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

Utah Supreme Court

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

WEST UNION CANAL COMPANY,
a corporation,

Plaintiff and Respondent,

vs.

PROVO BENCH CANAL AND IR-
RIGATION COMPANY, a corpora-
tion, et al,

Defendant and Appellant.

Case
No. 7190

BRIEF OF PLAINTIFF AND RESPONDENT

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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.)

STATEMENT

The statements of facts given by appellant are not considered by respondent to accurately present the evidence

upon which the trial court acted and the questions posed do not present the questions which this Court must decide in this case.

The evidence showed that the Provo Bench Canal & Irrigation Company owned the laterals and had incorporated them into its system. (336-337). Any stockholder of the company who wanted his water delivered through the Southeast Ditch asked the secretary of the company to place it there for him, and the secretary was the only person who could do it. (342). The amount of the water delivered to each ditch was determined by the Provo Bench officers. (330-332). The list of stockholders receiving water through the ditch or lateral was then submitted to the secretary of the ditch and the only organization of users on the lateral was for the purpose of dividing the water furnished by the company into equal shares of time according to the amount of stock certified to it by the secretary of the company. (118-119). All stockholders had not been notified of the time of their turn. (105). The superintendent of the Provo Bench company testified as follows: "Well, I try and size up how much rainfall there is, and try and determine, **I mean in my own mind**, how much water the people on Provo Bench need, and **I regulate** the flow of the canal accordingly." (359). He did not advise anyone when he turned the water out of the canal. (361).

The Southeast Ditch, a lateral of the Provo Bench Company, ended at the Christenson property and a ditch continued to the road, above the bridge, where the water washed into the respondent's canal. (124). About 11:00 o'clock of the evening before the washout, water was flowing across the road just above the bridge which crossed the respondent's canal at 20th South and Main Streets, Orem.

It was enough that the witness stopped his car before crossing. (8). It was still flowing about 6 o'clock the next morning. (262). Mr. Jensen testified: "Right at the bridge where this gravel had coursed from the road there was a big pile, there, practically blocked the canal, and we walked down the canal I should judge a hundred feet and kicked into the new fill that had been carried down by the stream of water, and it was approximately six inches deep at that point." (180). The road was washed out and practically impassable for from 20 to 25 rods and it took from 30 to 60 cubic yards of fill to level the road. (21, 389). There was no evidence of any rain water running down the street. (26). Mr. Schemensky, who had lived near there for 30 years had never seen any run-off as the result of rain. (132). Before the washing out of the road it had been covered at the side by hay and trash, but after the washout the trash was no longer there. (184).

The respondent's canal had been cleaned that spring for its entire length. (46). About a half mile below the bridge where the washing into the canal occurred a pipe in the canal was washed out. (39). Just above the intake to this pipe was a screen to catch debris coming down the canal. The watermaster had checked it the night before and there was a little trash on it. The next morning it was filled right up. When the trash on the screen became heavy, as on the morning of the washout, the trash would flow over. (243). See also plaintiff's Exhibit "F", a picture taken the day after the washout. Mr. Zobell, the secretary of the West Union, had also checked the screen the night before and it was then clear. (140). The pipe at the intake could run 35 second feet of water. (214). On May 5, 1946, the canal had carried 41.2 second feet of water at the head

and there was about 25 second feet going to the pipe and it was taking it well there. (247-248). On the night in question there was 30 second feet coming into the canal and below the Davis corner there would be 18 second feet. (241).

It is respondent's theory, and the court adopted it, that, where the canal had successfully carried and was able to carry more water than the West Union had in it at the time of the break, and water from the lateral of the Provo Bench had washed out a road, carrying down a large amount of dirt and gravel, together with trash, along the road, such trash and extra water were the causes of the break.

To clear the canal below the break and to scrape a way for the new section of the canal took 70 hours with a bulldozer, at the reasonable price of \$6.00 per hour. (188). The cost of the pipe which was washed out was \$235.00, and had taken three men two days to put in. (172-173). The cleaning of the ditch at the bridge took two men and a team two days, and the reasonable cost of such work was from \$10.00 to \$12.00 for the man and team per day and \$1.00 per hour for the extra man. (181-183). To construct a new canal in the place available for such canal cost \$1674.61. (203). The Court found a total damage of \$699.25.

Additional statements of fact will be adverted to in the argument.

ARGUMENT

The arguments in appellant's brief are grouped in four divisions, and respondent's brief will generally follow this division.

I.

THE SOUTHEAST DITCH WAS A LATERAL OWNED BY AND UNDER THE CONTROL OF APPELLANT.

Appellant objects to the finding that the Southeast Ditch was a ditch of respondent's. The evidence shows that the appellant owned this lateral and had incorporated it into the company. (336). The only person who had authority to change water stock from one lateral to another was the secretary of respondent. (342). The amount of water delivered to each lateral was determined by the officers of respondent. (330-332). The list of stockholders whose water was turned into the lateral was then submitted to the secretary of the lateral and his only authority was to divide the time in accordance with the list. (118-119). The superintendent of appellant testified: "Well, I try and size up how much rainfall there is, and try to determine, **I mean in my own mind**, how much water the people on Provo Bench need, and **I** regulate the flow of the canal accordingly." (359). He did not advise anyone when he turned the water out of the canal. (361). This evidence is practically uncontradicted, and would seem sufficient evidence upon which to base the finding. There is no evidence of anyone else being the owner of this lateral.

Appellant argues that it has no duty to see that a way is provided to care for unused water. The recent case of *Briant vs. Fremont Irrigation Co.*, 86 Pac. 2d 588, _____ Utah _____, at page 590 states:

"(2, 3) Utah is one of the arid states and the conservation of water is of the utmost importance to the public welfare. To waste water is to injure that wel-

fare, and it is therefore the duty of the user of water to return the surplus or waste water into the stream from which it was taken so that further use can be made by others. See Kinney on Irrigation and Water Rights, 2d Ed., Sec. 812, pages 1614-1616. Furthermore, the natural channel serves as the natural drainage for the waters in the area. Appellant's allegation therefore that respondent returned and allowed others to return waste water to its natural channel, could not, in the absence of an allegation of negligence in the manner of so returning the water, entitle him to any redress against respondent for doing that which it should do."

See also Salt River Valley Water Users' Assn. vs. Stewart, 34 Pac. 2d (Ariz.) 400; Billings Realty Co. vs. Big Ditch Co., 115 Pac. (Mont.) 828.

A general demurrer was interposed to the amended complaint. In the complaint it is alleged that the appellant failed to provide for excess and unused water, knowing that it was not cared for and a potential danger, and also that respondent failed to notify users of water of their turns and that these acts of negligence were causes of the damages alleged. We submit that these are acts of negligence and certainly good against a general demurrer.

All users on the night of the washout had not been notified that it was their turn to water. (105). The Southeast Ditch is continued to the road above the bridge where the water washed into respondent's canal. (124). During that night the periods for irrigation turns, as shown by plaintiff's Exhibit "G," varied from seven minutes to about three hours, with a total of 13 irrigators in less than 12 hours and two of those had over half the time. The probability of an irrigator with seven minutes turn getting up

in the middle of the night in a rain to take a turn of that length is small. The appellant has furnished the water to these stockholders knowing these things, and now wants to put the loss on respondent, which could do nothing about it. It is submitted that, as the cases say, the appellant did have an obligation to see that a way was provided for waste and unused water to get back to the natural channel or be safely taken care of in some other manner. Appellant is surely not contending that the respondent must maintain such a canal that it will take care of all the water the appellant can turn into the road above its canal.

It may be that the system was adequate when the users were large users with crops that required water each irrigation turn, but with turns for part shares, with small plots and short turns, it is not now adequate to control the water. We submit that this is the problem of appellant, and cannot be pushed on respondent.

II.

APPELLANT OWES A DUTY TO CARE FOR WASTE OR UNUSED WATER.

Appellant objects to the finding of fact No. 4, in which it was found that the Southeast Ditch Company is an association of stockholders for the convenience of the Provo Bench Canal & Irrigation Company. The only evidence on this was that the only purpose of the organization of the stockholders was to divide the time among the stockholders in accordance with the list of shares of stock submitted to them by the secretary of respondent. (118-119). From this it would seem to be only an organization to save the

secretary of respondent the job of figuring out the time for each turn. It had no part in the control of the lateral.

There is no dispute in the evidence that all the stockholders had not received the notice of their turns. The list, plaintiff's Exhibit "G", was made up from the slips not delivered the day after the washout. (105). The water had been turned into the canal and laterals of appellant, and some water had probably been in the canal and laterals all winter. To turn down a full supply without seeing to it that the users were notified that the time for regular turns had begun is not the act of one who is careful. We believe that appellant was under duty to see that such notice was given. They had been notified that there was danger at the exact point where the damage occurred. (59-60). To say that the company can put water in its own ditches without notifying the users that their turns have started, and without a place for the unused or excess water to go, does and should constitute negligence.

Appellant argues that it would be impossible for it to control the water to the end of the laterals. Had it been distributed over the land of the stockholders near the end of the ditch there would have been no damage. If the company had someone who would care for the water and see that it did not go into this particular ditch unless it could be used, there would have been no damage. As between appellant and respondent, there would seem to be no question of whose liability it should be.

III.

NEGLIGENCE OF APPELLANT PLEADED AND PROVED.

Appellant argues that there is no allegation of negligence or proof of negligence. As has been stated, the complaint did allege the negligence of appellant in failing to care for the waste or unused water in the ditch. It was also alleged that appellant had failed to notify the stockholders of the times of their turns. The evidence heretofore referred to shows such to be the case. A general demurrer was interposed to the amended complaint, and in its construction respondent is entitled to all that it fairly alleges. If appellant wanted a more detailed statement of in what way it had failed to provide for care of waste water, it should have been demanded by special demurrer.

It is not contended that the appellant is an insurer, but with notice of damage being done, and more probable, certainly an irrigation company cannot say it has no duty to see that unused or waste water in its ditch is so disposed that it does not injure other parties.

We submit that under the authorities cited above it is the duty of the appellant to see that such water is cared for.

Appellant argues that there is no evidence that the stockholders did not use their water during the night in question. There can be no question but that water in quantity flowed from the end of the ditch on the road and into the canal of respondent. From the very situation of the irrigation ditch, watering land on both sides (125) the ditch could not accumulate rain water.

There was enough water in the ditch and flowing out at the end of it to wash a road for a distance of 20 to 25 rods, making it impassable. (21). It washed enough into the respondent's canal to block the canal where it went in, and at a hundred feet from that point was 6 inches deep. (180). Probably the amount of the water, in and of itself, would not have done the damage, but with the debris that was picked up along the way, the extra water did cause the damage complained of by the respondent.

On May 5th the respondent's canal had carried 41.2 second feet at the head and 25 second feet at the pipe. (247-248). On the night in question there was 30 second feet at the head and 18 second feet at the pipe. (241). The canal had been cleaned shortly before. (46). The screen at the intake to the pipe had been checked the night before and found practically clean. The next morning it was filled right up. (243). The intake to the pipe would take care of 35 second feet of water. (214). How can appellant say there is no evidence that this extra water and debris was not responsible? It is much more reasonable, under such facts, to assume that the debris and extra water were the responsible agents.

The pipe or flume washed out had been placed in an iron half pipe that had been there for several years, and the dirt under it had been pushed in by a bulldozer and tamped. (176).

Plaintiff's Exhibit "F" is a picture of the screen to catch the debris about 75 feet above the intake to this pipe. This picture was taken the day after the washout. (40). A glance at it will show that the water had raised the debris high enough to flow around the screen, and undoubtedly this is what had happened and caused the break and

washout. With the amount of water in the West Union Canal, less than had successfully been used previously, such a conclusion—that the debris caused the stoppage of the pipe—seems well justified.

There was no substantial amount of flood water on that night. Mr. Dawson, the president of the respondent company, testified that the wash from the State Road did not lead into the canal at that time (69) and that the wash from the State Road later in the year was caused by irrigation water. (70). Mr. Schemensky, who had resided in that neighborhood for 30 years, testified that he had never seen surplus rain water flowing down the road above the bridge where the washin occurred. (13). Mr. Gappmayer testified that there was no evidence of any washing above where the ditch came to the road, and that the ground would take a lot of water. (207).

The trial court was able to see the witnesses when they testified, and to judge of their credibility, and his findings have much evidence to support them.

IV.

NEGLIGENCE OF APPELLANT CAUSE OF DAMAGE TO RESPONDENT.

Appellant contends that there is no evidence to connect it with the damages to the canal of respondent. It has been set forth previously that the Southeast Ditch was a ditch of appellant's, who did what supervising was done on it; that the water came out of this ditch and washed the rocks, dirt and debris from the road into respondent's canal; that this canal had previously handled more water than was in the canal on the night in question; that the

screen just above the intake to the pipe was clear the night before the washout and was covered over the next morning. The plaintiff's Exhibit "F" shows that the sticks and straw had been washed around this screen. This picture was taken the day after the washout. No one saw the water go over the screen and the debris sticking at the mouth of the pipe, but there is plenty of evidence on which to base such a conclusion.

Appellant cites the evidence of Mr. Davis. He never went above the bridge and never said he looked to see if the canal had been washed full of rocks. He heard the rocks rolling down during the night and no one saw them below the bridge the next day. Mr. Ervil Davis stopped his car at about 11 o'clock the night before, because the water was washing across the road about 40 feet above the bridge. (8).

Appellant claims the West Union Canal had broken its banks at other times when it was raining. The time referred to was caused by water from Roy Gappmayer's farm, which put a bar of gravel in the ditch. (175).

Mr. Frank Wentz testified that the water from the river at the intake to the canal could not change much. (387). The official records show 30 second feet at the intake. (Plaintiff's Exhibit "I", page 77). Appellant's Southeast Ditch circled the hill above where the respondent's canal is located, and the Provo Bench Canal & Irrigation Company did not report any other wash into respondent's canal. (103-104).

This is a case where the trial judge determines the fact, and if there is evidence to sustain his judgment, this Court will not reverse it. We submit that there is not only sufficient evidence to sustain the judgment, but that the

clear preponderance of the evidence sustains it. There is no other reasonable conclusion that can be reached on the evidence submitted.

CONCLUSION

In conclusion, it is respectfully submitted that the appellant has not sustained the burden of showing that no substantial evidence was introduced upon which the findings could be based. In fact, it was by picking out only unusually favorable pieces of evidence that the matter could be presented favorably to its contention.

We believe that an irrigation company has some duty other than merely bringing the water for irrigation out of a river and then turning it loose without notice, and without a sufficient ditch to care for it. We believe that this is especially true where they have been notified that damages have resulted before and indications are that further damage would be caused by them.

The judgment should be affirmed, with costs to respondent.

Respectfully submitted,

J. C. HALBERSLEBEN,
Attorney for Respondent