to the time it is diverted into such laterals, but also while it flows through the same and until it is turned upon the land of each individual user, so that the irrigation company has the responsibility to supervise and control the diversion of such water as between all stockholders down to the lowest user, to preclude the possibility of damage from unused water assigned among themselves to particular stockholders, or from rain or waste water, or a combination of all; or, in other words, does there exist such a legal duty of management and control as concluded by the trial court?

III. Was there any violation of duty or negligence as pleaded, or at all, on the part of the Provo Bench Canal and Irrigation Company; or, in other words, was there any delict as found by the trial court?

IV. If negligence were assumed for the sake of ar-

gument, is there any competent evidence to establish that this caused or contributed to the damages claimed and awarded in view of the speculation and conjecture involved in plaintiff's theory, the absence of evidence as to the failure of any stockholder to use his water, the heavy rain at the time, the uncertainty as to when the damage occurred, and the uncontradicted affirmative evidence that the respondent company itself on the night of the break was flowing more water in its canal than the pipe-line would carry; or, in other words, did proximate cause or connection exist?

In the argument to follow, these issues will be discussed in the order stated, under corresponding propositions which are believed to be borne out by the facts and the law.

## THE FACTS

Both appellant and respondent are irrigation companies of Orem, Utah, organized to sell and distribute water to stockholders (JR 28; 40). The individual defendants were stockholders of Provo Bench Canal and Irrigation Company (JR 28, 43).

Plaintiff in its amended complaint alleged that between the afternoon of May 28th and the morning of May 29th, 1946 (plaintiff's evidence is conflicting, but it developed in the latter part of its evidence that the occasion referred to was May 27-28), the irrigation water of Provo Bench Canal Irrigation Company was negligently, wilfully and unlawfully permitted, allowed and caused to flow from its ditch onto a public street where it picked up stones, earth and rubbish, and from which the water, with the debris, flowed into plaintiff's canal; that by reason of the stones, earth and rubbish gathered with said water, the



plaintiff's ditch was filled with rubbish, earth and stones; the flow of plaintiff's canal was blocked, causing the water to overflow and breaking plaintiff's canal (JR 29).

It was further alleged by plaintiff that the individual defendants were negligent in failing to use their water turns during the period in which the damage occurred (JR 30). It was further alleged that Provo Bench Canal and Irrigation Company neglected to notify the individual stockholders of the time the water would be put into the ditch for the use of the individual defendants and that it neglected and refused to provide for the care of excess and unused water in the ditch; knowing that the water placed therein was not cared for, and used by, such stockholders and was a menace and potential danger to plaintiff's ditch, and after plaintiff notified said Provo Bench Canal and Irrigation Company of such failure to take care of said water and of the potential damage to plaintiff's ditch (JR 30).

Provo Bench Canal and Irrigation Company denied any negligence on its part, and affirmatively alleged that plaintiff's damage was proximately caused and contributed to by the carelessness of plaintiff in failing to keep the pipe lines and flume in good state of repair and design free from rubbish and in failing to strengthen portions of its ditch to withstand conditions reasonably to have been anticipated and in failing to divert water from said ditch which substantially contributed to said breaking; and negligently turned water into the canal so as to contribute to said damage and negligently failed to take reasonable precaution in view of heavy rainfall (JR 43, 44).

The record discloses that the West Union Canal Company is a corporation having the control of a portion of the waters of Provo River, and acting through a president, a

water master and other officers, directors and agents (JR 28, 36-37). The West Union Canal, owned and operated by that company, diverts water from said Provo River in the vicinity of the Utah Power & Light Company Steam Plant below the mouth of Provo Canyon, running thence for about two miles along the west edge of the river bottom, approaching the east slope of Provo Bench under which it runs southeasterly for about three additional miles to the so-called Davis Corner (68), past which it flows northwesterly for about a half mile to Skinner's Hollow (75), thence continuing to the property of the Geneva Steel Company through which excess water is conveyed to Utah Lake (143).

The West Union Canal is about two feet deep and eight feet wide, holds a maximum of 70 second feet of water at its head, about 75 second feet just below the diversion point of its lateral No. 2 (about a half mile above the Davis Corner) (72). At the Davis Corner its capacity is 50 second feet before it spills from the Canal over the headgate (77). It will carry through the pipeline at Skinner's Hollow a maximum of only 35 second feet (75), there being no spillway at that point to provide for any excess water. The canal ordinarily carries about 30 second feet of water at its head, except in the high water season, a portion of which water is diverted into various laterals. This was the amount of flow at the head the morning before the washout (P. Ex. 1). There is no testimony, however, as to how much water was in the West Union Canal the night of the washout (252-253), except that it was running full and to overflowing at the Davis Corner before any water entered from the road (287, 289). The company had no record of the amount of water in its lateral No. 2 on the night in question (91) and

it was reported the water was turned from lateral No. 2 back into the canal (241, 259, 261).

In its course the canal traverses farm land, waste land, weeds and underbrush (68). A waste ditch to drain excess water from the new State Road empties into it (70, 78, 256) and other drainage (275). It also flows past or through numerous corrals and other places where livestock is fed (264).

The Davis Corner is located at 20th South and Main Street in Orem, Utah, which is some one-half mile west of the State Highway and approximately that distance below the diversion point of the so-called West Union Lateral No. 2. Davis has his home on the northwest corner at that intersection. The West Union Canal crosses Main Street in a westerly direction just north of the Davis home, at which point there is a bridge over the canal. Immediately to the west of the bridge there is a headgate leading south from the canal through which water is diverted across the Davis property next to the house for lower users (77, Def's Ex. 4). The carrying capacity of the canal at this point is about 50 second feet (77). The canal then proceeds in a northwesterly direction to Skinner's Hollow and to the Geneva Steel Company property beyond, as aforesaid.

Formerly, a concrete pipe carried the water from the top of Skinner's Hollow to the bottom; in 1945, however, this was replaced by corrugated pipe supported by trestle work with earth fill and with abutments of concrete at its ends. About sixty days before the occurrence in question, a 24-inch concrete pipe was laid within the corrugated metal pipe (97-98) and the water had been running in this for a period of only about 45 days prior to the washout (98). The work at Skinner's Hollow was done by an offi-

cer of the West Union Canal without the benefit of design, assistance or advice from an engineer except for a statement as to what to use for joints (162-165). The soil in the vicinity of the pipe was very loose and unstable (173).

About 75 feet above the intake in the unimproved portion of the canal was a screen consisting of boards set on edge with openings between for the purpose of screening out debris which might otherwise pass into the intake of the pipe (86). It was not unusual to find debris not only on this screen, but on the splitter board at lateral No. 2 above (82). The capacity of the pipe itself was substantial but the flow of water which could pass through the intake did not exceed 35 second feet (214-215), there being no place for any excess to go but over the side of the intake into the loose sand and gravel forming its base.

It was at this point that the principal damage complained of occurred. Apparently as a result either of an excess flow in the canal or some obstruction in the intake, the water had flowed over the sides of the intake, washing the foundation of the concrete away and causing the pipe to fall, due to the lack of support from sand and gravel underneath (242). There was no sign of washing in the vicinity of the screen (267-268), but it had caved in the immediate vicinity of the intake and apparently washed back south a few feet (89-90).

The Provo Bench Canal and Irrigation Company is a corporation, with usual officers and directors. The Provo Bench Canal diverts water from Provo River at the mouth of Provo Canyon, from which it traverses the side and onto the Bench, where it furnishes water to various laterals in the Orem area.

The stock of the company is divided into 1954 shares (326), entitling the holders to their proportionate part of the waters of the canal. The company adds the shares together and gives each lateral its proportion of the measurement in the weir according to the shares on that lateral (330). Six hundred ninety-one shares are owned by the North Union Irrigation Company, a separate corporation (327). The water is diverted into the head of the North Union Canal, which has three branches, the Loveridge Lateral, The Stratton Lateral and the Knight Lateral (327-328). Below the North Union diversion on the Provo Bench Canal is the Nickle Ditch, dividing into the Davis Lateral, the North Spencer Lateral, the South Spencer Lateral and the Curtis Lateral (329); at about the same point the southeast Ditch diverts from the Canal (330).

These laterals serve the stockholders of the Provo Bench Canal and Irrigation Company and the stockholders of certain other canal companies flowing water through the Provo Bench Canal.

The secretary of the canal company receives orders from the stockholders for change from one lateral to another, if desired, and distributes water into the new laterals for them (330-331); but the canal company has nothing to do with administration of laterals or in designating their officers (333-334).

There is no such thing as the Southeast Ditch Company, except as that refers to a group of farmers using waters from the so-called Southeast Ditch (104). They simply get together for the ticketing of their water and sometimes for mutual ditch cleaning (118). The Southeast Ditch is a lateral leading off from the Provo Bench Canal at the Ford Corner (104) and proceeding southwesterly to



the Kartchner Corner on the state road, where it divides into two principal branches, one leading northwesterly to the Roy Davis farm with 48 users on it (365-366); the other branch from the Kartchner Corner leads in a general westerly direction for the service of 50 users, including Christenson, who is the lowest user on this branch (124; 365). A continuation of the ditch across the Christenson land is used as a head ditch by him to water on either side (193). This is his own ditch (124) and it terminates at his fence line on the east side of Main Street about 500 feet north of the West Union Canal bridge across Main Street heretofore referred to, near the so-called Davis Corner, at which point it is very small (123). The Southeast Ditch, however, does not run to the road, but ends at the Christenson farm, which is the last place served by that particular branch of the ditch (112). He is the lowest user, and one branch of the ditch simply runs to his premises (124). The ditch is about  $2\frac{1}{2}$  miles from its head to the end of the north branch (372).

Besides the two main branches mentioned, various other laterals take off on either side of the Southeast Ditch to serve water users in the general vicinity; some ditches serve only one water user, and others a large number. There are a total of about 70 individual water users on the Southeast Ditch (117). This ditch has been substantially in the same position and has been operated in substantially the same way for at least 40 years (124; 121).

An arrangement has been made by stockholders to care for any unused or surplus water in the ditch. A steel gate has been placed near the head, so that people who do not want to use their turns can notify Roy Olsen, who shuts the water off. All stockholders know this (112-113, 368,

374). The canal company has no control over this gate (368). Surplus water also can be turned down the North branch of the ditch, from which it is impossible for water to get into the West Union Canal (375).

Stockholders on each of the main laterals leading from the Provo Bench Canal, for the purpose of cleaning the canal and providing for the distribution of water between them, appoint a ditch secretary, and some have a board or committee for the purpose of determining the period of water turn per share which is to be allowed in the ditch (109).

The Provo Bench Canal and Irrigation Company has nothing to do with this (110). The secretary of the ditch is notified by the secretary of the Provo Bench Canal and Irrigation Company each year how many share of water are being distributed to the ditch in accordance with the request of the stockholders (119, 342). The ditch then allocates the turns among the stockholders on the ditch in accordance with their stock holdings (110). Except for certifying the number of shares on the ditch, including the number of shares of Provo Reservoir Corporation stock and Tanner stock flowed through the canal in an arrangement with the Provo Bench Canal and Irrigation Company (126-127), the canal company never has assumed anything to do with the distribution of the water of the respective laterals or ditches (110, 128; 352-353), simply diverting into the head of the respective laterals the amount of water called for by the total number of shares represented on the lateral (123). The individual stockholders have the right to use the flow of water through the ditch (120). The canal company delivers water at the head of the Southeast Ditch to the 70 users on the ditch entitled thereto

(123). The Provo Reservoir Company rents water to various people using such water through the Southeast Ditch also. They have both Provo Bench and Provo Reservoir water in the ditch (126), and also Tanner water (128).

At some recent, but undisclosed, time, the Provo Bench Canal and Irrigation Company arranged with the government for cementing on some of the laterals, and amended its articles to provide for the levying of assessments for this purpose (336-338); but there is no other evidence that the corporation has assumed any control of the distribution of water, except to divert such water into the heads of the laterals in accordance with the amount of water represented by owners on the laterals desiring to take their water through such laterals (352-353, 379). There is no evidence that any cementing was done on any lateral other than at its head, and the evidence does not disclose that any cementing at all was done on any part of the Southeast Ditch.

The evidence further discloses that all of the water turned into each lateral, during every period of the irrigation season, has been allocated by the stockholders on the lateral into turns, there being no period when someone has not been assigned the use of the water (369).

About 30 days prior to the damage, at a meeting between officers of the West Union Canal and Provo Bench Canal, the danger of excess water entering the West Union Canal was discussed, and the Provo Bench officers indicated they would call the attention of its stockholders to the matter (56, 59, 60, 61). Shortly thereafter, the Provo Bench Canal notified all of the representatives of the various laterals that the company could assume no responsibility, but that the individual stockholders and laterals



would have to so manage their water as to prevent damage (Pl. Ex. H).

Taking in sequence a composite of the events as disclosed by the evidence, on the morning of May 27th, 1946, presumably early in the morning, as was his custom (252-253), Frank Wentz, river commissioner of Provo River, measured the water entering the Provo Bench Canal and found it to be 139 second feet. He also measured the water entering the West Union Canal and found it to be 30 second feet (Pl. Ex. I; 130, 131).

At about eight o'clock of that morning, Mr. Anderson, water master for Provo Bench Canal and Irrigation Company, and Mr. Keech, its president, being concerned about the heavy rainfall, went to the mouth of Provo Canyon, turned out of the Provo Bench Canal approximately two-thirds of its flow, so that the next measurement of the canal was 64 second feet (359-360; 382-383).

It continued raining most, if not all, of that day and night and until the early morning of the 28th. During that period, a total of .87 inch of rain fell, this being the heaviest rain of the year, except for the early Spring before the waters were in the canals, and except for August, when the water was low. (Provo River Commissioner Report 1946, p. 37, Pl. Ex. I; 131; 97).

During the day of the 27th the water flowing in the West Union Canal was observed to be more than the normal flow for that time of the year (343, 349).

At about 5:30 the evening of the 27th, the water master of the West Union Canal was in Skinner's Hollow and observed some debris on the screen (243), but did not think it enough to justify removing. About that same time, one of the officers of West Union Canal Company finished irri-

gating in the vicinity of Skinner's Hollow and turned his irrigation stream back into the canal (139).

At about 6 or 6:30 p. m. of May 27th, one Moroni Jensen saw a small stream coming into the road from the Christenson ditch, but it had not reached the canal (179). Although he was an officer of the West Union Canal, he made no report and did nothing (191).

Sometime during the night of May 27-May 28th, it appears that stockholders of the West Union Canal Company, not desiring the water assigned, turned the water flowing in lateral No. 2 back into the canal (259-261), and that a substantial amount of rain or waste water drained into that canal from the side of the new state highway a half a mile above the Davis Corner (322-325).

About 8 o'clock that night, Roy Davis left his home to go to the picture show (286); no water was coming down the road except a trickle of rain water, and none was entering the canal from the road (304-305).

At about 11 o'clock that evening, a farmer, Ervil L. Davis, was driving along Main Street in the vicinity of canal bridge and observed a small amount of water running down the road. He did not know where it came from (6). There was just a small stream and rut about 40 feet above the West Union Canal (7-9). He didn't see where the water was going (10). He could not remember whether it was raining at the time (9-10).

About midnight, Roy Davis returned from the picture show and noted that the West Union Canal was running completely full and overflowing the weir through his place (287-288; 295-296). He also noted that there was a small stream of water running down the side of the road and across the bridge, but that none was entering the canal

(288). He went to bed and about 2 o'clock in the morning he heard the sound of rocks rolling, and got up and observed that the water coming down the road, about sufficient to run through a 4-inch pipe, was running across the bridge and washing below the bridge (289); none at that time was entering the canal, but the canal was still running full, with 3 inches of water flowing out of the canal over the six-inch board down the ditch through his place. The capacity of the canal at this point was about 50 second feet before it flowed over the headgate (77).

At about 5 o'clock in the morning of the 28th, the president of the West Union Canal was notified that the road at the Davis Corner was washed (37). He called the water master, who sometime after went to Skinner's Hollow and found the break there (243). The president spent the hour following the report of the road wash in turning out the water from the West Union Canal (38), although very little, if any, water was then entering from the road (39). The headgate at lateral No. 2 was opened wide so as to take the flow of water out of the canal, and other laterals were opened and the water turned out of the head of the canal about 6:30 a. m. (51). Thereafter about 7 o'clock in the morning (39) the president of the company found at Skinner's Hollow that the structure holding the intake pipe had broken off, and the washing in the soft sand and gravel underlying it had extended back about four feet above the intake (242; 192; see also Pl. Ex. D). A large amount of sand and gravel had been washed off the hillside into the canal in the bottom of Skinner's Hollow (39-40). When the water master discovered the break, he estimated it was flowing about 16 or 17 second feet (245), but he admitted that the flow was to the top of the cement

structure (273). The record does not disclose whether the water had been turned out of the canal by that time or not.

The road near the Davis Corner by 7 o'clock the morning of May 28th had been washed below the Christenson ditch and above the canal, over a substantial distance (291-292). The wash was variously estimated at 3 or 4 inches wide and 6 inches deep (136); 6 or 7 inches deep (134); 8 inches wide and 4 inches deep (277-279) and 2 feet wide (271).

From the sand and gravel washed from the road, the bottom of the canal extending below the bridge for some several hundred feet was covered with sand and gravel to a depth near to the bridge of about one foot and petering out below (21-24; 30; 34-35; 290-291; 180).

It further appeared that the sand and gravel so placed would decrease the capacity of the canal (49) so that only one-third as much water could pass the weir at Davis Corner and flow toward Skinner's Hollow as would otherwise be the case (78).

The only evidence that water was running in the Southeast Ditch on the 27th or 28th was the testimony of Ludwig Christenson that on May 29th at about 7 o'clock in the morning (after the washout had occurred) water was running down that ditch onto his land and a portion onto the road. He turned all the water off his land and onto the road (18-19). He had not observed water on the road at any previous time that night and had not observed it in the ditch above earlier (12-13). He did not know how much water was in the ditch or on the road (13, 17), nor how much was rain and how much was irrigation water (14).

Because of the washout a completely new channel from

the intake to the bottom of Skinner's Hollow was constructed (67). The cost of removing the sand and gravel from the canal immediately adjacent to the bridge amounted to about \$36.00 (182-183). It was "thought" that a bulldozer at \$6.00 per hour for 70 hours or a total of \$420.00 was on the full job at Skinner's Hollow (188). What part of this was for removing the sand and gravel from the canal in Skinner's Hollow and what part was for excavation for new construction to replace the old construction does not appear (188), and no showing that this total amount paid was reasonable appears (152-154). Another witness attempted to break the cost down between excavation and other work, but still included in his balance the cost of excavating for the new and different construction (203-204). The new construction in Skinner's Hollow was a much more satisfactory, substantial and expensive structure in a different and better location (171-172; 198).

No attempt was made in the evidence to disclose what part of the expenditure was for the improvement of the existing structure and what part for repair of damage. There was no evidence introduced to show that the water users entitled to use water through the Southeast Ditch did, or did not, use the water to which they were entitled during the period involved.

The learned trial court took the view that the water which caused the washout at Skinner's Hollow was the Provo Bench Canal and Irrigation Company's water, and that notwithstanding the uncertainties of proof (415-416) and law on which the conclusion rested, it would be the policy of the court to hold the corporate defendant responsible.

Accordingly, the court found that the water in the Southeast Ditch and its branches was the water of Provo

Bench Canal and Irrigation Company (JR 54), that the "Southeast Ditch Company" was an association of stockholders for the convenience of the appellant (JR 54), that the company's water was negligently permitted to flow into the West Union Canal (JR 54), and that this particular water and the debris which it carried caused the break at Skinner's Hollow about a half mile below (JR 54-55). The court assumed to determine what part of the damages claimed was attributable to the Provo Bench Canal and Irrigation Company's water (JR 55).

### ERRORS ASSIGNED

1. The court erred in overruling the general demurrer of Provo Bench Canal and Irrigation Company to plaintiff's amended complaint (JR 33, 37).

2. The court erred in denying the motion of appellant for a non-suit (JR 65; 238, 284).

The court erred in making and entering its finding of fact No. 4, wherein it found that the Southeast Ditch Company is an association of stockholders of the Provo Bench Canal and Irrigation Company for the convenience of said company (JR 54).

4. The court erred in making and entering its finding of fact No. 5 (JR 54).

5. The court erred in finding that the irrigation water of the Provo Bench Canal flowing in the said ditch of said company was negligently permitted and allowed to flow from said ditch onto the public streets or highways along the west line of said section 26 (JR 54).

6. The court erred in finding that the irrigation water so flowing upon the street or highway flowed south



along said street, picking up stones, earth and rubbish into the ditch or canal of plaintiff (JR 54).

7. The court erred in finding that by reason of the stones, earth and rubbish so flowing on the ditch or canal, together with said water, the ditch or canal of plaintiff was filled with earth, stones and rubbish, the flow in said ditch or canal was blocked, causing the water in said canal to overflow the banks of the ditch or canal, washing away an enclosed portion of plaintiff's canal, breaking said plaintiff's ditch or canal and depriving it of the use, profit and benefit of the water flowing therein (JR 54-55).

8. The court erred in finding that by reason of the filling of said ditch and the washing away of a portion of plaintiff's canal, the plaintiff was damaged in the sum of \$699.25 (JR 55).

9. The court erred in making and entering its finding of fact No. 7 (JR 54-55).

10. The court erred in finding that the Provo Bench Canal and Irrigation Company failed and neglected to notify all of said individual stockholders at the time the water would be put in said ditch for said individual defendants (JR 55).

11. The court erred in finding that Provo Bench Canal and Irrigation Company failed, neglected and refused to provide for the care of excess and unused water from said ditch, knowing that the water placed therein was not cared for and used by said stockholders and was a menace and potential danger to the ditch or canal of the plaintiff and after plaintiff notified said Provo Bench Canal and Irrigation Company of such failure (JR 55).

12. The court erred in making and entering its finding No. 8 (JR 55).

13. The court erred in making and entering its finding No. 9 (JR 55).

14. The court erred in making and entering its conclusion of law that the plaintiff is entitled to judgment against the Provo Bench Canal and Irrigation Company for damages in the sum of \$699.25, and for costs (JR 56).

15. The court erred in making and entering its judgment whereby it granted judgment in favor of the plaintiff and against the defendant, Provo Bench Canal and Irrigation Company, for the sum of \$699.25, and for costs herein (JR 57).

16. The court erred in making and entering judgment in any sum against the defendant, Provo Bench Canal and Irrigation Company.

17. The court erred in denying defendant's motion for new trial (JR 68).

## ARGUMENT

It is the position of appellants that neither the duty of design and construction, nor that of supervision and control rested upon it with respect to the branches of the so-called Southeast Ditch; that no actionable negligence of appellant was established, and that no damage suffered by plaintiff was shown to have been proximately caused or contributed to by appellant.

In brief, neither the law nor the facts established the duties which the learned trial court assumed. There were no negligent acts or omissions proved against the appellant, and it is questionable whether there are sufficient allegations of negligence in the amended complaint to withstand a general demurrer. Assuming negligence, there is no competent proof that such negligence proximately



caused, or contributed to, plaintiff's damages. On the contrary, the evidence affirmatively shows that the washout at Skinner's Hollow was the result of an excessive flow in the West Union Canal—one beyond the capacity of the pipe line intake—at a time when no water was entering the canal from the Southeast Ditch. There were numerous other factors more likely to have caused the damage claimed than any flow of water from the Southeast Ditch at any time, and damages awarded, as well as the finding as to proximate cause, were based upon mere speculation and conjecture.

We further contend that the necessary effect and implications of the lower court's decision, if not reversed on this appeal, will be to grievously handicap and penalize irrigation companies, invite the shifting of legitimate responsibilities at the ultimate expense of company and stockholder alike, to promote judicial legislation making irrigation companies virtual insurers, and to circumvent well established principles with respect to burden of proof, proximate cause, and the sufficiency of evidence.

The general rules with respect to the liabilities and responsibilities of canal and ditch owners and their responsibility for their own negligent acts or omissions are not questioned. The application of these rules is the point in the instant case, in view of the facts shown by the record. Manifestly, the merit of our position depends a good deal upon the facts established, or not established, as the case may be. Hence in our Statement we have endeavored to present a rather comprehensive summary of them, which, as far as practical, will be supplemented, and not reiterated, in the argument on our respective contentions as follows:

## I.

THE APPELLANT WAS UNDER NO LEGAL DUTY TO MAKE CHANGES IN THE DESIGN OR CONSTRUCTION OF BRANCHES OF THE SOUTHEAST DITCH, OR SIMILAR LATERALS, OR TO CONSTRUCT ADDITIONAL DITCHES BELOW THE LOWEST USER.

Under this point we hope to be able to sustain assignments of error numbered 4, 5 and 11, particularly, and to support our other assignments going to the question of negligence.

In finding of fact No. 5 the trial court found, inferentially at least, that the Southeast Ditch was a ditch of the Provo Bench Canal and Irrigation Company (Assignments 4 and 5). In finding No. 7 the court found that appellant neglected to provide for the care of unused water in said ditch (Assignment 11). In the court's oral opinion it is clear that it assumed that the appellant was responsible for the design and construction of the ditch down to and beyond the lowest user, so as to insure against the possibility of damage to plaintiff (409-410).

This assumed duty of construction or design is in part, at least, the foundation of the court's decision against appellant. Much emphasis was placed in the evidence upon the fact that a branch of the Southeast Ditch ended at the Christenson property, without any continuation thereof to conduct unused water across the road, and to assure that it would not enter the West Union Canal.

This duty of construction or design is not specifically pleaded, and there is no suggestion in the evidence or pleading as to what could have been done by the appellant to construct a tail ditch from the end of this branch of the South-

east Ditch for the purpose of avoiding the West Union Canal, assuming water were to flow beyond the lowest user.

As a matter of fact, because of the slope, and the dominating location of the West Union Canal, it would be impossible to build such a tail ditch without paralleling that canal for more than a mile, extending past the Skinner Hollow, to the Geneva Steel Company, over which a further right-of-way would have to be procured down to the lake. This would be a prohibitive undertaking in itself, not to mention as it would be multiplied by the countless other branch ditch ends on a large irrigation system, in respect of which the duty also would exist if it existed here. There is no showing in the record of any feasible way to extend the ditch below the lower user, Christenson, and there is no reason for doing so, because it is not contemplated that any water shall flow past that point.

A consideration of the realities of the situation, in the light of legal principle, seems to suggest that an irrigation company distributing water to laterals maintained and controlled by stockholders of such company, and others, under a system of turns arranged by such stockholders, is not under the duty of assuring, at its peril, that all such laterals and branches thereof, to, and beyond, the lowest user, shall have means for the disposal of excess water in the event that any user fails to take his turn or water beyond the control of the company otherwise gets into, or flows through, the laterals and their branches.

Section 100-1-8, RSU, 1943, provides, among other things that the owner of any ditch, canal, flume or other water course shall maintain the same in repair so as to prevent waste of water or damage to the property of others.

This section does not establish any absolute liability, but plaintiff must allege and prove negligence or want of ordinary care on defendant's part in the construction, operation or maintenance of defendant's ditch. *Mackay v. Breeze*, 72 U. 305, 269 Pac. 1026. We shall have more to say about negligence under point III herein. For the present, we wish to emphasize that there is no proof whatsoever in the record that the appellant owned the Southeast Ditch proper at the time of the injury, much less the remote branches and branch ends such as the one which ended at the Christenson property, the lowest property watered from this branch.

It must be common knowledge that laterals, sublaterals and branches thereof through which farmers located thereon obtain their water ordinarily are not owned as such by the canal companies which turn the water therein at the request of stockholders. If there were any interference with any such branches or sub-ditches, the individual users would be the ones with a standing in court. It seems impossible to envisage a canal company owning all the ditches and sub-ditches through which water originally supplied by it ultimately might pass. But it seemn unnecessary to further urge this matter of judicial notice. The burden was upon the plaintiff and he failed to show any ownership by the Provo Bench Canal and Irrigation Company of the branch lateral involved.

Aside from the question of ownership, does the evidence give rise to a duty to design or construct, because of any assumption of management and control by appellant, as in the case of *Chipman vs. American Fork City*, 46 U. 134, 148 P. 1103; s. c. 54 U. 93, 179 Pac 742?. The record is singularly free from dispute on this point. The South-

east Ditch and other laterals handle not only the water furnished by appellant, but Provo Reservoir Company and Tanner water as well (125-128). The canal company has nothing to do with the administration of laterals or in designating officers (333-334). There is no Southeast Ditch Company, except as that refers to a group of farmers using water from that ditch. The ditch across Christenson's land is his own ditch (124). The canal company has no control over the gate used by farmers on the ditch to turn back water which they do not desire to use during their turns (368). The canal company has nothing to do with the appointment of a secretary on the respective ditches (110). The canal company has never assumed anything to do with the distribution of water of the respective ditches (110, 128; 362, 353). The ditch has been in substantially the same position for about forty years (124).

Rights through ditches are ordinarily acquired by grant, license, prescription or by eminent domain. 2 Kinney on Irr. and Water, p. 1456, par. 830. Even principal laterals and branches are not necessarily controlled by the same ownership. The sale of a ditch will not necessarily include a lateral. 2 Kinney on Irrigation and Water Rights, 2d Ed. p. 1785, par. 1003.

The practicalities of the situation indicate that the appellant was under no duty as to construction and design of the branches of the Southeast Ditch, and particularly Christenson's ditch.

The failure of proof as to ownership so indicates.

The affirmative evidence as to control so indicates.

The burden of proof was upon the plaintiff. It failed to assume such burden with respect to any duty of construction or design. As a matter of fact, such duty was not

pleaded, and no express finding was made of it or of the facts upon which it might be predicated. Yet, in the absence of such a duty assumed by the trial court, the effect of the decision is to make the canal company a virtual insurer that water originating in its canal will never cause anyone else damage, no matter in whose ditch it is found, or into whose control it has passed.

## II.

A CONTINUING DUTY OF MANAGEMENT AND CONTROL DID NOT REST UPON APPELLANT WITH RESPECT TO WATER FROM ITS CANAL AFTER IT HAD BEEN DISTRIBUTED INTO THE SOUTHEAST DITCH AT THE REQUEST OF STOCKHOLDERS ON THAT DITCH.

Assignments of error numbered 3, 9, 10, and 11, particularly, are covered by this heading, although all other assignments going to the general question of negligence are indirectly involved.

In finding No. 4 the trial court found that the "Southeast Ditch Company" is an association of stockholders for the convenience of said company (JR 54). Without expressly so holding, the inference is that the corporation had the duty of doing all that the users on the ditch did for themselves (Assignment No. 3). Finding No. 7 indicates that the appellant had the duty of notifying the users on the ditch when the water would be turned down to them, and had the duty to provide for the care of excess and unused water (Assignments 9, 10 and 11).

The latter finding ignored the undisputed evidence that the water was turned into the Southeast Ditch at the



beginning of the irrigation season at the request of stockholders therein, and was divided by them into turns, and that every period of every day was assigned among themselves, and that there was no period when someone was not assigned the use of the water (369). There is no proof that any user failed to take his turn. Aside from this point, which will be later considered, and speaking here strictly of duty, how can it be reasonably argued that the canal company must police not only 70 users assigned water around the clock on the Southeast Ditch, but similarly numerous users on the other laterals diverting from the company, to see to it, under penalty of being liable itself, that each user takes the water for the full extent of his turn, and that no waste, flood, return, or unused water gets back into the ditch? To assume the responsibility on each lateral and branch, and with respect to each user (and there is the end of a ditch of one sort or another on the land of every user) would be to place a burden upon the canal company which would be impractical and intolerable. It would penalize the average stockholder as well as the company, and encourage suits against the company on all manner of speculative and fanciful claims, despite the most burdensome expenditures for policing work.

We submit that on the basis of the facts in the record, for a more detailed statement of which reference is made to the summary of facts, *supra*, the law does not impose any such duty.

### III.

THERE WAS NO VIOLATION OF ANY DUTY OR ANY NEGLIGENCE AS PLEADED, OR AT ALL, ON THE PART OF PROVO BENCH CANAL AND IRRIGA-

TION COMPANY, AND THE PLEADINGS AND EVIDENCE ARE INSUFFICIENT TO JUSTIFY THE CONCLUSION OF NEGLIGENCE.

Assignments numbered 1, 2, 4, 5, 9, 10, 11, 15, 16, and 17. The assignments relate to determinations of the trial court, including ruling on general demurrer, findings, conclusion, judgment, ruling on motion for non-suit, and ruling on motion for new trial, necessarily premised upon the assumption that there was negligence on the part of the Provo Bench Canal and Irrigation Company.

We say these rulings were necessarily premised on such assumption, because, assuming responsibility for the sake of argument, the carrying of water through ditches is not a dangerous undertaking (4 Kinney on Irr. and Water Rights, 2d Ed. p. 3079, par. 1672). The plaintiff must allege and prove negligence in order to recover (Ibid, p. 3080). The owners of ditches and canals are not insurers (Ibid, p. 3077). See also Brian v. Fremont Irr. Co., 186 Pac. 2d 588, \_\_\_\_ Utah \_\_\_\_; Mackay vs. Breeze, et al, 269 Pac. 1026, 72 Ut. 305, supra; Annotation "Liability for overflow or escape of water from reservoir, ditch, or artificial pond," 169 A. L. R., 517, 523-529.

We are of the impression that the learned trial judge considered the duty of an irrigation company so broad with respect to water originating in its system as to make it a virtual insurer. If this is the purport of the decision, as it seems to us, it is contrary to the great weight of authority, including the doctrine followed by the Supreme Court of the State of Utah. If this is not the purport of the trial court's determination, but if it is founded up assumed negligence, then we submit such determination cannot stand,



because of the insufficiency of both pleadings and proof with respect thereto.

Paragraph 5 of the Amended Complaint charges that the irrigation water of the Provo Bench Canal and Irrigation Company . . . . was negligently, wilfully and unlawfully permitted, allowed and caused to flow from said ditch . . . . (JR 29). Up to and including paragraph 5, this is the only charge of any negligence, and there is nothing appearing to the effect that the negligence charged was attributable to, or committed by, appellant, or anyone else specifically. The water was "negligently permitted," etc., but by whom the complaint does not indicate. The same paragraph alleges damages of \$2500.00, but does not enlighten us as to who caused them or what negligence of what particular person or persons was responsible (JR 29).

Paragraph 6 charges certain individual defendants, not including appellant, with negligent failure to care for their water during their assigned turns, thus admitting that the water was the individuals' during the period in question. No mention of appellant is made therein, nor any connection with the appellant herein asserted (JR 30).

Paragraph 7 charges that appellant failed and neglected to notify the individual stockholders of the time said water would be put in said ditch, and neglected to provide for excess water, knowing that it was not cared for and was a potential danger, and after it had been notified of the failure of stockholders to take care of the water. This paragraph assumes that notification of possible or anticipated damage gives rise to liability, which we think does not necessarily follow. There must first appear a duty, and then a breach. The plaintiff in paragraph 6 of its Amended Complaint has already alleged that the individual defen-

dants were, during the times material, authorized, entitled to and required to use the water in said ditch, and that they negligently and wilfully failed and refused to use said water (JR 29). If there were a wilful failure on their part, as alleged, and if they had been authorized and were required to take said water, then the conclusion that appellant failed to notify them of the time the water would be put in the ditch would seem nullified. If all water were assigned, and the stockholders were required to use it, it would not seem to be "excess water."

The final paragraph in the Amended Complaint is that by reason of the negligence of the defendants as above set forth plaintiff was damaged (JR 30). The difficulty here is that there is no negligence above set forth attributable to appellant.

The findings are a little broader than the complaint, but not much better. As a consequence, it would seem that the general demurrer should have been sustained. At the present time, the judgment, unsupported by sufficient pleadings, and based on inadequate findings, should be set aside.

Assuming, however, that there are sufficient allegations and findings of negligence on the part of appellant, we submit that there is no proof to support such pleadings or to sustain such findings.

The charge that appellant failed to notify its stockholders when water would be put in the Southeast Ditch must fail, in view of the undisputed evidence heretofore pointed out that the water was put in the ditch at the beginning of the irrigating season, and its use was rotated among the stockholders on such ditch pursuant to their own arrangements. There was no question of putting the

water in, or withholding the water from, the ditch, or notice thereof, involved.

To the charge that appellant failed to provide for the care of excess and unused water, a complete answer is that there was no excess water, because turns were assigned around the clock by the stockholders themselves. As a matter of fact, there was no proof that there was any unused water. There is no proof that any stockholder failed to use the water throughout his assigned turn. But were there unused water, it would be impossible for any company to assume responsibility for the use of all water by every stockholder on a ditch serving seventy individuals, in connection with a number of similar ditches. The practicalities of the situation, as well as the law, we believe, negatives such duty.

Yet, were this burden the irrigation company's, it is further established without dispute that there had been provided by the stockholders themselves a system whereby any unused water could be turned out of the Southeast Ditch by notification to one Olsen at the head, should any stockholder not desire his turn. There was also the north branch of the ditch available for the diversion of any water not desired by any stockholder, because from this branch there could be no possibility of entry into the West Union Canal.

The evidence is insufficient to show that any particular quantity of water was in the Southeast Ditch at any time during the night in question. In fact, no attempt was made by the plaintiff to fix the quantity entering the road, although the burden was upon it. The fact that water was in the ditch, assuming it were not rain water, no more shows that a person on the ditch, whether a Tanner, Provo

Reservoir or Provo Bench stockholder, failed to take his turn, than that he took his turn and the water later flooded into the ditch lower down.

When the question of negligence is considered, it is interesting to contrast the known acts and failures of the plaintiff and its officers and stockholders with those of the appellant.

The night before the flume went out an officer of plaintiff company saw water running down the road near the Davis Corner toward the West Union Canal. He took no action or made no report to other officers of the company (190-191). The night before the break the water master of plaintiff company observed some debris on the screen near the intake of the pipe, but did not clean it off (243). During the night the water in lateral two was reported to have been turned back into the main canal, and the water master had such inadequate control or information concerning his own system as to be unable to state one way or another (259, 261). A drain from the State road, unconnected with the Southeast Ditch, was carrying a substantial flow of flood water into the canal, and was, and is, so arranged as to do this over a period of time, but no action was taken by West Union officials. The flume was constructed on loose sand without engineering advice, and no special precautions were taken during the heavy rain on the night in question. Before any water entered from the road at the Davis Corner, the West Union Canal was flowing approximately 50 second feet, and the capacity of the pipe line at the Skinner Hollow was not to exceed 35 second feet, making a washout inevitable (287-296, 77).

On the other hand, in view of the rain the morning of May 27th, the officers of the appellant had gone to the

mouth of Provo Canyon and reduced the flow in their canal to about a third (359-360; 382-383). They had therefore notified users on the individual ditches that the care of the water was their responsibility, and that steps should be taken to avoid any possible damage (Pl. Ex. H.). In short, the evidence fails to show anything that the officers of appellant did or omitted which indicated failure to act reasonably.

If there were any actionable negligence alleged against appellant, there was total failure of proof of such negligence, and there was a failure to show that any claimed act or omission on the part of appellant caused the damage to plaintiff, which brings us to our final proposition.

#### IV.

IF NEGLIGENCE WERE ASSUMED FOR THE SAKE OF ARGUMENT, THERE IS NO COMPETENT EVIDENCE TO ESTABLISH THAT THIS CAUSED OR CONTRIBUTED TO THE DAMAGES CLAIMED AND AWARDED; SUCH CLAIMED DAMAGES AND THE CASUAL CONNECTION ARE PURELY SPECULATIVE AND CONJECTURAL, AND THE EVIDENCE AFFIRMATIVELY SHOWS THAT THE ACTS OF THE PLAINTIFF ITSELF WERE THE PROXIMATE CAUSE OF THE DAMAGE AT THE SKINNER HOLLOW.

Assignments numbered 2, 7, 8, 9, 12, 13, 15, 16 and 17 are covered hereunder.

We have already sketched above some of the factors indicating acts or omissions of the plaintiff itself which caused or contributed to its own damage. Aside from the



question of contributory negligence, however, the fact remains that appellant or any person or persons connected with it did not cause, and could not have caused, the damage at Skinner Hollow.

Before any water entered the West Union Canal in the vicinity of Davis Corner, the canal was already running full at that point, in a volume of approximately 50 second feet. The capacity of the pipe line below was 35 second feet (72, 77-78). A washout was inevitable, as it is undisputed that there was no safety spillway for any excess flow. After water entered at the Davis Corner from the road, the capacity of the canal was reduced by gravel (78), and hence had the pipe not already washed out, the danger thereof would have been reduced. Thus the evidence negatives any casual connection between any claimed failures of appellant and the washout at Skinner's Hollow. The evidence of Mr. Davis was positive, certain and uncontradicted. There is no evidence in the record, except his, as to whether or not the canal was running full during the night.

The record shows that the West Union Canal has broken its banks at other times when it was raining (170). The flume was built on very loose and unstable sand. It was a common occurrence to find trash on the screen (249). The water master did not know what the West Union was flowing at any particular time, except for the River Commissioner's records, and his last measurement was the morning before the break (253-255). The loose sand and gravel under the concrete works at Skinner Hollow washes fast when the rain gets in (265). There was no evidence of washing in the vicinity of the screen (268). There have been frequent occasions when water from higher ground

runs into West Union Canal and washes over the banks, this often occurring when others above are irrigating (268).

Consider these, and the other facts outlined in the Statement of Facts, *supra*, in the light of these circumstances: The time of the washout at Skinner's Hollow within a twelve-hour period was not fixed. The time any person on the Southeast Ditch failed to use his water, or the fact that anyone failed to use his water, was not fixed. The amount of water flowing in the West Union Canal at the time of the break, except for the testimony of Davis that it was running full during that night, was not fixed. The amount of water entering the West Union Canal at the Davis Corner was not fixed. The amount of water entering at the new State Road was not fixed, except that it was sufficient to make a bigger wash than at the Davis Corner. How the break at Skinner's Hollow was caused was not determined, except that it could either have been from an excess flow in the canal or from debris flowing over or through the screen and blocking the intake pipe. Where the debris came from on the screen was not fixed, except to suggest it might have come from the Davis Corner or countless other places along the canal where livestock were fed, or from the drain on the new State Road, or other places. It is pure speculation and conjecture to say that any stick or piece of straw or willow or other debris arriving at the Skinner's Hollow originated at the Davis Road; on the other hand, because of the excessive flow in the canal before any water entered at the Davis Corner, it seems certain that the flume had gone out theretofore.

There is some evidence that at sometime during the night after 2 o'clock, and after the canal had run full for several hours, some water in an uncertain amount entered

the West Union Canal from the road at the Davis Corner. It is also apparent that sometime during that night the flume at Skinner's Hollow washed out. There was no relationship established between these two events.

The facts in evidence do not make a case, unless the appellant is not only an insurer against damage from water originating in its canal, but also against any and all damage to the West Union Canal, whether shown to have any direct or remote connection with it or not.

The damages awarded are founded upon pure speculation—worse than that—upon an affirmative showing that appellant had no connection with the washout at Skinner's Hollow, which occurred from an excess flow in the West Union Canal traceable in no respect to appellant. It is purely speculation without proof to suppose that the appellant was responsible for any water entering the West Union Canal, and we submit that there is no justification on the basis of even speculation to suppose that such water or anything carried with it washed out the flume at Skinner's Hollow.

### CONCLUSION

By reason of a combination of circumstances that is unlikely ever to arise again—an inadequate flume since replaced, heavy rain, a canal running beyond the capacity of an intake pipe installed on loose sand, water from uncertain sources, in uncertain amounts, entering the canal at various points during the night, and the various other peculiar facts shown by the record—the West Union Canal Co. suffered damages to a somewhat speculative amount, but now has a better and more efficient structure. It may be natural for it to seek to recover its alleged loss from



others. That attempt, and the amount awarded, are relatively unimportant.

However, the West Union Canal Company, as well as the Provo Bench Canal and Irrigation Company, and the scores of similar enterprises throughout the State, and their stockholders, will be irreparably prejudiced if unsound doctrine as to the duty of canal companies is accepted; if an unjustified and impractical burden is placed upon them in the nature of policing and regulating matters not within their customary responsibility; if claims against them as virtual insurers are fostered; and if ordinary care is interpreted as actionable negligence because canal companies defendant are involved; the public as a whole will suffer if proximate cause by precedent is made supportable by conjecture and speculation.

In view of the significance of these phases, and because:

No duty either in respect to construction or management on which liability can be founded was established as to appellant,

No actionable negligence was proved,

No proximate relationship between the claimed negligence and the damages awarded was shown,

The judgment should be reversed and plaintiff's action dismissed, with costs to appellant.

Respectfully submitted,

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