

1949

# Lewis Beagley v. United States Gypsum Company and Ed V. Downs : Brief of Defendants and Appellants

Utah Supreme Court

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Case No. 7302

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

LEWIS BEAGLEY,

*Respondent,*

vs.

UNITED STATES GYPSUM COM-  
PANY, a Corporation, and ED V.  
DOWNS,

*Appellants.*

**FILED**

MAR 22 1948

CLERK, SUPREME COURT, UTAH

**BRIEF OF DEFENDANTS, APPELLANTS**

**CRITCHLOW, WATSON & WARNOCK**

*Attorneys for Appellant*

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APPELLANT'S BRIEF

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Since the transcript of the testimony is listed as page 52 of the Record, the references to testimony herein will be cited to the paging of the reporter's transcript and indicated by the abbreviation "Tr."

STATEMENT OF FACTS

*The Complaint*

This is an action for alleged damage to a flock of turkeys owned by the plaintiff, caused, as alleged in the complaint, by the action of the defendants Gypsum Company and Mr. Downs, its mine foreman, in shutting off

the water from which the plaintiff obtained his supply for his turkeys. The complaint alleges that the defendant unlawfully and negligently interfered with the flow of the water in the pipeline of Nephi City, with the result that the turkeys were deprived of water from the morning of October 27, 1945, to about noon of October 28, 1945, and as a result of this the turkeys became nervous, went off their feed, flew from the lot where they were kept, ate deleterious grasses, drank stagnant water and failed to gain weight thereafter, to plaintiff's damage in the sum of \$10,000.00. The case was tried to the court without a jury and judgment rendered for the plaintiff, from which the defendants have now appealed.

### *The Water System*

The United States Gypsum Company and the City of Nephi are the joint owners of the right to the use of the flow of water from certain springs known as Rowley Springs, arising in the mountains above the mine of the Gypsum Company. The Gypsum Company owns one-sixth of the flow and the City five-sixths (Tr. p. 2). The water is collected in a box something over a mile above the mine, and from there it flows through a 3 inch pipe down past the mine and into a concrete box located near the northeast corner of the Pine View Cemetery of Nephi City. The Gypsum Company had the right to take its water from the pipeline by means of a two-inch pipe at a point approximately 4,000 feet distant and in elevation considerably higher above the

concrete box—frequently referred to in the testimony in this case as “the breaker box” (Tr. p. 178). This breaker box is 3 feet 7 inches wide by 3 feet 10 inches long (inside measurement) and 8 feet deep from the top (Tr. p. 175) and was covered with a plank lid which was kept locked with hasp and padlock.

Above the breaker box the pipeline ran at a steep grade up the hill and beyond to the collecting box far up the canyon. At a point about 3,750 feet above the breaker box there is a shut-off valve, on the open mountainside (Tr. p. 178). This valve is not enclosed or locked in any way and can be opened or closed by anyone passing by. No key is necessary to turn the valve (Tr. p. 216-7). This condition and method of use had existed for many years prior to the incident involved in this action (Tr. p. 187).

The flow of the stream is variable, according to the seasons (Tr. p. 210), and is also subject to interruption above the collecting box up the canyon by leaves, debris and other causes. There is no device on the pipeline by which the flow in the line can be measured or divided as between the City and the Gypsum Company (Tr. p. 220).

At the breaker box the water is taken into the City mains through a four-inch pipe (Tr. p. 176) which is located on the westerly side of the box (opposite the side on which the water enters the box) at a point approximately one foot above the bottom of the box (Tr. 175). In the spring of 1943 a 1½-inch pipe was con-

nected directly to the box to convey water to the premises upon which the plaintiff kept his flock of turkeys during the summer and fall of 1945 (Tr. p. 129). The opening in the breaker box to this pipe was located on the same side as the outlet to the City main and the bottom of the 1½-inch pipe was 1 inch lower than the bottom of the outlet to the City main (Tr. p. 176). On the same side there was an overflow outlet 4 inches in diameter located at an elevation 2 feet 2¾ inches above the 1½ inch outlet, or 21 inches above the top of the outlet to the City line (Tr. p. 176). In the testimony the 1½-inch outlet is sometimes referred to as the Beagley outlet, since it was through the pipe attached to this outlet that water was conveyed to the plaintiff's turkeys.

The pipeline to the plaintiff's turkeys was 1½ inches in diameter from the box for a distance of twenty-five feet, at which point it ran into a water meter. This meter is at an elevation 1.4 feet below the outlet from the box (Tr. p. 177). From this meter the pipeline continued with a ¾-inch pipe 729 feet to a point on the north line of the Beagley turkey ranch. At this point there was a second meter (Tr. p. 177). This second meter is 34 feet in elevation below the first meter, but in its course from the upper meter the pipeline crosses a swale or wash so that the pipe there makes a flat U (See Exhibit "B").

Within the fence enclosing the turkey ranch the water was distributed through pipes, hose and troughs with stand pipes with valves by which the water could be shut off completely or could be diverted from trough



to trough as needed. Some troughs were equipped with water float valves which shut off the water from that trough when full (Tr. p. 31-32).

Mr. Beagley claimed the right to the use of the water under a permit from the City of Nephi issued on April 28, 1943 to Bailey & McCune, a partnership, from whom Beagley leased the ground on which he raised his turkeys in 1945. This permit (Exhibit "A") recites that Bailey & McCune had made application for permission to receive water from the City pipeline for domestic and culinary uses, that they have represented that

"They do not make such installation upon any representation that they will receive constant, continuous or continual service; but such application is made only on the basis of use of excess waters available in Nephi City Waterworks System."

The permit was issued under date of April 28, 1943 upon the condition that the installation and maintenance of the pipeline, boxes and valves, and the use and payment for use should be under the ordinances and rules and regulations of Nephi City relative to its Waterworks System and

"(5) That the license herein issued shall not be transferable, and must be renewed every three years upon written application."

The record is devoid of any proof that Nephi City had consented to the use of water under this permit by Mr. Beagley or had issued a permit to him.



### *The Contention of the Plaintiff*

It is the contention of the plaintiff that the defendants negligently or tortiously closed the valve on the main pipe line above the breaker box and stopped the water from flowing past and into the breaker box, causing the water level in the box being drawn off through the City main and the turkey pipeline, to fall to a point at or near the bottom of the turkey line, thus stopping flow of water through that line and causing the meters to stop operating. He contends further that the moving parts in the upper meter stopped at the precise point in the meter which would completely block the meter, and because of the condition of the meter due to wear and deposits of lime, etc., the mechanism stuck so tightly at that point that no water could flow through even after the pressure of water from above had been increased to the maximum possible by filling the breaker box to the overflow.

### *The Evidence*

About 9 o'clock on the morning of Saturday, October 27, 1945, Alma Madsen, the caretaker of the turkeys, reported to Mr. Lewis Beagley, the plaintiff, that there was no water running to the turkeys. Mr. Beagley went up to the place and verified the report that there was no water coming through (Tr. p. 34). He then returned to town to find Mr. Park, the water superintendent for the City. Being unable to find him he asked his father,

Mr. Harry Beagley, to go up to see if he could get some water.

Mr. Harry Beagley, the plaintiff's father, first arrived at the breaker box somewhere about 11 o'clock (Tr. p. 104) on Saturday morning. He couldn't hear water running into the box so he returned to town, borrowed a hacksaw, returned to the box, sawed the lock off and lifted the lid. There was no water flowing in. In a few minutes a Mr. Howell, the caretaker of the Paxman turkeys which were being raised some distance north and east of the breaker box, came down from above and while Howell was there the water came in with a "*pretty good flow*" (Tr. p. 104). Mr. Beagley then closed the lid and went down to the turkeys to regulate the flow there but no water came. He returned to the box, lifted the lid again and there was no water flowing in (Tr. p. 94). He then went up the pipeline to where Mr. Paxman had some turkeys which were watered from small line which took off from the City pipeline some distance above the breaker box and below the shut off valve (Tr. pp. 94 and 251). There was no water coming through this line (Tr. p. 94). Then he and Mr. Howell walked up the canyon (maybe a mile or more) to the intake to the pipe line (Tr. 95). There they found the water overflowing the collecting box. Then they returned, following the pipeline down to the mine tipple where Beagley saw Ken Wright of the Gypsum Company who was operating the aerial tram which carried the plaster rock from the mine to the mill some mile or so away (Tr. pp. 96 and 110). Beagley told Wright

that “the water was shut off the turkeys” and Wright said that they had been testing the pressure of the pipes in the mine and that he thought the water had been turned on (Tr. pp. 97 and 110).

After waiting a while for Mr. Downs, the mine superintendent, Mr. Beagley went back down to the box where he found a little stream of water flowing in (Tr. p. 98). He then got in his car, drove up the foot of the hill on which the mine tippie is located, walked up to the workings to find Mr. Downs. Not finding him, he went around the hill to the shut off valve and “turned the water loose,” turned it “so I could see (sic) the water swishing through” (Tr. p. 98). Then he returned to the mine where he saw Mr. Downs and told him he had better check and see how the water pressure at the mine was. Downs turned a tap and said, “Yes, we have got pressure.” (Tr. p. 99).

Mr. Beagley returned to the breaker box where he found Lewis waiting for him. The water was flowing in (Tr. p. 100). He then went over to the turkeys to see if the water was coming through and then went back to town to get his dinner. It was then about 3 o'clock in the afternoon. Lewis Beagley, the plaintiff, went down to the turkeys and waited fifteen or twenty minutes at the taps. No water came through so he returned to town to look for Mr. Park, the City watermaster, again (Tr. p. 59). Again being unable to find Mr. Park or his assistant he went to his father's house and told him there was still no water coming through to the turkeys.

After Beagley, Sr. had had his dinner he went back up to the turkeys. Finding no water running through to the turkeys, he went to the box and then to the upper meter. Lifting the lid of the meter he observed that the dial indicator was not turning. By this time Lewis Beagley had arrived with Alma Madsen and with hip boots and gunny sacks. They lifted Madsen down in the box (Tr. p. 106) in the hip boots and Madsen removed the screens which were full of holes and stuffed the sacks in the outlet to the City main. The water soon rose to the overflow. The meter still wasn't turning. Before they plugged the City outlet the water level in the box was above the City and turkey outlets (Tr. p. 112).

Lewis went back to town and about sundown returned with Mr. Park who took out the insides of the meter and connected it up again and said: "Now you will have water." Lewis Beagley who had meanwhile gone down to the taps at the turkey ranch called to Park, "I believe it is coming through all right." (Tr. p. 118). Mr. Park then left. Mr. Harry Beagley then went down to the turkeys, found just a little drizzle of water coming through, and left. (Tr. 103-4).

It was then dark so the plaintiff returned to town to get Mr. Park to go up again. Mr. Park said he would go, and the plaintiff went to a party. After the party he went up to the turkey ranch at about midnight to sleep but didn't look to see whether or not the water was getting through to the turkeys (Tr. p. 71).

The following morning, about six o'clock, the plaintiff got up and found there was no water on so he went back down town and saw Mr. Park who said he would go up as quickly as he could (Tr. p. 41). Then Mr. Beagley started to hunt for a tank to have water hauled up to the turkeys. He finally located one, but by the time he got up to the turkeys the water was running. This was somewhere between eleven and twelve o'clock in the morning (Tr. p. 43).

Mr. Park had not gone up to the box again on Saturday night, but went up early Sunday morning. There he replaced the upper meter with another that he had taken with him. This meter had no disc or chamber so the water could flow through without interruption (Tr. p. 120). Then he went down to the lower meter, a half inch meter. He took this meter entirely out of the line and still the water didn't come through the open pipe. So he got a piece of wire and ran it in the pipe, cleaning out the pipe, and the water started to run. Mr. Park stated that "Some little fiberish pieces came out of the pipe, may have been rust, may have been pieces of brush, sediment of some kind" (Tr. p. 122).

The upper meter was found to have quite a bit of corrosion and encrusted with lime deposit (Tr. p. 131).

Mr. Downs, the mine superintendent, testified that on Friday, October 26th, the water pressure to the compressor at the mine was low and he had gone down to the check valve on the pipeline, which was located about 217 feet below the take off pipe to the mine, and turned

it down a bit to back the water up in the line to the mine takeoff (Tr. p. 201). After he had turned it down he could still hear the water flowing past in the pipeline (Tr. p. 203). He then returned to the mine, went up to the 300 foot level, about 2,000 feet, tested the pressure, returned to the restroom, telephoned to Hansen, a fellow employee, on the tippie to raise the valve on the pipeline (Tr. p. 206). Hansen did so (Tr. p. 242). Mr. Downs later came down to the tippie and then went over to the valve and raised it himself another turn, and again heard the water flowing past into the pipe line below (Tr. p. 207). Between the times Downs turned the valve first down and then up he estimated not more than 45 minutes had elapsed (Tr. p. 208). Nothing else was done at the valve that day and the valve was not touched by him or by anyone connected with the Gypsum Company on the following day (Tr. p. 208).

During the three years Downs had been foreman at the mine they had turned the valve whenever needed to get water at the mine, usually in the fall of the year when the weather would change (Tr. p. 210).

The Complaint is stated in two causes of action. The first alleges that the immediate cause of the failure of the water to reach the turkeys is that "the pipeline leading therefrom (the breaker box) supplying the turkeys ran empty and dry, and the water meters attached on said pipeline became set and the pipeline filled with air pressure so that when the water was again turned into said three inch line (the line which fed water into the breaker box) the water could not and did not run

through said pipeline \* \* \* supplying the turkeys from said breaker box until after great and serious delay.” (Paragraph 5, First Cause of Action, R. p. 3).

The second cause of action attributes the immediate cause of the stoppage to the alleged fact that “as the water (in the breaker box) receded to and below the intake to the pipeline leading to the parcel of land (on which the turkeys were watered), the suction of the water running into the pipeline sucked and drew into it \* \* \* and into the meters, chaff and lint floating on the surface of the water \* \* \* (which) stopped and lodged in the pipeline and meters and thereby stopped the flow of water \* \* \* until after great and serious delay.” (Paragraph 5, Second Cause of Action, R. p. 5).

### *The Damages*

Evidence was received of the weights and grades of turkeys raised by four other turkey growers in the vicinity of Nephi from which it was argued, and the Court so found, that except for the fact of the interruption of the water supply to the plaintiff's turkeys from the morning of October 27th to 11 o'clock on the morning of October 28th, plaintiff's turkeys would have averaged, in weight and grades, when they were processed on November 21st and November 28th, the equal of the average of the turkeys of those four growers. The Court awarded as damages the difference between what the plaintiff would have received had they equalled these, at the prices at which he had contracted to sell, and the



amount he actually received, less a sum claimed to equal the cost of the feed which they did not eat but would have eaten except for the loss of the water.

## STATEMENT OF ERRORS RELIED ON

1. The trial court erred in finding as a fact that on the 27th and 28th of October, 1945, or at any other time, "the plaintiff had the right to the continuous and uninterrupted flow and use" of waters from the breaker box through his pipeline to the turkeys, since the uncontradicted evidence is solely to the effect that whatever right he had was under the permit granted by the City of Nephi which gave him use of water only from the excess of waters available to Nephi City Waterworks System with express disclaimer of right to receive constant, continuous or continual service (See Finding of Fact No. 3-A, Record p. 29 and Exhibit "A").

2. The trial court erred in finding as a fact that the defendants "on the morning of October 27th, 1945, at about 9 o'clock, by a valve on the 3-inch pipeline at and below the said connection (to the mine) \* \* \* turned and shut off the water flowing down through said 3-inch City pipeline" and further erred in finding that the defendants "permitted said water to be so turned and shut off for approximately five hours" for the reason that there is no evidence to support either such finding of fact, and for the further reason that the said findings of fact are contrary to the evidence in the case (Finding of Fact No. 4, Record p. 29).

3. The trial court erred in finding, by implication, that it was unlawful and in violation of section 103-59-2, Utah Code Annotated 1943 for defendants to turn the valve on the pipeline, for the reason that such finding is contrary to law (Finding No. 4, Record p. 30).

4. The trial court erred in finding that the defendants wilfully or negligently or in reckless disregard of any rights of the plaintiff shut off the flow of water through said pipeline on the 27th day of October, 1945, or at any other time, for the reason that there is no evidence in the record that the defendants at any time shut off all the water flowing in said line or any more of said water than an undivided one-sixth thereof, and further that the uncontradicted evidence in the record establishes that the defendants had a right to close down the valve to obtain its share of the flow of water for beneficial use by the defendant Gypsum Company (Finding of Fact No. 4, Record pp. 29-30).

5. The trial court erred in finding as a fact that the defendants or either of them knew of the plaintiff's use of water from the pipeline for his turkeys, or knew of his need for the use of said water or any water for his turkeys, for the reason that such findings are not supported by any evidence in the case (Finding of Fact No. 4, Record p. 30).

6. The court erred in finding that "the defendant (sic) could have and should have foreseen" that by turning the valve and shutting off the flow of water the breaker box, pipeline to the turkeys and meters thereon

would become empty, that the meters would stop operation, and the pipelines become filled with air and the meter mechanism become dry, for the reason that there is no evidence in the action that the defendants or either of them knew of the existence of plaintiff's pipeline, or the meters thereon, or the condition thereof, or the conditions existing at the breaker box, and for the further reason that there is no evidence in the action that the box did become empty, or that the pipeline and meter became empty or full of air, or that either of such conditions caused the meters to fail to permit water to flow through when the head of water in the box was restored (Finding of Fact No. 4-A, Record p. 30).

7. The court erred in finding as facts that the failure of water supply to the turkeys from 9 a.m., Saturday, October 27, 1945 until about 11 a.m., Sunday, October 28, 1945 was the direct, or proximate, or natural result of any act of the defendant or others in turning down the flow of water into the breaker box for the reasons that (a) there is no evidence in the action that the water was shut off by the defendants at said time or at all, and (b) there is no evidence in the record that the meters ran dry, and (c) there is no evidence in the record that the meters became set so as to prevent water flowing through, and for the further reason that the clear preponderance of the evidence leads to the conclusion that the water failed to pass through to the turkeys because of sediment and other matter which plugged the pipeline to the turkeys, which said sediment and matter had been permitted to accumulate and stop the flow of water

by the negligence and carelessness of the plaintiff. (Finding of Fact No. 5, Record pp. 30-31).

8. The court erred in finding as a fact that the plaintiff did all that a reasonably prudent person under the same circumstances could or would have done to supply water to the turkeys and minimize the damages, for the reason that a reasonably prudent person would and the plaintiff should have anticipated that the failure of water was caused by sediment and foreign matter plugging the pipeline or meters or both and would have and should have inspected said line, and would have and should have known that the meters were corroded and might stop and block the further flow of water through the pipeline, and would have and should have immediately made effort to supply the turkeys with water until the flow was restored, and the uncontradicted evidence is to the effect the plaintiff failed to take reasonable steps to find the cause of the stoppage, to repair it, and failed and neglected to take any steps or make any effort to supply the turkeys with water from other sources until the morning of Sunday, October 28, 1945 (Finding of Fact No. 5, Record p. 30).

9. The court erred in finding as a fact that the turkeys went out of bound and control because of thirst, in finding that the turkeys or any of them came into contact with or consumed foreign vegetable or stagnant waters beyond the premises or consumed turkey droppings, in finding that the lack of water caused 200 of said turkeys or any of them to contract fever and disease and die, or that any turkeys did contract fever and

disease, for the reason that there is no evidence in the record to support said finding (Finding of Fact No. 7, Record p. 31).

10. The court erred in finding that the death of any turkeys after October 27, 1945 was the direct and proximate result of any act or neglect upon the part of the defendants or either of them (Finding of Fact No. 7, Record p. 31).

11. The court erred in finding as a fact that said turkeys or any of them lost weight, or failed to gain weight, or developed excessive pin feathers, drop crow or became off color for the reason that there is no substantial or any evidence in the record to support such findings (Finding of Fact No. 8, Record p. 31).

12. The court erred in finding as a fact that the condition, weight and grades of the turkeys at the time of marketing was the proximate or direct result of any act or neglect upon the part of the defendants or either of them for the reason that there is no evidence in the record of any causal connection between the condition of said turkeys and any act or omission upon the part of the defendants or either of them (Finding of Fact No. 8, Record pp. 31-2).

13. The court erred in finding as a fact that "had not the defendants turned and shut off the water the turkeys when marketed by the plaintiff would have graded, weighed and averaged as stated in Finding No. 8 and would have yielded the sum of \$41,739.34" for the reasons (1) that there is no evidence of any causal con-



nection between any act upon the part of the defendants and the weights or grades of the turkeys or that the condition was the proximate result of any act upon the part of the defendants, (2) that there is no competent evidence in the record to support the finding that the turkeys would have so graded and weighed but for any act or thing done by the defendants (Finding of Fact No. 8, Record pp. 31-33).

14. The court erred in finding that the plaintiff was not negligent or careless in removing the lid to the breaker box and stuffing sacks therein for the reason that the uncontradicted evidence is to the effect that said plaintiff or his agent did enter said box, and standing therein removed the screens at the inlet to and outlets from said breaker box, place gunny sacks in the outlet into the City main and cause or permit to be caused sediment and other substances and material to clog the pipeline to the turkeys and meters on said line, that the plaintiff was negligent and careless in committing said acts and that the stoppage of said pipeline was the direct, proximate and natural result of said acts and contributed to any other cause of the failure of the water to flow through to the turkeys (Finding of Fact No. 10, Record p. 33).

15. The court erred in finding as a fact that "the meters on the pipeline were functioning normally up to the time the water was turned and shut off by the defendants" (Finding of Fact No. 11, Record p. 34) for the reason that there is no evidence in the record that the meters were functioning at anytime before Sun-

day, October 28th when a new meter was installed in the upper part of the pipeline leading from the breaker box, and for the further reason that there is no evidence that the defendants or either of them shut off the water.

16. The court erred in finding as a fact that “the plaintiff did not know, nor by the exercise of ordinary care should have known, that the meters were old, and worn and clogged with rust and corrosion (Finding of Fact No. 11, Record p. 34).

17. The court erred in failing to find that the plaintiff was negligent and careless in failing to know the condition of said meters and in repairing or replacing them and in failing to find that such negligence proximately contributed to the failure of water to flow through the pipeline to the turkeys and cause the damage to the turkeys, if any.

18. That the court erred in refusing to admit evidence offered by the defendants to prove the existence of a custom and course of conduct of many years standing between the defendant Gypsum Company and Nephi City respecting the method of use of their respective rights to the use of the waters in the pipeline and the use of the valve for the purpose of regulating said use as between them (R. Tr. pp. 189-191, 210, 220-22).

19. The court erred in entering judgment against the defendants in the sum of \$6,432.71 or in any other sum for the reason that (a) the liability of said defendants for the condition of the turkeys rests solely upon conjecture and not upon facts established by the evi-



dence or legitimately to be drawn therefrom and (b) the damages found are purely speculative and not supported by any competent evidence.

## ARGUMENT

It is axiomatic that before a person can be held liable in negligence or tort for damages to the person or property of another, the burden is upon the plaintiff to prove by evidence that the defendant committed the act complained of, that it was committed in an unlawful or negligent manner and that the plaintiff suffered injuries of which the act was the proximate cause.

It is not sufficient that the plaintiff prove merely that the act could have been committed by the defendant when the evidence is equally susceptible of the inference that it could have been committed by someone else or by some other cause. Nor is it sufficient that the plaintiff prove only that the injuries could have resulted from the act committed, when the evidence is equally susceptible of the inference that they could have resulted from some other cause. In this case the evidence utterly fails to justify the inference that the defendants committed any tortious act or any act in a negligent manner, and likewise fails to establish the fact that the injuries which the plaintiff claims to have sustained were the necessary result or consequence of any act of the defendants. In other words, the Findings of the court that the defendants committed the act complained of, that the act of the defendant was negligent or tortious, that any

injuries suffered by the plaintiff were proximately caused by any act of the defendants, and finally that any injuries were sustained by the plaintiff, were based upon mere speculation and conjecture and not upon any proven fact or inference to be legitimately derived therefrom.

### POINT I.

THE EVIDENCE FAILS TO SUPPORT THE FINDING OF THE COURT THAT THE DEFENDANTS TURNED THE VALVE IN VIOLATION OF SECTION 103-59-2, UTAH CODE ANNOTATED 1943.

(a) *No right of the plaintiff was violated.*

The plaintiff, while admitting the defendant's right to one-sixth of the flow of the springs and its right to take it from the pipeline above the breaker box (see Stipulation, Tr. pp. 1-2), contended that the defendant had no right to adjust the check valve on the pipeline so as to obtain its water, and that if it did so it was a violation of Section 103-59-2, Utah Code Annotated 1943, and is therefore responsible for any and every consequence.

This section provides:

“Every person who, in violation of any right of any other person, wilfully turns or uses the water, or any part thereof, of any canal, ditch, pipe line or reservoir, except at a time when the use of such water has been duly distributed to such person, or wilfully uses any greater quantity of such water than has been duly distributed to him, or in any way changes the flow of water when lawfully distributed for irrigation or other useful purposes, except when duly authorized to

make such change, or wilfully and maliciously breaks or injures any dam, canal, pipe line, water-gate, ditch or other means of diverting or conveying water for irrigation or other useful purposes, is guilty of a misdemeanor.”

Under the very terms of this statute the liability is contingent upon the act being in “violation of any right of any other person.”

The plaintiff, however, had no right in this water. Whatever right he had was under the permit issued by the City of Nephi to Bailey McCune in 1943 (Exhibit “A”), which permitted Bailey McCune to connect the pipeline to the breaker box. This permit, however, did not purport to give the permittee the right to a continuous flow of water or to any water except from the excess of waters not needed by the City. Furthermore, it was necessarily subject to the superior rights of the defendant Gypsum Company to the use of one-sixth of the flow of water in the pipeline and to take this water from the line above the breaker box. It was also subject to the right of Ned Ostler to take water from the pipeline above the breaker box and below the Gypsum Company’s takeoff. This is the pipeline used by Mr. Paxman for watering his turkeys during the season of 1945 (Tr. p. 88). Nor would any right of the City be violated provided the adjustment of the valve by the defendant was for the purpose of obtaining the use of its water and provided that by such adjustment of the valve the defendant did not use a greater quantity of water than it was entitled to.

Under these conditions the plaintiff had no right to a continuous flow through the Bailey McCune pipeline nor could he as a reasonably prudent man expect to have a continuous flow at all times.

The proof, therefore, fails to establish a right or interest in the plaintiff which had been invaded or interfered with, and the finding of the court that he did was erroneous.

(b) *There is no evidence of any control over the distribution of the water in the pipeline as between the defendant and the city or any fixed arrangement as to the time of use.*

There is not the slightest evidence in this case of there being any control over the distribution of the water here involved between the two owners thereof, that is the Gypsum Company and the City of Nephi. So far as the evidence in this case is concerned both parties had the right to use the valve for the purpose of obtaining their rightful shares without limit as to time. There was no water master to distribute the water and so far as the evidence here shows it may have been perfectly agreeable between the owners thereof for the Gypsum Company to use all of the water flowing from the spring for one day out of every six or for four hours of each day, or in any other manner which would enable the two owners to utilize their rights to the greatest efficiency. *Spanish Fork City v. Spanish Fork East Bench Irrigation Company*, 46 Utah 487, 151 Pac. 46.

Further than that, however, there is no evidence in the record that at any time did the Gypsum Company use any greater quantity of water than it was legally entitled to, one-sixth. There is no evidence of the volume of water flowing in the pipeline at any time, nor the volume of the water that was actually taken by the Gypsum Company at any time. There were no measuring devices on the line. The mere fact that at various times during the morning of Saturday, October 27th, there was no water flowing into the breaker box is no evidence or proof that the Gypsum Company had shut it off or that it was using more than its share. It may have been that there was no water coming into the pipeline at the head at the particular time, or it is possible that the flow into the line at the head was so small that the five-sixths or even the entire flow passed the valve and was being drawn off through the Paxman pipeline.

The defendant offered to prove that the division and the use of the waters between the two owners by means of the valve had been employed and acquiesced in by the Gypsum Company and its predecessor and the City for more than 25 years, during which time the Gypsum Company and its predecessor had, whenever necessary, employed the valve for the purpose of obtaining its water at its place of use with the knowledge of and without objection from the City. This offer was refused by the court and the defendants have assigned its rejection as error.

Apparently the court took the position that a right to so use the valve was exclusively the right of the City

and could not be delegated or exercised by the Gypsum Company without a written contract or permission by the City Authorities (Tr. p. 210.) A short answer to this position is that in this case there is no evidence of ownership of either the pipeline or the valve by the City, and so far as the record here is concerned these facilities may have been the property of the Gypsum Company. The valve was located on the open hillside more conveniently to the mine than to the City. There was no lock or other guard upon the valve and it could be turned at any time by anyone. The obvious inference to be drawn from the physical situation is that the valve was placed at that point in the pipeline for the very purpose of making its use convenient for the mine. Clearly there is no basis for any inference that it was under the exclusive control of the City.

We submit, nevertheless, that long acquiescence in a particular method of distribution and use of water from a common source by the owners thereof is competent and satisfactory evidence of a right to continue such method of use and distribution as between those owners so long as it does not interfere with any superior right, and rejection of the offered proof was error.

In 67 C. J. 1084, Section 651 it is said:

“Long continued and unvarying use of water by the grantee, acquiesced in by the grantor, will furnish very satisfactory evidence of the extent of the grant.”



In *Villa v. Kaylor* (Wash.) 160 Pac. 297 the court said:

“That such a continued mutual diversion and use of all the water for such a period of time would become determinative of the rights of the parties touching the apportionment of the waters seems plain as a matter of law, especially when such apportionment seems equitable as it does in this case.”

(c) *There is no evidence that either of the defendants turned the valve on October 27th, the day charged in the complaint and found by the court.*

Not only was there a complete failure of the evidence to show that an adjustment of the valve by the Gypsum Company would be a violation of the statute, but there was also failure of the evidence to prove that the Gypsum Company did adjust the valve or shut down or turn off the water on the day charged in the Complaint and found by the court, and the Finding “That on the morning of October 27, 1945 at about nine o’clock by a valve on said pipeline the defendant wilfully \* \* \* and in violation of \* \* \* Section 103-59-2 \* \* \* turned and shut off the water” is based upon conjecture and speculation.

Nowhere in the evidence is there any proof that Mr. Downs or any employee or agent of the defendant had touched the valve or in any way affected the water supply on that day, nor is there fact shown by the evidence from which a legitimate inference that they had done so could be drawn. To the contrary, Mr. Downs



specifically denied that the valve had been turned on that day. The mere fact that the defendants, among others, could have turned it is no proof that they did. *Denver & Rio Grande Railroad v. Ashton, Whyte, Skillicorn Company*, 49 Utah 82, 162 Pac. 83.

It is true that the defendant had turned down the valve on the day previous (Tr. p. 208). But here again there was no proof that during that period the Gypsum Company reduced the flow past the valve by more than one-sixth of the flow in the line at that time.

Mr. Downs testified that on Friday, the day before the date charged in the Complaint, he had turned the valve on the pipeline down to get water to the mine tipple for the purpose of testing the pump by which they intended to pump water up to a point in the workings where they were to do some core drilling the following week. He gave the valve a half turn down and after doing so he heard water flowing past the valve and into the line below. The valve remained in this position for not more than 45 minutes when Mr. Downs returned and turned the valve back up.

This happened at least sixteen hours before the water at the turkey ranch stopped, and there is no evidence that anyone connected with the Gypsum Company touched the valve or in any way affected the water supply after that.

Mr. Harry Beagley testified that when he first reached the breaker box on Saturday morning, at about eleven o'clock, there was no water flowing in the box but

that after he had been there a short time, after having cut the lock on the lid to the breaker box, the water started to come in with "a pretty good flow" (Tr. pp. 193-194). He then left the box to go down to regulate the water for the turkeys, nearly 1,000 feet away, and finding no water coming through the pipe he returned to the box to find that the flow into it had stopped.

From this testimony it is obvious that something or someone was interrupting the flow through the pipeline above other than anyone from the Gypsum Company, and of course there are many things which might have caused it. A possible cause is suggested by the fact that when Harry Beagley and Jay Howell walked up to the head box up the canyon they found the water over-flowing, wetting the ground and indicating that something in the box had temporarily interrupted the flow into the pipeline. Another possibility is that some third party had closed the valve that morning. Being unguarded, it could easily have been turned without anyone at the tipple or down at the breaker box knowing it. But whatever the cause, the temporary stoppage of the flow was not shown to have been by any act of the defendants.

Mr. Harry Beagley's testimony above referred to is no proof that the flow into the breaker box had been stopped or interrupted on the previous day, October 26th, when Mr. Downs had turned down the valve. The same causes which made the flow come and go on Saturday could have affected the flow on the day before, and of course there was no evidence that the flow had been stopped on the previous day.

In this state of the evidence the Finding of the court in Finding No. 4, that the defendant shut off the water “ in violation of the provisions of Section 103-59-2, Utah Code” is without support and is clearly and plainly an inference not warranted by any proven fact.

## POINT II.

**THERE IS NO EVIDENCE OF ANY NEGLIGENT AS DISTINGUISHED FROM TORTIOUS ACT UPON THE PART OF THE DEFENDANTS.**

The only act of the defendants which affected the flow of the water into the breaker box at any time as established by the evidence in this case was the act of Mr. Downs when he turned the valve on October 26th to obtain water at the mine.

We have shown that this act of the defendants was not a violation of the statute relied upon by the plaintiff and was not negligent *per se*. The only other possible basis for liability is that the act was negligent as distinguished from malicious or tortious.

When considered in this aspect, the evidence again wholly fails to support the Finding and Judgment.

“Fundamentally, the duty of a person to use care and his liability for negligence depend upon the tendency of his acts under the circumstances as they are known or should have been known to him. The foundation of liability for negligence is knowledge—or what is deemed in law to be the same thing; opportunity by the exercise of reasonable diligence to acquire knowledge of the peril

which subsequently results in injury. A man cannot be held responsible on the theory of negligence for an injury from an act or omission on his part unless it appears that he has knowledge that the act or omission involved danger to another. One who seeks redress at law does not make out a cause of action by showing, without more, that there has been damage to his person, but if the harm was not wilful he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it although the harm was unintended. The foregoing principles, which emphasize knowledge actual or implied as the foundation of the duty to use due care, are adhered to generally by the authorities. Fault on the part of the defendant is to be found in action or non-action accompanied by knowledge, actual or implied, of the probable results of his conduct. \* \* \* An injury is not actionable if it was not foreseen or could not have been foreseen or reasonably anticipated. \* \* \* The maxim *sic utere tuo ut alienum non laedas* is grounded upon this element of action accompanied by knowledge." 38 *Am. Jur.* 665-6, Negligence, Section 23.

Tested by the foregoing rules, the evidence in this case wholly fails to support the Finding of the court that the defendant knew or should have known

1. That by turning down the valve for 45 minutes and partially reducing the flow into the breaker box the box would become empty, or
2. That if the box became empty the meters in the breaker box would cease to work and become set and the

water would not run through the meters until the meters and the pipeline had been cleaned out.

Knowledge that the claimed injuries to the turkeys would be the natural and probable result of defendants' act in turning down the valve, or that any injuries would result to any user of water from the lines below, necessarily assumes knowledge, actual or implied, upon the part of the defendants of the fact that there was a pipeline connected to the box rather than to the City main through which the City took its water. There is not a scintilla of evidence that the defendant knew or should have known about such a connection or even that the plaintiff was using water for his turkeys from the City water supply. It also assumes that the defendant had knowledge, actual or implied, that if the flow into the box were lessened there might be meters on a line which were so corroded and encrusted with deposit that if the moving parts stopped they would stick at a point where no water could pass and stick so tightly that when the water pressure above was increased to the maximum possible (by plugging up the outlet into the City main) they would not break free until the meters had been cleaned out.

There is, of course, no evidence in this case from which it can be inferred that the defendant knew of the existence of any meters on a line taking off from the box, much less their condition. As a matter of fact, the plaintiff himself testified that he did not know the condition of the meters or where they were (Tr. pp. 65-67)

or of the location of the three outlets from the breaker box (Tr. p. 56).

To charge the defendant with liability it must be assumed that the defendant knew or should have known that the outlet from the box into the pipeline was only an inch below the four inch outlet into the City mains and that if the draft of water through the City main equaled or exceeded the inflow from the pipeline the level of water in the box above the outlet to the turkey line would be reduced to one inch and that leaves and other foreign matter would be on the surface and might then be drawn into the turkey line and clog a meter, if there should be one, on that line, and therefore it was the duty of the defendant not to reduce the flow by adjusting the valve lest that event should happen.

There is, of course, no evidence that the defendant knew of any such condition or that it or any reasonably prudent person could have foreseen or anticipated such a combination of circumstances.

Furthermore, there is no proof in this case that these necessary elements in the plaintiff's theory of causation did occur. For example, as we have shown above, there is no proof that the defendant shut off the entire supply of water in the pipeline or more than one-sixth, and then only for not more than 45 minutes.

Next, there is no proof of the draft on the water in the box through the City main and whether the flow of



water through the City main at any time here involved equaled or exceeded the inflow was never established by evidence or presumption.

Next, there is no proof that the water in the breaker box was ever below the outlet to the turkey line. The plaintiff testified (Tr. p. 56) that when he first arrived at the breaker box on the morning of October 27th the water level in the box was above the two outlets (to the City mains and to the turkeys). There was no water running in the box at that time. Neither he nor Mr. Harry Beagley nor anyone else testified that at any time was the level of the water in the breaker box below the outlet into the City main.

Finally, there is no evidence in this case that the lowering of the water level in the box caused the meters to stop operating. To attribute the stopping of the meters to the lowering of the water level is purely speculation which ignores not only the many other possible causes but also the cause which was conclusively established by the testimony of the plaintiff's witness David Ralph Park. Mr. Park's testimony on this subject is first found on page 118 of the Transcript. There he says:

“I went back with the tools and took the meter out. I cleaned it up. He (Lewis Beagley) was down the hill taking care of the turkeys. He hollered at me and says, ‘I believe it is coming through all right.’ I said, ‘O. K.’ \* \* \* I went back and cleaned the meter up and put it back.”



This was on a Saturday afternoon. On Sunday morning Mr. Park went up to the breaker box and meters again. He testified:

“At that time I took the meter. I had another meter in the car truck and I replaced the meter that was there (the upper one) with that one.” (Tr. p. 119).

His testimony continues:

“A. As I said, he (Mr. Lewis Beagley) came to me on Sunday around about seven o'clock, around that time, and told me he didn't have any water. \* \* \* So I went up there. At that time I took the meter \* \* \* and replaced the meter that was there with that one.

“Q. Which meter did you replace, the upper one?

“A. The upper one. From there I went on down and took that meter we had on the property line, the McCune property. We had another half inch meter there. I took that out, and the water still didn't come. So I got a piece of wire and took the lid off, still it didn't come, and I run a piece of wire in the pipe, and that started the water. I got the water started. I hollered to Mr. Beagley and the turkeys got water.

“Q. Did you observe, Mr. Park, when you went up to the upper meter on Saturday afternoon if the water was running, or the meter was operating or functioning?

“A. Well, I didn't take notice of that. The first thing about after I went back I decided I would go up and take it out. I cleaned the cham-

ber of the meter and I figured that it was operating all right.”

On cross examination Mr. Park testified, Transcript p. 122:

“Q. You said you had taken a wire and cleaned out the pipe?

“A. Yes.

“Q. Is that correct?

“A. Yes.

“Q. What came out?

“A. Oh, just some little fiberish pieces, may have been rust, may have been pieces of brush. I never took particular notice, just fiberish pieces, sediment of some kind.”

It thus appears from the evidence of the plaintiff that the reason why the meter was not registering when Mr. Beagley looked at it and when Mr. Park took it out was because the line below the meter was clogged with sediment so thoroughly that when the workings in the upper meter had been removed and the lower meter taken out of the line entirely and the water in the breaker box had been raised to the maximum level to overflow still the water would not flow through to the turkeys.

We anticipate that the plaintiff will contend that the meter stopped before the pipeline became clogged. But this again requires a presumption without proof. The water system within the Beagley enclosure was equipped with taps and the watering troughs were equipped

with float valves which automatically turned the water off when the troughs became full. There is no evidence that these taps were open all the time or that the float valves had not stopped the water from flowing into the troughs some time during the night of October 26-27. Of course, if the taps were closed at any time or if the taps being open, the float valves had shut off the water, there would be no movement of water through the meters and the mechanism would stop. If the mechanism in the meters were in such a corroded and defective condition as the plaintiff contends they were, they would be as likely to stop and stick at that time and for that cause as upon the removal of the pressure from above.

The court found in paragraph 5 of the Findings that the meters ran empty and dry so that when the water was again turned into the breaker box from the three inch pipeline the water could not and did not run through the meters until after great and serious delay.

There is no evidence whatsoever that the meters were dry or that the mechanism stuck at any point where water would not run through. In this connection Mr. Park again said, as quoted above, that he had not taken notice of whether the meter was operating when he went to the upper meter on the Saturday afternoon. He then testified as follows (Tr. p. 121):

“Q. What was the condition of the meter?

“A. We found quite a bit of corrosion, hard things of that kind, evidently the chamber corrodes, you see the disc in the chamber plugs up

until it won't operate. We take this out and replace it with a new one."

Later Mr. Park told about the occasion, probably in the spring of 1944, when, after the water into the pipeline had been turned off for the winter, the upper meter failed to register when the water was first turned on. He said (Tr. p. 128):

"Q. When you turned the water in again in the spring, the meter was set?

"A. Yes.

"Q. And didn't function?

"A. That is, it didn't register.

"Q. Just explain what you mean by didn't register. Was there any water going through?

"A. Well, the water will go though. The water will go though, but there is times it goes through without registering.

"Q. What was the situation then in connection with the water?

"A. The water did go through, yes.

"Q. A full stream?

"A. I wouldn't say a full stream, didn't have a head there enough to force the meter, and unless there is a head, and unless there is a head, your pressure in the disc of the meter happens to set a little it may remain in that position so as to let some water through, but it may not be a full flow.

"Q. *What was your observation as to the meter being set and not functioning when you*

*first examined it?* (on the afternoon of October 27).

“A. Well, the disc, as I say, was set but it would probably check it, the way it had been set, there would be a flow of water, there is a position the disc is set in will allow some water through.

“Q. Is there any position that it can be set in and not let any water through?

“A. Well, it could be set so as there wouldn't be any water go through, or at least very little.

“Q. Have you a judgment from your observation of the meter as to how it was set or locked, about whether or not it would permit any sizeable stream going through?

“A. Well, I just don't remember the position of the disc, but it was tight so as that it would not operate.”

When Mr. Park was questioned by the court (Tr. p. 133) he was asked:

“Q. Mr. Park, what caused that meter to stop?

“A. Well, there are different things that cause it.

“Q. Do you know in this particular case?

“A. No, sir.

“Q. What generally will cause it?

“A. Well, most generally in the meters—our water is hard, has a lime substance in it that remains in the chamber, and that evidently tightens the disc, that causes it to stop. There are

other things that cause it to stop. Sometimes the disk will break, sometimes the hand in the disc head will break off.

“Q. You saw no cause here except possibly a lime deposit?

“A. Yes.”

It is submitted that not only does the evidence fail to support a finding that the act of the defendant caused the water level to drop but it also fails to support a finding that the dropping of the water level in the breaker box was the sole cause or any cause of stopping the meter, or that the stopping of the meter was the cause of the failure of the water to run through to the turkeys. The whole chain of causation upon which the plaintiff must rely to establish liability depends upon speculation and conjecture, the assumption of fact not proven, and rejection of many possible factors which could have interrupted the plaintiff's water supply.

### POINT III.

THE EVIDENCE ESTABLISHES THE FACT THAT THE PLAINTIFF'S NEGLIGENCE WAS THE CAUSE OR CONTRIBUTING CAUSE OF THE INJURIES COMPLAINED OF.

The plaintiff testified that he had never had occasion to go up to the breaker box and that he had never been to see or seen the meters until after this incident occurred. Since he was relying upon this water supply for his turkeys, he, as a reasonably prudent man, should have known the condition of the meters, that they do



become corroded and defective from normal use. He should have known the set-up in the breaker box and that if the in-flow into the box just equaled or was less than the draft out of it into the City main the level of the water in the box would fall to a point not exceeding one inch above the outlet into his line and that the head of water above the upper meter would be, in that case, not over 1.4 feet. He knew or should have known that the Gypsum Company had the right to take out one-sixth of the flow of the water from the pipeline above the breaker box, that the flow of water in the pipeline from the springs was variable and subject to seasonal changes and might at times drop in volume. He also knew or should have known that Mr. Ostler also had a half inch pipe taking off water from the pipeline above the breaker box and below the take-off to the mine. He certainly knew that the permit under which he had the right to have water at all did not guarantee him a continuous and continuing flow but only water when and if there was excess water not needed for the City Water Works System.

It was his negligence in failing to exercise a reasonable care to see that his watering system was in good condition and to anticipate the probability that at some time during the season he would not receive water through the system because of conditions over which neither he nor the City nor the Mining Company nor Mr. Ostler had any control.

It further appears that one reason for the delay in his getting water if not for the entire interruption of

the flow, was the plugging of the pipe above the lower meter with sediment and fibrous pieces. It is also proven that on Saturday afternoon Mr. Madsen, an employee of plaintiff equipped with boots and gunny sacks, got into the breaker box, removed the screens from the outlet to the turkeys and plugged the outlet to the City mains with gunny sacks, some of which were drawn into the main. While there is no evidence that at that time any leaves, particles of brush or other debris was floating on the top of the water or had settled on the bottom, it is not difficult to believe that this action stirred up debris in the water and the screens being removed it got into the pipeline and settled and effectually plugged the line. This was the reason why the turkeys did not get water and this was an independant intervening cause of the injury, if any, which the plaintiff sustained. We submit that the finding of the court that the plaintiff was not negligent and that no negligent act of the plaintiff proximately contributed to the damages is against the uncontradicted evidence. We also submit that the finding of the court that the plaintiff did not know, nor by exercise of ordinary care should have known, that the meters were old and worn and clogged so that they might at any time have failed to function (Finding 11) was contrary to the uncontradicted evidence in this case.

#### POINT IV.

#### THE DAMAGES ARE REMOTE AND SPECULATIVE

The plaintiff contends that the lack of water for 36 hours at the most caused his turkeys to go off their feed,

failed to gain, gave them fever from which 200 turkeys died, and caused them to have excessive pin feathers and to grade down lower than they would have graded had the water not been interrupted.

Here again the plaintiff's injuries and the damages awarded are remote, conjectural and speculative.

With regard to the effect on the turkeys, Mr. Beagley said (Tr. p. 42): that on Sunday morning some of the turkeys were getting out of the pens, some had gone down to the cemetery, some just outside the gate and some around a puddle of water which had overflowed from the breaker box the night before. He testified that they didn't eat the feed which had been put in the troughs the day before, and they didn't require much feed on the following day (Tr. p. 44) and never did get back to the feed they had been eating before. Afterwards on weighing specimens he "didn't notice any material gain in weight. In fact, if anything, they seemed to lose a little weight." As to losses he said, "Well we naturally lose a few turkeys all along it seems like. But about four or five days after, their heads turned red, like they had a fever, and a few die, just a few more, and they seemed to get a little worse, they would mope around two or three days and the next morning they would be dead \* \* \*" (Tr. p. 46) "I figured around 200 turkeys" (died between October 27 and November 22), (Tr. p. 47). After the turkeys had been processed he learned that "they were awful bony. There were a lot of the turkey were red, that is when they were dressed up they were off color so to speak. Instead of a nice color

and fat, I think they were just red meat, that is all \* \* \* They were way underweight, under the normal weight of turkeys, average weight, and due to the pin feathers, and this poor coloring, the grading was way off.”

It is obvious from this testimony that to attribute the condition of the turkeys when sent to the processing plant over three weeks later to the lack of water is pure speculation, and was an afterthought. There is no evidence in the record that depriving turkeys at this stage of growth of water for 30 hours will cause pin feathers, fever, off coloring, and the mere fact that Beagley’s turkeys did turn out as he described, if they did, does not prove or tend to prove that the lack of water for this short period was the cause. All that was said on this subject was from the witness Ostler who said (Tr. p. 82) :

“Q. Do you have an opinion as to whether the lack of water over a period of 24 hours or a day would have the effect of making turkeys susceptible to disease?

“A. Well, it is only general knowledge among nearly all turkey producers that cutting down the energy supply of turkeys would naturally make them more susceptible to disease.”

### *The Damages*

To evaluate his claimed damages, the plaintiff selected four turkey producers from the vicinity of Nephi who testified that they raised turkeys of the same type as

those of the plaintiff during the season of 1945 and fed them in somewhat the same way. These four growers shipped their turkeys to the same processing plant and the record of their shipments were received in evidence over defendant's objection (Tr. p. 153). These records showed the number of birds received from each grower, the number of each sex and grade and the total weight of each sex and grade. On the theory that except for the interruption of the water supply the plaintiff's birds would have averaged in grading classification and weights the equal of the average of the same grades and classes as these four producers, the court found that the plaintiff would have sold the 6644 birds which he sent to the processing plant for \$41,739.34 or an average of \$6.28 per bird whereas he actually received only \$35,768.72 and would have received \$6.28 for each of the 200 birds which plaintiff claimed had died after October 27th and before he shipped to the processing plant. This made a difference of \$7,226.62 from which the court deducted the sum of \$793.91 claimed to represent the cost of the feed which the birds would have eaten between October 27th and November 20th and 28th, 1945 when the 6644 birds were sent to the processing plant in two lots, if the water interruption had not occurred.

The only evidence in this case to sustain the amount of claimed damage are the processing plant records on the grades and weights of the turkeys raised by the four

other growers, Bowles, Park, Belliston and Orme (Exhibits 9-14) and the tabulation (Exhibit 15) submitted breaking these records into averages. Perhaps it is significant that the records of Paxman and Ostler, two producers who raised their turkeys on ground practically adjacent to the plaintiff, were not used in the computation.

This evidence submitted is valueless as proof of what the plaintiff's flock would have done, even if their having been without water for 24 hours could have caused some deterioration in their weight and quality.

In the first place, the evidence that the flocks of these four growers were raised under the same conditions as Beagley's and with the same care and experience is very sketchy. The only evidence in this respect was limited to the statement that the turkeys were all of the Bronze Broad Breasted Type, they were raised about 18 weeks on range, were fed mash and whole grains and were all raised near Nephi. Nothing was shown as to the source of the eggs or poults, the susceptibility or immunity of any of the flocks to disease or deformity, or the care exercised by the respective growers. There was testimony by the plaintiff himself that his flock had had the "black head" and that he had had other troubles. All of the other hazards incident to turkey raising are ignored.

In computing his claimed loss the plaintiff furnished a tabulation of computations (Exhibit 15) from the processing plant's records of the four growers in which



the average weights of each grade of bird and the percentage of the whole number of hens and toms respectively in each grade are listed. The court applied the resulting averages and percentages to the 6644 birds which plaintiff sent to the processing plant and found that his turkeys would have graded and weighed according to these results if their water supply had not been interrupted and the difference attributable to that cause alone determined the amount of damages.

We submit that this method does not accurately or necessarily approximate or reflect the loss or deterioration, if any, in the flock and that the judgment reached thereby is the sheerest speculation.

For example, it appears from Exhibit 14 that Lavern Bowles had 1025 birds processed, of which 540 were toms and 485 were hens. Ninety-one and eight-tenths per cent of the toms and 95.3% of the hens were graded prime, 7% of the toms and 4% of the hens graded choice, and the balance graded commercial or no grade. These percentages are derived from only those birds which Bowles sent to the plant, and does not reflect those which he may have culled out and disposed of elsewhere. And, of course, it does not include those birds which had died or been killed during the growing season which, if included, would naturally reduce the averages, and we know from Bowles testimony that of his original flock of 1500 only 1025 are accounted for, nearly one-third are not accounted for.

That Bowles records are no criterion is obvious by comparing it with those of the other three growers.

	<i>Bowles</i>				<i>Park</i>			
	<i>Toms</i>	%	<i>Hens</i>	%	<i>Toms</i>	%	<i>Hens</i>	%
Prime.....	496	92	464	95	788	69.5	761	89
Choice.....	38	7	19	04	302	26.4	91	10.6
Comm'l.....	4	2/3	2	.4	32	3	4	.4
No. Gr.....	2	1/3			11	1		
Total.....	540		485		1133		856	

  

	<i>Belliston</i>				<i>Orme</i>			
	<i>Toms</i>	%	<i>Hens</i>	%	<i>Toms</i>	%	<i>Hens</i>	%
Prime.....	1478	73	585	82.4	1704	79.7	434	71
Choice.....	392	19.4	120	17	330	14.6	150	24
Comm'l.....	138	6.8	5	.7	104	4.6	23	3.7
No. Gr.....	7	.5			12	.6		
Total.....	2015		710		2150		607	

From the above tabulation it appears that for some reason the toms that Park sent to the processing plant only 69.5% graded prime, as against Bowles' 92%, Orme's 79.7% and Belliston's 73%. There is no explanation of any reason for these variations in grades, but their use as criteria is justified only upon the assumption

that range feed, breed and other condition were the same. If these assumptions were true, then each flock would grade the same. It follows of course that all the essential conditions of similarity did not prevail and that there was some undisclosed cause for the variations.

The same discrepancies are applicable to the grading of the hens. Seventy One per cent of Orme's hens graded prime, compared with 82% for Belliston, 89% for Park and 95% for Bowles.

Similar variations appear in the other grades and also in the average weights, all of which indicates that there are other causes than interruption of feed and water to affect both grading and weight.

Since no one of the selected four producers scores is a fair comparison because of the existence of unknown factors, the combination of the four scores is no better, but really accentuates the lack of fairness of the method used.

In not one of the four compared scores has it been shown that the birds processed constituted all of those raised, or that those processed had not been selected from the entire flock and the less desirable birds—judged by quality or weight—disposed of elsewhere.

One very obvious difference between Beagley's flock and those of the others is that Beagley attempted to raise 7500 birds in one flock, whereas apparently the largest number any of the others undertook to raise was Belliston who started with 3500 (Tr. p. 142) and pro-

cessed 2725 (Exhibits 12 and 13), leaving 775, 22.16% unaccounted for.

Orme started with 3000 birds (Tr. p. 140) and processed 2757 (Exhibits 10 and 11), leaving 243 birds, 18.1 per cent unaccounted for.

Park started with 2300 birds (Tr. p. 137), processed 1989 (Exhibit 9), leaving 311, 13½% unaccounted for.

Bowles started with 1500 birds (Tr. p. 164), processed 1025 (Exhibit 14), leaving 475, 31-2/3% unaccounted for.

Beagley started with 7,500 birds (Tr. p. 30), processed 6644 (Exhibits 7 and 8), claims 200 died on or after October 28th, leaving 656 or 8.7% unaccounted for. If the 200 birds had not died his loss in birds over the season would have been 856 or 11.5.% A comparison of the records on this basis clearly shows the invalidity of their use as standards.

It seems reasonable to assume that the wide difference in percentage of birds not accounted for is probably due to the fact that the other growers had culled out the inferior birds before processing and that had each shipped his entire herd his average both as to the grades and weights would have been considerably reduced.

It also appears that at least some of these growers segregated the hens from the toms and shipped the hens one or two weeks earlier than the toms. There is no explanation in the testimony as to why this is done but

from the fact that it was done is some indication that some growers at least consider it the better practice, to insure the best results (Tr. p. 27).

It appears from the processing plant records (Exhibits 12 and 13) that Belliston's hens were processed on November 25th and his toms on December 8th.

Orme's hens also were processed a week or more before his toms on December 6th (Exhibits 10 and 11).

Beagley's flock was processed in two lots a week apart, but in each lot there were both hens and toms (1138 hens and 822 toms in the lot of November 21, and 2599 hens and 2085 toms in the lot of November 28).

The tabulation indicates that Beagley's birds averaged in weight per sex and grade somewhat less than did any of the others, but the differences are not extreme. Compare Beagley's prime hens at an average of 12.8 pounds per bird with Belliston's average of 12.9 and Parks of 13.4. In the prime tom grade Beagley's average was 21.13 compared to Park's 22.6 and Belliston's of 23.1.

No explanation of grading method was given and we are left to speculate on the reasons for grading some birds prime and others commercial. Difference in weight is apparently not the reason for we find Beagley's hens at 12.8 pounds being graded prime and Park's 13 pound

hens being graded choice. Beagley's 21.1 pound toms were graded prime and Belliston's 21.2 pound toms were graded choice.

## CONCLUSION

In conclusion we respectfully submit that the Judgment and Findings are unsupported by the evidence, and the Judgment should be reversed and set aside.

Respectfully submitted,

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