

1950

William D. Jackson v. Spanish Fork West Field Irrigation Company et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM D. JACKSON,

Plaintiff and Respondent,

vs.

SPANISH FORK WEST FIELD IRRIGATION COMPANY, a corporation, SPANISH FORK SOUTH IRRIGATION COMPANY, a corporation, SPANISH FORK SOUTHEAST IRRIGATION COMPANY, a corporation, THE SALEM IRRIGATION AND CANAL COMPANY, a corporation, SPANISH FORK EAST BENCH IRRIGATION AND MANUFACTURING COMPANY, a corporation, LAKE SHORE IRRIGATION COMPANY, a corporation, ED WATSON, State Engineer of the State of Utah, and WAYNE FRANCIS,

Defendants and Appellants.

BRIEF OF RESPONDENT

Appealed from the Fourth District Court of Utah County, Hon. William Stanley Dunford, Judge

P. N. ANDERSON AND
DILWORTH WOOLLEY,
*Attorneys for
Plaintiff and Respondent.*

FILE

APR 21 195

Clerk, Supreme Court

ELIAS HANSEN,

Attorney for

Defendants and Appellants.

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Defendants and Appellants.

Case No.
7450

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The plaintiff and respondent brought this action for a temporary restraining order and permanent injunction against the defendants to prohibit them from interfering

with his use of the 1 C. F. S. continuous flow the year around of the waters of Thistle Creek for irrigation, stock-watering and culinary purposes. The right which he claimed and which the Court sustained is in addition to other rights which he has in that stream, one of which is based upon the McCarty Decree and the other arising out of the purchase in 1915 by his predecessor of exchange water in the Strawberry Valley Project. The basis of plaintiff's right to the 1 C. F. S. in his adverse use thereof as against the named defendants, except the State Engineer and his deputy, to whom the waters were decreed by the McCarty Decree. Notwithstanding the assertion of the attorney made in Appellants' brief, page 53, the plaintiff does not depend upon an adverse use prior to April 20, 1899, which is the date of the McCarty Decree, but he does depend upon his use beginning with the date of that decree and continuing to the date of the trial.

The defendants by their answer challenged the right of the plaintiff to the permanent injunction against them and to the use of the 1 C. F. S.; and it was to the issue thus raised that most of the evidence in the case is concerned.

The named corporate defendants acting through a Central Committee appointed to speak for them had instructed the State Engineer and his deputy to distribute the water according to this McCarty Decree, thus ignoring the plaintiff's right which accrued after the date of the McCarty Decree. So far as plaintiff knew

and believed and as the record shows, these corporate defendants are the only water users on or from this stream who made any objection to plaintiff's use of the 1 C. F. S., and they are the only users who brought pressure to bear upon the State Engineer to cause him to shut off the water from plaintiff's lands. Therefore, so far as we know, these corporate defendants are the only persons whom it was necessary for plaintiff to seek an injunction against in order to protect his rights to the use of the 1 C. F. S. of this stream.

Judge William Stanley Dunford, who tried the case, filed a written memorandum of his opinion in which he has set forth so clearly and fully the legal basis for the action and the evidence upon which he relied to sustain his findings and judgment that we feel we can do no better service to our client and be of no greater aid to this Court than to set out the same in full, which we do, with insertions to the pages in the transcript where the testimony of the different witnesses appears. The memorandum is found in the Judgment Roll beginning at page 61. It is as follows:

MEMORANDUM OPINION

"The plaintiff obtained a temporary restraining order against the defendants, enjoining them from interfering with plaintiff's use of one cubic foot per second of water flowing in Thistle Creek, in Utah County, and an order for the defendants to show cause, returnable upon the 10th day of September, 1948, why

the temporary order should not be continued in effect pending trial of the cause upon its merits. Upon the return date of the order, all of the defendants except the State Engineer appeared, and, having previously filed their answer and Counterclaim, and the plaintiff upon the return date, having filed his reply, it was stipulated that the cause might proceed upon its merits as between the plaintiff and the answering defendants. Trial was thus had, and the issues framed by the complaint, the answer of the corporate defendants and the reply of the plaintiff, were fully heard and submitted.

“On the last day of the trial, the Court’s attention was called to the separate answer, filed during the trial, by the State Engineer. Upon agreement of counsel, the Court took the cause under advisement to give counsel an opportunity to ascertain whether a stipulation could not be arrived at with the State Engineer adopting the record made in the trial and submitting that defendant’s cause for determination upon that record.

“The stipulation was not received until January 24, 1949. It is, however, sufficient to submit the full cause upon the pleadings and evidence filed and adduced at the trial.

“In his complaint, the plaintiff alleges that he has lands on Thistle Creek which he irrigates by use of 35 shares of Strawberry Valley Project water and 20 shares of secondary water right, which waters he takes from Thistle Creek. That for more than 50 years there

has been and now is, what is called West Simmons or West Jackson Ditch (both names referring to the same ditch), which takes off from Thistle Creek at or near the south end of Plaintiff's lands and courses northerly and northeasterly on the west side of plaintiff's lands, the point of diversion being below where Nebo Creek, Aggie Creek and Benny Creek join Thistle Creek to form one stream flowing about three S. F. of water past the West Jackson Ditch.

"That for more than 40 years prior to the year 1939, (since which year no rights to appropriated water can be obtained by adverse use or possession, see 100-3-1, U.C.A. 1943), the plaintiff's predecessors in interest in the described lands had openly, notoriously, adversely, continuously and under claim of right diverted from Thistle Creek through the West Jackson Ditch 1 C. F. S. of water in addition to and aside from the rights first above set forth, and used such water for irrigation, stockwatering and culinary purposes on the lands described, and that since 1939 and up to July 12, 1948, excepting for the interruption complained of, he and his predecessors have continued to use the water for the purposes described.

"He alleges that for more than 50 years, the occupants of plaintiff's lands have obtained their culinary water from a well which is lower than the West Jackson Ditch and about 300 yards easterly from its course. That the well is supplied with water diverted through the West Jackson Ditch and spread out upon lands

between the ditch and well from whence it seeps and percolates through the ground and into the well; furnishing an adequate supply of fresh water for families living upon the lands. When the water is shut off the Jackson Ditch for two or three days the water in the well recedes below his pump and becomes stale, and unfit for use, and thus, it is alleged, the culinary use of the well water has for the 50 years or more of use of the West Jackson Ditch been the principal provision for culinary water and that he is entitled to the continuous use of the questioned 1 C. F. S. of water flowing in the West Jackson Ditch.

“He then complains that on or about the 12th of July, 1948, the defendants wrongfully shut off, or caused to be shut off, the water from the West Jackson Ditch, and continued to keep it shut off and threatened plaintiff with criminal prosecution if he again turned the 1 C. F. S. of water into the West Jackson Ditch.

“That by reason of such unlawful acts the water in the well receded so that the water became insufficient and unfit for use by plaintiff, making it necessary for him to transport his culinary water over long distances to his irreparable damage.

“That in addition to the foregoing use the water in the ditch has been used for more than 50 years to irrigate about nineteen acres of meadow hay lying below the ditch which hay dried up because of defendants’

diversion of the water to plaintiff's damage in the sum of \$480.

"Grounds for injunction are then alleged.

"The prayer is for permanent injunction against the defendants, against their interference, for damages, costs and general relief.

"The answer of the defendants is joint.

"While defendants formally deny the plaintiff's ownership of the described real property and his ownership of the Strawberry and secondary water right alleged, there is no contention in the record as to either and the Court finds such ownership.

"They deny the allegations of plaintiff's and his predecessors' use of the 1 C. F. S. of water for more than 40 years prior to 1939, and the open, notorious, continuous, adverse use thereof under claim of right or that such use was or has been made of such waters from 1939 and until July 12, 1948, except when interrupted by the defendants as alleged. They deny the use of the water, through seepage to the well, for culinary purposes, that the shutting off of the water from the West Jackson Ditch renders the well water unusable or that the claimed 1 C. F. S. of water in the ditch has been for more than 50 years the principal source of supply to the well or that plaintiff is entitled to the continuous flow of such waters from the converged waters of the creeks named.

“They deny that any water has been wrongfully or unlawfully shut off from plaintiff’s ditch, and allege that they have requested the water commissioner on the Spanish Fork river to distribute the waters to the persons entitled thereto and not otherwise. They deny threats of criminal prosecution, but assert their readiness to assist in prosecution of plaintiff or any person who wrongfully takes water from Thistle Creek and its tributaries.

“They deny that plaintiff has been deprived of any water to which he is entitled, and deny plaintiff’s needs upon information and belief. They further deny the plaintiff’s use of the 1 C. F. S. of water for irrigation of the 19 acres or that by reason of any wrongful act of theirs the plaintiff has lost any crop or suffered any damage. They also deny irreparable injury and inadequacy of plaintiff’s remedy at law.

“Defendants then present a further defense and counterclaim in which they in substance allege:

“That Spanish Fork River is a natural stream arising in the Wasatch Mountains and flowing northwesterly into Utah Lake, and is made up by the tributaries alleged in plaintiff’s Complaint. That more than 70 years ago the predecessors of the defendants and their stockholders and by means of dams, and ditches, diverted the waters to their lands which are barren and unproductive without water, but produce abundant crops when irrigated. That ever since such diversions the

waters have been beneficially used by defendants and predecessors. That by various decrees of this court, especially the McCarty Decree of 1899, the waters of the river have been adjudicated, and since have been distributed, except when wrongfully interfered with, to the persons entitled thereto, and that plaintiff's predecessor in interest was a party to such decree and plaintiff's rights to the use of the waters were thus determined by the decree. That the defendants and Spanish Fork City are the owners of the 1 C. F. S. of water claimed by the plaintiff, and that plaintiff's claims are subordinate thereto.

"The answer and counterclaim were supplemented by permission of the Court, in that the defendants set up the temporary restraining order granted by the Court on the 19th day of August, 1948, and the diversion on August 20th by the plaintiff of the 1 C. F. S. of water in question, his continuous use thereof since, and their, and Spanish Fork City's damage at the rate of \$5.00 for each 24 hour period of their deprivation.

"All of the affirmative matters of the answer and counterclaim are duly denied by the plaintiff.

"It is conceded by all parties appearing that no rights to the use of water can be acquired by adverse possession in the amendment of Section 100-3-1, U.C.A. 1943 in the year 1939, but that prior to such amendment, rights as between private persons having rights to its use could be adversely acquired in the same man-

ner as rights to real property may be adversely acquired, i.e., by open, adverse, notorious and continuous use for the periods provided by law.

“There is no dispute that all of the waters of Spanish Fork River including its tributaries and also including the disputed 1 C. F. S., had been anciently appropriated by users in Spanish Fork Canyon and in Utah Valley at Spanish Fork, and that such rights had been determined and adjudicated by various decrees of this court. It is conclusive too that the disputed 1 C. F. S. originally was water that had been decreed and distributed to users other than the plaintiff or his predecessor in interest, to which the defendants are the successors in interest, and the Court so finds.

“Thus if the plaintiff is to prevail in this cause, he must show by a preponderance of the evidence that since such adjudication when such rights became fixed and prior to the year 1939 upon the effective date of 100-3-1 as amended, he has openly, adversely, notoriously and continuously diverted and beneficially used the 1 C. F. S. in question for some period during which such user could, under the law, ripen into an adverse title to the use of the water, and that since the completion of such title, he has not abandoned or forfeited his right, and that no one has, since he acquired such right and prior to 1939, adversed him.

“All of the waters of Spanish Fork River and its tributaries, and all claims of right thereto were adjudi-

cated by this court in cause No. 390 Civil by what is commonly called, "The McCarty Decree," Plaintiff's Exhibit J, which is dated April the 20th, 1899. In the action resulting in that decree, all of the defendants here except Spanish Fork East Bench Irrigation & Manufacturing Company, Lake Shore Irrigation Company with Spanish Fork City were plaintiffs and the latter two mentioned companies with all of the individual users of water above the mouth of Spanish Fork Canyon were defendants. Leven Simons, predecessor in interest of the plaintiff, was one of those defendants. The Decree is a general adjudication of all rights in the Spanish Fork River and its tributaries. It is based upon a stipulation of all parties, and contains a "Schedule" naming Leven Simmons as having a right to the use of no "First Class water," seven acres of "Second Class water" and eight acres of "Third Class water" as his sole right.

"Being party to that action, Leven Simmons' rights were totally adjudicated. If at that time, he claimed the use as a primary and appurtenant right, to 1 C. F. S. continuous flow of water, he either then asserted it and had it adjudicated in the decree, or he then made no claim of it, which amounts to the same thing as a direct assertion of it, and in either case the question of such right became *res adjudicata* in the decree. *Logan, Hyde Park & Smithfield Canal Co. v. Logan City*, 72 U. 221, 269 P. 776.

"Thus we have a "floor" date of April 20, 1899,

the date of "The McCarty Decree," and a ceiling date of March 20, 1939, the effective date of the amendment Section 100-3-1, to exclude adverse user as a means of acquiring water rights, and if plaintiff is to prevail he must show acquisition of the right to use of the 1 C. F. S. by adverse use for seven years between these extreme dates.

"It has been fully determined that rights to the use of water could be obtained through adverse user at all times prior to the amendment of Section 100-3-1 U.C.A. 1943 in 1939, and that the institution of filings through the State Engineer's Office in 1903 did not change that rule. *Hammons vs. Johnson*, 94 U. 35, 75 P. 2, 164, *Wellsville East Field Irrigation Co. vs. Lindsay Land & L. Co.*, 104 U. 448, 137 P. 2, 634.

"Our court in *Utah Power & Light Co. vs. Richmond Irr. Co.*, 80 U. 105, 13 P. 2 320, at Page 119, expressed some doubt that a water user who receives rights under a decree and claimed his rights by virtue of it, can, during such time, acquire an adverse right to an amount in excess of the adjudicated right. However, in *Wellsville East Field Irrigation Co. vs. Lindsay Land & L. Co.*, *supra*, the court, by holding that Nichols, predecessor to Lindsay Land & Livestock Co., and Knowels and Olsen, all of whom were parties to the Kimball Decree had acquired rights in addition thereto by adverse user, put that question at rest. It is now the law of this jurisdiction that a user, even though he is a party to a general adjudication decree, may never-

theless have acquired additional rights in the stream (subject to the time limit of 1939) by openly, adversely, notoriously, continuously, uninterruptedly using the water under a claim of right for a period of seven years.

“In order to fully analyze and test the evidence in this cause, it is well to point some additional rules governing the case. The plaintiff claims a continuous constant flow of the claimed 1 C. F. S. of water the year round, and his claim of adversity rests upon his proof that he so adversely the defendants for the period of seven years. This is a different situation than where an adverse claimant claims use for limited amounts or for stated periods. In the latter class of cases, such a claimant need only show that he has used such an amount at the stated periods openly, etc., and without interruption at such periods. Taking the water from him when he is through using it, or when he does not need it, is not an interruption of his possession so as to prevent his acquisition of the right to use. When, however, a constant continuous year round flow is claimed by the adverse, any interruption which is of equal dignity with the acts necessary to start the adverse use, will interrupt the running of the seven year period. There seems no possible question of doubt that the act interrupting the adverse user must equal in all respects of dignity, the acts which will initiate the adverse right. *Wellsville East Field Irr. Co. vs. Lindsay Land & L. Co.*, *supra* and *Hammond vs. Johnson*, *supra*.

“The burden of proving the adverse user in this

case is upon the plaintiff not only because he is the plaintiff and bases his claim upon such adverse user, but because there is a presumption against such acquisition of title.

“Showing that the plaintiff accepted regulation of his water under the McCarty Decree defeats his claim of adversity unless the preponderance of the evidence shows he used in excess of the amount permitted him by the regulation.

“It is not necessary to actually bring knowledge of the adverse user of water home to the owner where the user is open, notorious and under claim of right under circumstances such as the owner could have discovered the use by being alert, and it is the duty of the owner to guard his right and to make full investigation where there is indication to put him on notice. *Utah Power & Light Co. vs. Richmond*, 79 U. 602, 12 P. 2, 357.

“Keeping these principles in mind, we will examine the evidence.

“The West Jackson or West Simmons Ditch is diverted from Thistle Creek up the canyon south of the home now occupied by the plaintiff. (Tr. 9, 10.) There is a dam in the creek and the point of diversion is surrounded by trees and brush. There is an old pioneer road running along the west of the approximately 19 acres of land of the plaintiff served by the West Jackson Ditch. The ditch follows down the canyon on

the west side of the road which anciently crossed the ditch three or four times. The ditch then entered the Jackson property toward the southerly end of Tract "B" as marked on the sketch Plaintiff's Exhibit "A" and flows northward and to the west of plaintiff's home, through his corrals to the north and northwest of the home and ends in the plat marked "D" on the sketch. The plaintiff and predecessors for years have raised good crops consisting of cereal crops, garden crops and hay crops. The plaintiff has 35 shares of Strawberry water and 20 shares of "Secondary Water Right," this latter being under the McCarty Decree referred to. He uses what he needs of either of these rights upon the lands serviced by the West Jackson Ditch, but claims that with the continuous flow of the 1 C. F. S. involved in the action, he has not needed to use a great amount of water under those rights on the 19 acres near the house, and that he has need for all of his other rights upon other lands owned by him, so that to use such rights to replace the controverted 1 C. F. S. deprives him of water elsewhere. There is no water in his corrals or pasture beside that in the West Jackson Ditch, and when all of the water is removed from the ditch so that it cannot be spread upon the lands to the south and west of his home, the water in his well recedes, becomes stagnant and rancid. The plaintiff asserts that the disputed 1 C. F. S. has always, continuously and uninterruptedly flowed in the West Jackson Ditch, augmented when necessary by his other rights, but always flowing with such water and after the other water is removed

from the ditch. For a great number of years, the old road running to the west of plaintiff's home, followed and intersected by the West Jackson Ditch, was the residents and users of lands upon the creek and its only road leading up Thistle Creek Canyon so that all tributaries had to travel it to reach their respective properties, and the public domain in the water-shed. The Post Office and shopping center for all of these residents was at Thistle. Above plaintiff's property also is considerable sheep and cattle range, the only access to which was for a great many years over this old road. There were no bridges over the West Jackson Ditch other than one crossing over a culvert so that passengers over the old road were compelled to ford whatever water was flowing therein, and herds and flocks being driven up and down the canyon watered at the crossings.

Between April 20, 1889, the date of the McCarty Decree, and, at the earliest, June 1, 1915, when the first contract, Defendants' Exhibit 3, was entered into, the only water Leven Simmons had for use upon all of his property under the Spanish Fork River was fixed by the McCarty Decree and, as pointed out above, those rights were limited to eight acres of Third Class water and seven acres of Second Class water, with no First Class or primary water. Third Class water was the early spring run-off and when the flow of the river, measured at the mouth of Spanish Fork Canyon, flowed a volume of 22 inches in depth by 41 feet in width or more, and such rights were cut off when the volume

reached that amount. The Second Class had use when the water receded from the amount stated above and had not reached 15½ inches deep by 24 feet in width. When the flow reached the latter quantity, Second Class rights ceased and First Class consisting of 30 acres of primary water was all that could be used above the mouth of the canyon. Third and Second Class water cut down comparatively early in the year (see Defendants' Exhibit 1) so that any water flowing in the West Jackson Ditch during these years and after Secondary rights were cut off would be especially noticeable to persons passing along the old road and coming in contact with the West Jackson Ditch crossings. Even after Strawberry water became usable upon the upper river and its tributaries, it is reasonable to conclude that any constant flow of 1 C.F.S. of water, or anywhere near such amount, would be very apparent to any persons making regular trips over the old road and across the West Jackson Ditch.

The witness Marie J. Shepherd (Tr. 99) lived upon Crab Creek some two miles above plaintiff's property from 1909 until April of 1920, during these years she traveled the old road every Tuesday, Thursday, Saturday and Sunday, missing very few years. She rode in buggies, carts and on horseback. There were always good crops of hay and grain on plaintiff's property. The ditch was always full of water except when it was turned out to clean the ditch, and she saw occupants of plaintiff's property using the water to irrigate. She worked considerably for Simmons while he oper-

ated the place, and used water from the well. She never knew the well to go dry or the water to become foul. She was on the place more than once during July, August and September. In hauling hay and grain over the road she "got stuck" at times in the ditch. She doesn't know what happened to the water after flowing through the corral. She has been up there only two or three times since 1923.

Joseph H. Shepherd (Tr. 118) had much the same experiences and made much the same observations as his wife, except that his passage up and down the canyon was a little less frequent and when he was 16 or 17 years old he worked upon plaintiff's lands, helped build the dam, replacing it after washout, for diversion of the water into West Simmons Ditch. He helped plant grain and other crops. The ditch was always full and in winter was frozen. He couldn't say where the water went at all times but he saw Spencer Simmons with a shovel.

Earl Gardner (Tr. 139) has property about a mile above plaintiff's place which he has owned for 25 to 30 years or back to about 1924, and has operated the property now belonging to plaintiff. He was road supervisor between 1923 and 1935. The land always produced good crops of hay and grain; alfalfa produced two crops. He used to go to the plaintiff's well to fill his water bags; water was always good drinking water. He "nooned" in the grove of trees near the West Simmons Diversion and worked all along the road. He crossed the ditch frequently and there was always so much water in the ditch

that a little trash collecting would cause overflow upon the road. He repaired the culvert crossing frequently, and saw the water in the ditch nearly every day during July, August and September. He never crossed the ditch when there was no water in it.

George W. Jackson (Tr. 150), plaintiff's brother, has operated sheep since 1918. He then lived at Fountain Green. Prior to 1918 he herded sheep for one Henry Jackson upon property adjoining the Simmons ranch. He also operated Henry Jackson's irrigated farm and dry land. He ran sheep during the spring and summer at Thistle and went up the canyon every week or ten days. From 1923 to 1931 he traveled the road in question and the water in the ditch was "quite a headache," because the ground was soft, and the sheep would tramp the bank down and the water would overflow onto the road. He crossed the ditch with his herds twice each year, going up in the spring and back in the fall. This was time between 1923 and 1931, and previously when he had leased sheep. He does not recall ditch ever being without water. The flow was generally greater than since the service of the restraining order. He traveled the road also with wagons, trucks and later a Ford car. He was never there when anyone was working on the ditch.

Alvin L. Jackson (Tr. 163), another brother of plaintiff, worked for Will Jackson about 1920 and was acquainted with plaintiff's property after 1923. He could observe it from a hill, could always see green fields on

plaintiff's property, except during the summers of 1925-26 when he was not in the vicinity. He used to come to the highway for his mail and never saw any of the property in question dry under the ditch. From 1923 to 1931 he traveled the road taking supplies to Colton. During this time there was more water in the ditch than there was after the restraining order. He never remembers the ditch being empty; sometimes got stuck in the ditch and had to have help to get out.

David A. Mitchell (Tr. 174), age 84, first went to Thistle 1889. He knew plaintiff's predecessors in interest. He lived on Crab Creek when Robert Henderson owned plaintiff's property, which, according to the Abstract, Plaintiff's Exhibit "I", was between September 5, 1891 and August 26, 1908. He moved away in 1911, moved back in 1913, remaining until 1936. He traveled the road and observed the ditch in question every time he went down and back and that ordinarily the ditch was full, and never remembers it being empty. Crops were generally good. The lower people (defendants) never bothered any of the canyon people about water until the supply cut down at different periods of the year then the valley people would come up, but he never noticed any difference in the flow on plaintiff's property after the valley people came up. The flow continued about the same at all times.

T. E. McKean (Tr. 188), age 56, has lived at Birdsey, above the plaintiff's property, since 1910. The main road up the canyon was changed from the west to the

east side of plaintiff's property in 1936. After 1919, when they got their car, they traveled the road once a week down to Spanish Fork. He never saw plaintiff's ground when there weren't good crops. In the years before the highway change he never remembers the ditch not having water in it except during cleaning time prior to August 20th when it was dry. Flow since injunction is about the same as prior years but seems that there was more in the ditch during those years, because the ditch used to flood over at times. He never knew of Simmons having an entire crop failure. Simmons ran cattle and in the fall kept them in the pasture west of the road. He had a loop in the fence across the ditch so that cattle could water from the range west of the road, and he ran water in the ditch through the corrals for stock watering. Simmons ran 50 to 60 head of cattle on this west range and there was no other place but the loop to water them. These cattle were placed in the west pasture as soon as they came from the range and were retained there in the spring until time to turn onto the range. The years 1924 and in 1932 were dry years but Simmons raised fair crops upon plaintiff's property. On August 20, 1948, plaintiff had no crops. On August 20th the well in question was 12' deep. Plaintiff turned the pump on and the water went down in less than one minute, and it smelled badly. On this land he irrigates wild hay first about the 1-15 of April, grain in the middle of May. He irrigates grain twice, the second irrigation being between the 1-10 of June. Cuts his grain about August. Hay is the last crop irrigated. That is along

in November. He thinks he noticed the water in the West Simmons Ditch on an average of nine months each year and on occasions when he went by. He thinks Simmons used 1 C.F.S. of water to irrigate 14 acres of ground. Simmons' crops were better than a neighbor's (Ehlers). He has seen Simmons' cattle in pasture west of the road in spring and fall.

James Hicks (Tr. 206), age 61, has property at Thistle and Birdseye, and worked for Simmons many times upon plaintiff's property, beginning in 1912 and off and on until 1930. The place always produced good crops. Simmons had corrals and yards northwest of the house and operated roan Durham cattle. There was a fence on the west side of the old road, but he doesn't know when it was built. Simmons ran cattle west of this fence. He remembers the ditch in question. Simmons had good average crops when he worked for him in the 20's. The areas southwest and northeast of the house were watered beginning in June and watered all summer. He was acquainted with Simmons' operation for about 40 years before 1946 and a little more than 1 C.F.S. flowed in the ditch during those years. The flow was larger in the 20's than after the injunction. He traveled the old road once per week on the average during those years, and doesn't recall any time during the 20's when the ditch was without water. He remembers valley people coming up and cutting off the water during dry years. He was cut off sometimes in June or July and was cut off regularly after Strawberry water came in. Most people bought Strawberry water because

they didn't have enough without it. He saw the water commissioner of Spanish Fork River up near them at times. He thinks Spencer Simmons was using Strawberry water. While he worked on the Simmons' place he got water from the well all the time. Most of the time the water was good in the well. One time while he worked there the well dried up late in the season, but the majority of the time the water was good.

Max Depew (Tr. 228), owned the plaintiff's place. Spencer Simmons, who died in 1938, was his uncle. The witness bought the place from his mother and aunt. He first went on to operate the place in the fall of 1930. The well was their source of culinary supply between 1930 and 1944 when plaintiff took over. He operated both dairy and range stock and ran them on the pasture west of the road. The water source was a dip in the fence over the West Simmons Ditch. This water hole has existed there for about 28 years to the best of his knowledge. Corrals were north and west of the house and water for stock in the corrals came from the West Simmons Ditch. He helped Spencer Simmons harvest the crops prior to 1931. In 1931 he used 20 C.F.S. (20 A.F., Tr. 235) Strawberry water, then the highwater and there was always a small stream in the ditch which was used on the garden and on the pieces west and east of the house, and with a "booster" was used south of the house. He would use most of his secondary and Strawberry water south of the house, on the Crab Creek Field and fields east of the house. The stream in the West Simmons Ditch supplied water to the well, and if he didn't keep water

on the field west of the house, the well would get stale and go dry. Some water was always in the West Simmons Ditch. Before 1931 there was always more water in the ditch than after the injunction. While he operated the place there was only once when the ditch dried. He found not enough turned in from the creek and turned more in. He never put Strawberry water into the West Simmons Ditch. He claimed the right to use the water in the West Simmons Ditch in addition to the Strawberry and McCarty Decree water. His forefathers used it and he always used it. When he was there, there was good hay all over the meadow. He raised fairly good crops. Except for this stream which ran all of the time, he got tickets for all other water. Once when he came from town there was no water in the corral and he went up and turned more down. He doesn't know that he was ever charged for the 1 C.F.S. He didn't on or about the 1st of July, 1943, ask Frank Simmons to please let a little water come down the house ditch for him. He doesn't remember Mr. Francis turning the water off on June 19, 1941. He raised good hay and grain on all of his land.

Ole C. Anderson (Tr. 258), age 38, from 1910 to 1938 traveled the road once per week from his home in Provo, and several times a week went from his father's ranch above plaintiff's property to Thistle for mail. He can remember from '22 to '24 and on. He never knew crops to burn on plaintiff's property. There was fall pasturage that had to be irrigated. The ditch always had water in it, but he hasn't seen it for several years

now. Ditch was usually full and ran over onto the road making a mud hole. He was secretary of the Clinton Irrigation Company (created under agreement to distribute Strawberry water) since 1932. That was the first year they attempted to regulate the water. In 1932 and 1933 he was assistant to Cliff Jex, water commissioner on the Spanish Fork River, and went with him to measure some streams and sometimes watched the water when Jex was not there. He doesn't remember of him having the water out of the ditch in question. He was never sent to turn the water out and if Jex did so, he didn't know of it. The lower companies would ask the water to be released to them about the 1st of July. The users between 1922 and 1932 helped themselves to the water. The flow in the West Simmons Ditch was not charged against Simmons. If there had been a charge of 1 C.F.S. continuous flow it would run him out of water, and he was never without water. Stock were watered on the ditch either in the west field or in the corrals the year round.

Ernest Mitchell (Tr. 287), age 39, was born and lives at Birdseye, traveled over the old road once a week and sometimes two or three times a day. Plaintiff didn't cut any crops south of the house this year but last year timothy and alfalfa were harvested there. Hay in the field before cutting this season is \$20.00 per ton. Pasturage is worth \$12.00 to \$15.00 per acre at Birdseye. He has a criminal complaint against him for taking water but he doesn't hold that against the Spanish Fork people.

Dr. Raymond B. Barnsworth (Tr. 301), assistant professor of agronomy at the Brigham Young University, on September 18, 1948, made a study of plaintiff's lands. This was after the claimed interference with the water by the water commissioner and nearly a month after the 1 C.F.S. had been turned back in the ditch after the injunction. He took nine soil samples over the property for testing as to present water content and carrying capacity. The average of these samples showed an actual water content of 15.8%. The average carrying capacity of the same samples was 54.63%. 5% (45%, Tr. 333) of the water applied to these lands is lost by evaporation and percolation; this is about one half of the average. Those areas require about two acre feet of water per season as a minimum to fully develop crops. The 1 C.F.S. constant flow would be required upon these lands to fully develop crops.

I have summarized in some detail the testimony of plaintiff's witnesses other than the plaintiff's own testimony, inasmuch as there is a considerable period of history to cover under the rule that if the questioned 1 C.F.S. has been openly, etc., used by the plaintiff and his predecessors under claim of right for any consecutive period of seven years between the McCarty Decree and 1939, the title to the use of the water was acquired. Manifestly from such a review, the plaintiff's evidence clearly supports his claim. The adverse period in this case is seven years, it being clear from the evidence that Simmons continued the flow after the McCarty Decree without cessation, for the culinary, stock and crop water-

ing purposes indicating clearly that he did not consider that the 1 C.F.S. was included in the McCarty Decree regulation.

We will see, then, if there have been such interruptions during that period as would break the required adversity for seven years.

L. P. Thomas (Tr. 351), age 77, was employed by the irrigation companies as far back as 1902. Newell Monk, who is now 88 and too feeble to testify, was the first commissioner and was appointed in 1909, serving 11 years. He had an assistant. On August 4, 1914, witness and Francis Hanks went to the diversion of the West Simmons Ditch and turned the water out of the ditch at 4:00 or 5:00 p.m.—“shut it dry.” Spencer Simmons was then in possession. He did not testify that this act was made known to Spencer Simmons.

He talked to Simmons about his claim when Mr. Oberhausley and Mr. Mitchell were officers of the Clinton Irrigation Company. They were holding a meeting in the Clinton Schoolhouse. The date is not given. Spencer Simmons claimed that if they would measure the water in the river above the field and then go and measure the river below, he would be willing to take a charge for whatever he shorted the river. They told him that they couldn't do that. Mr. Simmons did not then make claim to the 1 C.F.S. now claimed and the witness never heard of such claim. He is still a member of the Central Committee and the committee has authorized the commis-

sioner to regulate the water according to the McCarty Decree. In 1920 and 1921 there was abundant water and all users had all they wanted. Until the river receded to 352'; the canyon people have taken all they wanted. From 352'; down to 242'; the canyon people had 2% of the river flow. Until it receded from 242' to 118'; they had 1% and when it reached 118' they were cut off except for primary rights. The commissioner was not directed to distribute water except Strawberry and McCarty Decree water.

Lorin W. Jones (Tr. 378), was water commissioner from 1923 to 1928 inclusive. His duty was to distribute the natural river water plus Strawberry. He made trips up the canyon once per week and sometimes oftener. Made first trip along in June when the river dropped in flow. He attempted to follow the terms of the McCarty Decree. During these years he went to the West Simmons diversion once every two weeks, and took measurement of the flow that was turned out. He turned the water out in 1923. He never turned water into Spencer Simmons property. Simmons did that himself, and witness doesn't know how he got the information to turn the water in. He would tell Simmons to turn the water off and he would turn it off. Simmons never made any claim to him to a right to use water other than McCarty Decree and Strawberry and he discussed water with Simmons several times during each year. When he turned the water off, Simmons never made any statement to him about water for his cattle. After the 20th

of September to middle of October he didn't bother to regulate the people in the canyon.

Sometimes there was more than 1 C.F.S. in the West Simmons Ditch and sometimes it was shut off completely. After he shut it off, someone turned it back in or brush forced it into the West Simmons Ditch. He shut off the water several times each year. He doesn't know that Simmons had a "house stream." He can't recall any year when any of the crops on the Simmons' place were dried up. The flow he would cut off Simmons' ditch was Secondary water. Water that he would shut off was water which he understood under the McCarty Decree should go on down the river. He didn't go up each time Simmons took Strawberry or decree water. He told Simmons that he would do it or Simmons must shut it all off. Each individual never put in application for Strawberry water; each user was charged with the responsibility to turn it back. He never checked that, it was left up to the Clinton people. He doesn't know whether Simmons turned the water off each time he told him to. He understood that to regulate the secondary water, that when the flow cut down, he would tell the people to cut off their water.

James A. Anderson (Tr. 399) was commissioner from 1929-1930 and attempted to regulate the use of water in the canyon. He made four trips up the canyon in two years. No one was using water wrongfully. Early in the season there was water in the Simmons ditch but in the last of July of 1929 and 1930 there was no water

flowing in the Simmons ditch, at no time when he was up there did he see water in the West Simmons Ditch after May; the whole ditch was dry. There was no dam in Thistle Creek, but there was a dam in West Simmons Ditch and the ditch was dry below. He didn't go to any other ranches to see if water was running in their ditches, the only observations made were in the West Simmons Ditch because Simmons ditch was along the road.

David Warner (Tr. 411) Spanish Fork, was commissioner in 1934 and about six weeks in the latter part of 1930. During 1934 he worked mostly in the canyon measuring irrigation streams. The water master at Clinton distributed to the users. He passed by the West Simmons diversion every time he went up the canyon, and turned water out of the ditch several times. At one time Spencer Simmons was there when he turned it off, and he reported the fact to the commission. Simmons requested that he not cut his dam but that he divert it lower and they cut it back into the creek lower on the ditch where they cut it back into the river. This cut was about 20' to 30' below the diversion. This was done with the man he always supposed was Simmons. He had probably $\frac{3}{4}$ C.F.S. in the ditch at that time. Couldn't say where the water was running. That was the driest year on record. Thinks he just told Simmons that he was going to turn the water out. May or may not have said something about the water. Doesn't remember Simmons claiming any right or his protesting; wouldn't

remember how he turned the water off—he usually carried a shovel. Doesn't remember whether he put the dam across the ditch. Shut the ditch dry, but doesn't remember whether it was necessary to put in the dam. That's the only time he remembers that Simmons was present. This was in the morning while he was going up, but he doesn't remember whether he saw water in the ditch when he came back down. Doesn't recall much about 1930.

Angus D. Taylor (Tr. 426) was assistant commissioner working under Clifford Jex 1937, 1938, 1939 1940. His job was to regulate the waters in the canyon. He was furnished copies of the various decrees and the list of Strawberry water showing the amounts to each user. He was at the West Simmons Ditch about once a week or ten days during these years. He turned the water out of the ditch approximately six times each season. He never turned water off in the canyon without notifying the owner or leaving word at the place. He told Spencer Simmons in 1937, maybe it was Max DePew. When Simmons wasn't there he usually left word with DePew's wife at the house. In 1938 word was left at the house. Each time he turned it out he filled the head of the ditch with rocks and dirt until flow stopped. He never saw the Simmons ditch with water in it when he wasn't supposed to have water in it. He was turning off Strawberry and river water. He never kept track to see whether Simmons turned it back in after he left. He never knew Simmons to have an entire crop failure. There was never water in Sim-

mons' corral and he never knew about the well.

Benjamin Frank Simmons (Tr. 436) was deputy commissioner in 1943. He is related to Leven and Spencer Simmons. He went to the head of the West Simmons Ditch whenever water was ordered in to see how it was. Max DePew occupied these lands during his year. He turned the water off of the West Simmons Ditch, only once was there difficulty. There was a gate which leaked and DePew didn't want him to shut off the water completely and wanted some to run for his cattle and that's what he did. When Max DePew's turn was up he would go to see that it was shut off. Water users were the ones who probably had the duty to turn the water off and on but you can't always depend upon them. His duty was to see that the Clinton Irrigation Company got all of the water it was entitled to. Oberhausley was to see that it was distributed into the canals. He was there every time that a user got the water and when he turned it off. When DePew was there at time,s he turned it off. From his book he testified that he turned the water out of the West Simmons Ditch April 20th, April 23rd (it was off), August 7th, August 21st, September 13th. When the water was on, from 1½ to 2 C.F.S. flowed in the ditch, and when off there was a little that leaked through the gate.

Willis Hill (Tr. 454) was deputy water commissioner in 1944 and went to the Simmons property the first year of plaintiff's possession. He directed plaintiff to hang out a flag when he needed water and again when he was

through. The West Simmons Ditch was considerably filled up during his year and not much water could have run through. Between Jackson's turns he doesn't remember water being in the ditch. He walked down the ditch one day to see Jackson and no water was in the ditch as he remembers. He drove past several times and glanced over but doesn't remember water in the ditch. He doesn't know of any adversed rights. Jackson was harvesting a fairly good crop of hay along in July.

Arla M. Stewart, (Tr. 464) was deputy commissioner in 1942 and again in 1945. He went to the DePew property in 1942, he visited the headgate nearly every day. He kept a record and from it testified to turning off and on the property through the period from May 21, 1942 to September 8th. Some of these times were not charged because water was plentiful. He went to the West Simmons Ditch almost daily and turned the water off nearly every turn. DePew's little girls couldn't turn the water off so he turned it off for them if it wasn't off by 9:00 o'clock when he got there. There was a crude dam in the creek, with a tin headgate to the ditch which couldn't be entirely shut off. He never saw DePew at the headgate. During 1945 he kept record of turning water on and off but there was no charge on the West Simmons Ditch during that year and an August storm washed Jackson's dam out. He went by practically every day and visited the head gate two or three times a week. Except for a little leakage Jackson never had a stream in except during his turns.

Victor Sabin (Tr. 489) since May 1, 1946 has been Deputy Commissioner and was so at the time of trial; looks after the upper river. He was up the river every day, except during free water, saw the West Simmons Ditch, and never saw anything but the little leakage water in it when it wasn't Jackson's turn. The seepage may amount to $1/25$ to $1/50$ C.F.S. He presented his records of turns in both years 1946, 1947. In that year while up there in the latter part of the season he found about $1/2$ C.F.S. in the ditch. He stopped at the home and asked plaintiff why he left the water running and plaintiff said he felt that he should have some stock water. sum of \$480.00.

He told plaintiff that according to the decree he has no title to a stream around there, to which plaintiff answered: "Man, I've got to have the water for stock." He then shut off the water and left. A new gate ("calcometer") was installed in the West Simmons Ditch on July 26-27, 1948, but its installation was incorrect and plaintiff installed a 15''x20'' wier to measure water.

When he cut off the plaintiff's water on July 12th he did so under instructions from Mr. Francis, River Commissioner. He turned the water off on June 19th and plaintiff turned it back on. He turned the water off on July 1, 2, and 3rd. It was turned off on July 14th and was held off until the court's injunction. At no time in 1947 did plaintiff have water in the ditch except that which he turned in and the small leakage referred to.

Latter part of 1947 there was a discussion about there being a right to a continuous flow in the West Simmons Ditch. Plaintiff first mentioned the well on July 4, 1948, when he said it had always run there and he was entitled to it. On July 28th plaintiff said 1/2 C.F.S. was for garden and to "sweeten his well up."

Roy Creer, (Tr. 541) member of the Central Committee was up to the Simmons property in 1933, the latter part of July or the 1st of August. There was then about 1/4 C. F. S. in the West Simmons Ditch. "The dam was kinda broke."

Wayne Francis, (Tr. 546) has been river commissioner since 1941. In that year he turned off the water from the West Simmons Ditch several times when it was ordered turned. He recalls times when there was no water running in the West Simmons Ditch and never saw water in it except upon turn. After the water should be turned off he always visited the gate. After 1941 he didn't pass near the gate because of change in the road. On May 1928 he was up by the ditch in an old Ford car and ran out of water. He dipped water from the West Simmons Ditch. Had trouble getting water it was so shallow. While the commissioner and deputy relied upon the people somewhat to turn their water on and off, he would check every time and if not completely shut off, he would shut it off.

Burgis Larson (Tr. 594) was deputy water commissioner in 1935. He visited the Simmons property nearly

every day in the latter part of the season. He turned water off of Simmons' property, a fraction of a C.F.S. in the latter part of July. The ditch did not carry water at all times when he saw it. Just saw it the one time.

Upon reopening the case for further hearing on February 23, 1949, R. A. Hart (Tr. 604) testified that he was water commissioner beginning in 1906, when he served all of the season, and serving only for a short period in 1907, and only one month in 1908. As to the canyon water he had to do with shutting off or decreasing the flow of the various users. He first sent out post card notices to the users that the tertiary rights were cut off, then again when the Secondary Rights were cut off. After he sent these cards in 1906 he got Newell Monk and they went up the river including Thistle Creek to check on receipt of the cards by the users and whether complied with. He knows plaintiff's property. He found everyone on Thistle Fork had complied with his order. He remembers that Mr. Simmons was specially interested in the amount of flow on his ditch, and asked him to measure it. He did and found .98 C. F. S. in the ditch which he didn't shut off. This flow was running past Simmons' house in a shallow ditch but he didn't follow it to see whether it was spread out on the land or ran directly back into the river. Mr. Simmons made no claim to water beside the McCarty Decree water, but did ask why he couldn't use springs arising on his own property.

As stated above, we look only for adversity from

April 20, 1899, the date of the McCarty Decree, to 1939. If the preponderance of the evidence establishes it for any period of seven years during that time then we must find for the plaintiff unless the record also shows that thereafter and prior to 1939 he was adversed by someone else, or unless since the time of completion of his adversity he has abandoned or forfeited his right so that it now is public water and subject to appropriation.

Any water flowing in the West Simmons Ditch in excess of McCarty Decree water, or during the period when no McCarty Decree water was permitted to flow therein and up to the time of the use of Strawberry water, and thereafter any water flowing therein in excess of the McCarty Decree water and the Strawberry water or at times when no such water was permitted to flow therein, was flowing in contradiction of and opposition to the rights of the defendants and all of them except the State Engineer and Wayne Francis.

Under the circumstances of this case as shown by the evidence and the authorities cited herein, there could be no question as to the open and notorious character of such use. And with a continuous flow for seven years at any period covered by the evidence, there could be no question as to adversity.

From the testimony of David Mitchell, this continuous use was in existence from 1891, (previous to the McCarty Decree) to 1911, and from 1913 to 1936. This use

is corroborated since 1910 by T. E. McKean, from 1909 to 1920 by Marie J. Shepherd and by her husband Joseph Shepherd, and by James Hicks from 1912 to 1930, by Ole C. Anderson from 1910 to 1938. The first interference with this flow was on August 4, 1914, as testified to be L. P. Thomas for the defendants. Leven Simmons owned the property upon which this water was used from October 26, 1908, until in 1928 when his heirs quitclaimed to Spencer Simmons (April 9th) and he received the Decree of Distribution in the Leven Simmons Estate (July 7th). From the evidence Leven Simmons continued to use the 1 C.F.S. in question after the McCarty Decree the same as he had used it prior thereto, and the same as Robert Henderson, his predecessor had used from 1891 until Leven Simmons himself acquired it. The fact that the water flowed consistently through this ditch during those years, and that the use was not changed in the least by the McCarty Decree demonstrates these old users' claim of right and as such use contains therein all of the other elements of adverse possession, i.e. open, adverse, continuous, notorious and under claim of right, and such use and claim existed continuously from 1891 to 1914, more than seven years of such use is established and the Court must find and hold that the adverse right to the use of the 1 C.F.S. in controversy was complete on April 20th, 1906, or eight years before the first attempt of the owners to reassert their right.

That right, once acquired, became the right of Leven Simmons and attached as an appurtenance to the land. It could then be lost only by forfeiture, abandonment, or

a new right by adverse user arising thereon in exactly the same manner and subject exactly to the same limitations as upon his acquisition. Does the record show any one of such occurrences?

Considering each method of loss separately and in the order named, we will first consider the question of forfeiture in view of the record.

Forfeiture occurs when a user ceases to use the water for a continuous period of five years. 100-1-4 U.C.A. 1943 as amended L. of U. 1945 at page 261. *Hammond v. Johnson*, supra. This question as the as the question of abandonment, is unaffected by the 1903 creation of filings upon water with the office of the State Engineer or by the 1939 amendment outlawing adverse possession as a means of acquiring rights. Thus the whole record must be searched on both questions of abandonment and forfeiture while only the record between 1906 and 1939 need be searched on the question of loss by adverse possession.

The ditch in question ends upon the lands of the plaintiff and serves only that land. Thus whenever water is seen flowing in the ditch it is equivalent to seeing it used upon the plaintiff's land. From the unquestioned evidence that owners of these lands always when good crops were produced elsewhere produced good crops up until the shutting off of the water by the defendant river commissioner in 1948, considered in light of the uncontradicted testimony of the witness

Dr. Farnsworth as to the content and carrying capacity of the soil and the conditions found after the water had been taken by the defendant, the Court concludes that the use of the questioned 1 C.F.S. was always beneficial.

At the risk of repetition, we will review in chronological order the defendants' evidence from April 20, 1906 when the adversity of plaintiff's predecessors in interest was complete until the beginning of this action to determine whether a forfeiture as provided by 100-1-4 U.C.A. 1943 or by preceding pertinent statutes has occurred. Prior to amendment in 1919, the period of non user to constitute loss of the right was seven years. The 1919 amendment reduced that period to five years. While in the old statutes as in the above cited section the language combines abandonment and non user, they are two distinct methods by which the right can be lost, the distinction being primarily one of intent. If an owner of a right knows he has it, and intentionally relinquishes it, the union of act and intent accomplishes the abandonment and time is of no concern. Forfeiture, however, occurs through, not the deliberate act of the owner, but by his neglect to beneficially use for the statutory period. *Hammond v. Johnson*, supra.

In 1906 R. A. Hart, commissioner, notified the water users by post card when their rights under the McCarty Decree cut down or cut altogether. Thereafter he went up the river to check to see that the notices had been complied with. On such a trip, Simmons asked him how much water was then flowing in the west Sim-

mons Ditch. Hart guessed 1 C. F. S. then measured to find .98 C.F.S. actually flowing, which he did not shut off. The water was flowing into Simmons' field but he didn't see what use was being made. This occurred at one of the times when the commissioner was checking upon the compliance with one of his post card notices to cut out some of the canyon rights and probably was after April 20th when the adversity had been complete. The water was measured at Simmon's request and left running. Thus if it were prior to April 20th it did not interfere with the running of the adverse period, and did show an acknowledgment on the part of the commissioner of Simmons' rights.

There is then no history by the defendants until 1923—enough time for the adverse period to more than have run again. Lorin W. Jones in that year turned the water out of the Simmons ditch several times. Simmons sometimes either turned it back or brush catching in the creek sent the water down the ditch. Thus, Simmons was using the water during that period. This occurred also in 1928. Wayne Francis stopped at the ditch in 1928 and filled his car radiator therefrom. There wasn't much water in it, but some.

In both of the years 1929 and 1930 James A. Anderson made trips to the West Simmons Ditch, a total of four times. He found no water flowing in the ditch on the last of July. David Warner was commissioner during the last six months of 1930 but didn't go up the canyon. There is nothing to show how much of the time

the 1 C.F.S. in question was running otherwise. These years could not be added to a forfeiture period.

The next record has to do with 1933, when Roy Creer was commissioner. In the latter part of August or 1st of September he found the dam "broken a little." He shut off the water without notifying Simmons. What uses other than this once was made in that year is not shown so it cannot count in a forfeiture period. In 1934 David Warner turned the water out of the ditch several times, showing that 1934 could not count in the forfeiture period because the claimant used the water.

In 1935 Burgess Larson as commissioner visited Simmons' property nearly every day. He turned the water out of the ditch in the latter part of July. There was a fraction of a second foot flowing. The only time he saw water in the ditch "out of turn" was that one time. The water turned out in the latter part of July was neither Secondary or Strawberry right because that water was "on turn" and if it had been running he would not have turned it off. Thus, there was use of at least part of the water in question that year, which fact prevents it being counted in a forfeiture period.

In 1937, 1938, 1939 and 1940 Angus D. Taylor was commissioner. He was at the West Simmons Ditch once each week or ten days and turned water out of the ditch at least six times per season and always notified the owner. In 1937 he told Spencer Simmons that he had turned it out. In 1938 he turned it all out and filled the

head of the ditch with rocks and dirt until the water ceased to flow. He never kept track to see whether Simmons reopened the opening, and he never saw an entire crop failure on the Simmons property. This testimony is clear to the effect that these years cannot be counted in a forfeiture period because use was made of the water.

Since 1941 Wayne Francis has been commissioner. In that year he turned off water in the Simmons' ditch several times when it was ordered off. He never saw water in the ditch except upon turn. After 1941 he didn't pass the Simmons place close because the road had been moved. On June 19th (year not shown but DePew owned the property from April 6, 1944 to April 17, 1944, and operated from 1930, he found that DePew, then owner, had left a stream in the ditch and he turned it off. Each time DePew's turn ended, if DePew didn't shut off the water the witness did. He couldn't see from the road when the owner applied water on the Simmons property from the West Simmons Ditch.

During Francis' tenure, in 1942 Orla M. Stewart assisted him. Stewart went by the Simmons property nearly every day and turned the water off nearly every turn. He didn't see DePew but he assisted DePew's little girls in shutting off the water. There was a tin head-gate that wouldn't entriely shut off the water. He has no knowledge whether more was let in after he left.

Benjamin Frank Simmons also served under Francis

in 1943. DePew was operating the farm. He had difficulty with Depew. Depew didn't want the water shut off completely — wanted some to run for his cattle and "that's what I did." When DePew's turn was up he would go to check on whether the water had been fully turned. Water leaked through the gate into the Simmons Ditch. When DePew was on the place, at times, he turned the water out of the ditch.

Willis Hill assisted Francis in 1944, which was the first year of plaintiff's possession. The Simmons ditch was quite filled up that year. Between turns, he doesn't remember water in the ditch. He walked down the ditch once to plaintiff's house and drove by several times, glancing over plaintiff's property, and there was no water in the ditch. He didn't know of any adverse claims of plaintiff. Good crops were being harvested in July.

Orla M. Stewart was back on the job in 1945. That year he visited the plaintiff's headgate two or three times a week. The plaintiff never had a stream in except in turn, and some leakage.

In 1946 and 1947 Victor P. Sabin assisted Mr. Francis. During 1946 he was up the river every day except when use of the water was free. He never saw water in the West Simmons Ditch except upon turn and "1/25th to 1/50" C.F.S. seepage around the headgate. In 1947 he went to the West Simmons diversion every time when plaintiff's turn ended to see that it was shut

off. In the latter part of September he found about $1\frac{1}{2}$ C.F.S. of water in the ditch. He stopped at the house and asked plaintiff why he had it running. Plaintiff said that he felt he should have some stock water. He told plaintiff that under the decree he had no right to the water for stock. Plaintiff said: "Man, I've got to have water for stock." He shut off the water and left. At no time did plaintiff have water in the ditch out of turn except some small leakage there was a discussion as to plaintiff's right to a continuous flow. Prior to 1947, plaintiff himself shut off all of the water except a trickle around the headgate.

From this review it is clear from defendant's testimony alone, there was some use of the questioned water every year at least to 1944 when Willis Hill assisted the commissioner. From then, until 1947 when the plaintiff and Victor P. Sabin had a discussion because plaintiff had 1 C.F.S. in the ditch, and orally claimed his right, is insufficient time for running of the forfeiture period and the Court must and does hold that the right was not forfeited.

When a right to the use of water is once established, whether by appropriation, or by adverse user during the period when such adversity was permitted by law, it cannot be taken away from the owner upon any proof which falls short of a clear preponderance of the evidence, which must establish an intentional relinquishment of a known right, the controlling element being the intent. *Hammond v. Johnson*, supra.

At sometime while Spencer Simmons owned the property (April 9, 1928 to May 13, 1939) a discussion was held at the Clinton School house wherein Simmons claimed that if the water were measured above his field and below his field would probably show no reduction in the Thistle Creek. At least if there were such, he would be willing to be charged with the difference. He was informed that that couldn't be done. This was nothing more than an offer to abandon if it can be given such dignity. There was no declaration of abandonment. There was an implied assertion of his right. There is nothing to show that thereafter he turned the West Simmons Ditch stream back into the natural channel.

Several of defense witnesses assert that plaintiff's predecessors in interest never asserted or claimed to them that they had the right to use of the questioned flow. That fact makes no difference when the flow was actually being used.

David Warner said that at one time when he was at the West Simmons Ditch and was about to turn the water out, Mr. Simmons requested that he not cut the dam but that he turn the water out of the ditch lower down and that they did cut it back into the river some 20' or 30' below the diversion. On cross examination, he wasn't sure it was Simmons, nor that anything was said about the water, or whether there was a protest, or how he turned the water off or whether a dam was placed across the ditch, just remembers that they shut it dry. This evidence does not preponderate to show Sim-

mons' "intentional relinquishment of a known right."

There was a point of "difficulty" between Benjamin Frank Simmons and Max DePew in 1943, when DePew asked Simmons not to turn all of the water off. DePew didn't then assert his claim of right but asked Simmons to leave some running for his cattle. A mere failure to assert his claim then when there was "difficulty" which may be added to by such assertion does not show an intentional relinquishment.

Orla M. Stewart's assistance to DePew's little girls in turning off the water when the turns of Secondary and Strawberry water was over, certainly is not evidence of DePew's relinquishment, intentional or otherwise.

The plaintiff himself told Victor Sabin that he felt that he should have some water for his stock but Sabin shut it off and left. He didn't then assert his right to the water, but it would go a long way to hold that by his failure then to assert his right, he did the required affirmative act of intentionally relinquishing a known right.

Thus, the Court finds no abandonment and none of the requirements for re-acquisition of the right of adversity after plaintiff's predecessors acquired it appear from the detailed and extensive review of the record.

The Court therefore finds that plaintiff is the present owner of the right to use of the questioned 1 C.F.S.

of water, the right being to have the same flow throughout the year through the West Simmons Ditch for irrigation upon the described approximately nineteen acres of ground, for stock watering and culinary purposes.

The restraining order heretofore issued is, thus, ordered made permanent.

The acts of the defendants in turning off the water was thus wrongful and plaintiff is entitled to recover damages, proven by a preponderance of the evidence to have directly and proximately resulted from such act.

Plaintiff testified that during his occupancy the 19.21 acres in question had produced an average of two tons per acre of hay upon the first cutting and 1½ tons per acre on the second and that because of being deprived of the water, he could cut no hay in 1948. Hay production would thus have amounted to 67.235 tons. According to Ernest Mitchell the type of hay grown was in 1948 worth \$20.00 per ton in the field which would make the value of the loss \$1,344.70.

From the testimony of Dr. Frank Farnsworth as to the greening of the ground where water had been applied up to September 18, 1948, when he made his tests, and the fact that plaintiff had free use of the 1 C.F.S. of water under the injunction of the Court, and the fact that pasturage was used only in the fall and spring, it is reasonable to conclude that there was no loss of pasturage.

Plaintiff is however limited in the amount of recovery by the amount prayed for in the Complaint. Therefore, judgment is ordered in his favor for the sum of \$480.00.

Plaintiff is awarded his costs, and may draw and present Findings of Fact, Conclusions of Law and Decree in accordance with this memorandum.

As to the joint answer of the State Engineer and Wayne Francis referred to supra, a stipulation has been filed wherein plaintiff waives claim for damages and costs against these answering defendants, and upon such waiver, these answering defendants have waived and withdrawn their affirmative answer and prayer. The issue otherwise are to be concluded by the Findings of Fact, Conclusions of Law and Decree as directed in this memorandum, except that the two named defendants are excluded from the judgment for damages and costs.

Dated at Provo, Utah County, Utah, this 28th day of February, A.D. 1949.

BY THE COURT

Wm. Stanley Dunford

Judge

ARGUMENT

Appellants' Point One

The record in this case seems clear that the use of the water involved herein was actual, open and notorious. Under the circumstances that existed from May 20, 1899 and on the use of this water could not have been clandestine. It coursed through an open ditch which traversed the public highway and onto the lands now owned by plaintiff. It was running day and night, year in and year out,—spreading out and freezing on the land in the winter time, and watering the land to produce noticeably good crops throughout the summer months. It was running onto that land for anyone to observe, and most of all the defendants, their predecessors, and their agents. And their commissioner and witness, H. A. Hart, did see it in the West Simmons ditch and running onto that land in 1906. And that this water Hart observed was the 1 C.F.S. involved herein there can be no doubt about. Hart had sent out notices, cards, terminating the tertiary and second class water use rights (Tr. 606), and had gone up Thistle Creek after users had had time to comply and to see that they had complied. (Tr. 606). Simmons had no primary or first class right and there was no Strawberry Valley water,—so what Hart saw being used by Simmons, and was not shut off, was 1 C.F.S. of water other than McCarty Decree or Strawberry water.

The water witness D. A. Mitchell (Tr. 174 to 180) saw running through the West Simmons ditch the year

around from 1899 and on was other than Strawberry water, and Simmons had no first class water. It was other than tertiary and second class water for such water rights went off or were terminated along middle of June to 1st of July, and without this 1 C.F.S. or more of water for use the remainder of the season the good crops could not have been grown, as will be pointed out later herein.

The use of this water right was hostile and under a claim of right. In the face of a decree, McCarty Decree, what could have been more hostile and indicative of a claim than the aforesaid open, actual and notorious use of it as was had. D. A. Mitchell testified that this water was used from 1891 and the use continued the same after the McCarty Decree May 20, 1899, and the use of this water actually, openly and notoriously notwithstanding defendants' and their predecessors' claims to the right to its use and in and of itself was hostile, all of which is the strongest evidence that its use by plaintiff's predecessors was under claim of right.

The use of the water claimed was continuous without interruption for a period of fifteen years, May 20th 1899, until August 4, 1914, at about 4 or 5 p.m. (Tr. 356-359) when, as L. P. Thomas testified, he and Monk turned it off. And this was before the Strawberry water became available and at this time of year was after the tertiary and secondary rights of Simmons would have been terminated. There is not one scintilla of evidence that there was any interruption during that period of time.

Appellants' Point Two

As to the quantity of water used during the period 1899 to August 4, 1914, witnesses testified that there was as much or more than at time of trial. That there was a continuous flow of 1 C.F.S. or more, and that it was and is necessary, cannot be doubted in view of the undisputed testimony of good crops having been produced during the above mentioned period, fresh water in the well, and ranging of livestock to the west of the old road the only source of water for which was out of the West Simmons ditch, and the showing that without such flow the crops would fail and fields and garden burn, the well go stale and unusable, and livestock be without water. That with such continuous use of said water so as to produce the crops and pastures which were grown on the land, supply fresh culinary water, and supply constant water for livestock, and without which use such crops could not be or have been produced, fresh well water be or have been supplied, or livestock be or have been watered which graze on the range west of the old road, are circumstances which testify above all denials to the continuous use of the water claimed.

Appellants' Point Three

Counsel for appellants argues that the use of water as claimed for by plaintiff on his land is excessive, and by his keen way of putting the bits of evidence together might make plaintiff's claim appear absurd if other pertinent evidence is not considered. Counsel cites the testimony of Dr. Farnsworth "that in some instances you

may have to go as high as six acre feet '' during a growing season, with which we agree.

Plaintiff testified that he had used this 1 C.F.S. stream running continuously during the years 1944, 45, 46 and 47 and up until July 12, 1948 when it was shut off the first time. (And as far as Witness Francis knew or had any record of Jackson had so used this water. (Tr. 588-590) After the water was turned off July 12, 1948, the well water became stagnant and unfit for use and receded below the intake valve, (Tr. 15) and plaintiff had to haul water from July 20 on (Tr. 17). On July 26 water table in well was 10.5 feet from top of cement casing. On July 27, 1948, plaintiff drew as emergency Strawberry water and applied on the garden, which was burning, in early forenoon, and about mid-afternoon turned on areas west and south of house. At 3 p.m. water table had raised to 9 feet 11 inches, and at 5 p.m. it had raised to 9.5 feet; at 9 p.m. it raised to 9 feet 2.5 inches from the top. (Tr. 17-18). After July 28 to August 21 (just before plaintiff drew the 1 C.F.S. under restraining order, water had again receded to 10 feet 5 inches from top of well. About 3 hours after applying water August 21 water table began to raise. The well was about 300 feet east of the West Simons ditch. On August 22 the water table was 9.5 feet; and on August 24 the table was 8 feet 11.5 inches. (Tr. 19). The foregoing evidence shows clearly the necessity for the continued use of the water on the land, and the water having always, with about only one exception, been fresh and suitable for

use, shows that the water claimed had in fact been running in the West Simmons ditch continuously. Not only that, but his evidence show as clearly as any classification can the pervious character of the soil (sandy loam—an old creek channel) on which the water had been and is used.

In the years 1944, 45, 46 and 47 plaintiff raised two crops of hay and had fall pasture for his lambs, the first crop yielded about two tons per acre and second crop about one and one-half. (Tr. 27). He used this 1 C.F.S., and (note) supplemented it with Strawberry water for high places, which supports the witnesses who testified that the water flowing in the West Simmons ditch in the early periods involved was more than at the time of trial which was 1 C.F.S., for as shown by plaintiff's testimony, they needed more in order to cover all the ground. Counsel in his arguments attempts to convey the idea that the McCarty Decree water and Strawberry water is and has been applied on this land in addition to the 1 C.F.S.

In 1948 plaintiff produced one crop and nothing after. After July 12 fields and gardens burned up. (See exhibits A, B and C — Tr. 26, 27, 28.) During the whole history of the land now owned by plaintiff as covered by testimony, it had been a good producing and profitable ranch, and no less so prior to Strawberry Valley water, due, without doubt, to the continuous use of the 1 C.F.S. or more of water, as testified to be the witnesses, and taking away this 1 C.F.S. from use there-

on can mean only irreparable injury to plaintiff, drying up of the lands and the worst kind of soil erosion and depletion.

Witness for plaintiff, Dr. R. B. Farnsworth, Associate Professor of Agromony, gave his account of a thorough study and analysis of the land and soil, the whole of which is very relevant to the subject, but too lengthy to set out herein for its full effect. He says (Tr. 333) that due to the character of soil and topography at least 45% of water applied on the land is not utilized by the plants, 10% is lost by evaporation and 35% percolates into the soil. His conclusions (Tr. 335) are that 1 C.F.S. can be beneficially used and is necessary for the adequate irrigation of the land on which the 1 C.F.S. has been used. Dr. Farnsworth says, and this is not refuted in any degree, as follows: (Tr. 324).

“Well from the nature of the soil and the vegetation that is growing, I would estimate that, as I said, he should rotate or vary from about four to seven or eight days between those spots in which he must put water on these particular fields. Now assuming that six days would be about an average, he should rotate on that field at least once a week. He should get that water over that on an average, over the entire farm, every week in order to keep his vegetation growing, particularly during the growing season, June, July and August, the heavy growing season.”

Plaintiff testified (Tr. 34) that the waters under the Strawberry Project and the McCarty Decree, without

the water which he had diverted in through the west Jackson (West Simmons) ditch would not be adequate for the irrigation of this land.

That the conclusions of witnesses Farnsworth and Jackson are sound is made clear by factual matters not controverted. When the water table in the well was down to 10 feet five inches and water was then applied the table began to raise in about 3 hours. If the water is withheld from the well area for four days the water in the well becomes stagnant and recedes, (Tr. 14) which indicates that the water head in the land drops in that period (4 days) to the extent that there is no pressure to force fresh water into the well. And if that be true then the water table in the land areas has dropped to such extent that moisture available for plant life has diminished to such extent that plant life begins to suffer, and water application is again needed.

Appellants' Point Four

This action is not an attempt to modify the McCarty Decree. We accept that decree and claim that by adverse use our client has acquired a right as against these corporation defendants to a part of the right awarded these corporate defendants by that decree and which the defendants have no right to shut off. It is just the same as if these corporate defendants have conveyed a 1 C.F.S. of their right under said decree to the plaintiff by deed, as far as the ultimate effect of the judgment herein. These defendants, excepting the State Engineer and his

deputy, are liable to the plaintiff for the damage which he sustained by reason of the turning off of his water, because they (1) assumed responsibility by their answer; and (2) because the water commissioner acted under their direction. The defendants' witness L. P. Thomas testified on cross examination; (Tr. 376) that he was a member of the Central Committee of the defendant corporations water users in May, June and July, 1948; that the committee met with Wayne Francis, the commissioner, prior to July 1, 1948, with reference to the distribution of the waters of Thistle Creek; and Francis at that meeting was requested to go up and shut off all the water from plaintiff claimed by the corporations under the McCarty Decree; since the committee does not recognize the stream referred to, which is the 1 C.F.S. in the West Jackson ditch.

It is submitted that from the allegations in their answer and counterclaim and the testimony above mentioned there can be no question of the liability of the defendant corporations for plaintiff's damages caused by shutting off his water.

Appellants' Point Five

We say again that plaintiff is not seeking to amend the McCarty Decree. He is claiming adversely to the rights of and against these particular corporate defendants; he claims a part of the rights awarded to them by that decree. There is no other water user from the stream below plaintiff's dam whose rights are affected

by this decree other than the named corporate defendants. (Tr. 591). Wayne Francis, defendants' witness testified:

Q. Isn't it a fact that Jackson is the lowest user of water on Thistle Creek?

A. Yes, with the exception of those homes. There are some homes right in the mouth of Thistle Creek, just as it goes into Thistle. There are some gardens down there that use water. They draw through the D. & R. G.s' diversion, however, which is above Mr. Jackson's lower turn-out. So I guess his turn-out would be the last one on Thistle Creek before it enters or comingles with Soldier Fork, and then down into Strawberry.

Some question is raised because Spanish Fork City is not made a party to this action. But plaintiff has no cause of action against Spanish Fork City. Spanish Fork City had no part in the shutting off of plaintiff's stream; it had no representation on the Central Committee; so far as we know and so far as the evidence shows, Spanish Fork City makes no objection to plaintiff's use of the 1 C.F.S. of water involved in this action. Plaintiff brought this action against every user, so far as he knew, who had anything to do with the shutting off of his stream; and to have brought in any party not offensive to plaintiff's rights would have been unjust and untenable. And to sustain the allegations for the injunction against the offending defendant corporations plaintiff established his right thereto as against their claims under the McCarty decree.

The difficulties of distribution if this judgment is to stand will not be insurmountable. The situation will be exactly the same as if plaintiff had purchased his right from the defendants and received a deed of conveyance for same. There is no occasion for any action that would partake of the aspects of a general judication. This suit is between these private parties over a private water right and does not in any way concern any public waters. If these corporate defendants had not taken action for the purpose and effect of shutting off plaintiff's stream this action for injunction and damages would not have arisen. As against these corporate defendants damages were granted plaintiff, and as against said defendants plaintiff is granted a decree for the 1 C.F.S. and an injunction against the defendants from shutting this water right off. The judgment and decree affected a full and complete determination of the issues between and rights of the plaintiff and these defendants and can not injuriously affect the rights of absent parties. The case of *United Shoe Manufacturing Corporation v. United States*, 258 U.S. 651-662 and 708; 42 S. Ct. 363, sustains the plaintiff's position, and we quote from (1) pages 64-5;

"... The relation of indispensable parties to the suit must be such that no decree can be entered in the case which will do justice to the parties before the court without injuriously affecting the rights of absent parties." Citing 1 Street's Equity Practice, 519.

Counsel for Appellants cite 47 C. J. page 88, and it is found there stated:

“But a person is not a necessary party defendant who. . . will not be affected or concluded by a judgment in the action;. . . .”

And sustaining this rule there is cited the case of *Reed v. Wing*, 168 Cal. 706, 144 Pac. 964, which says:

“... It is not denied by plaintiff, and can not be denied, that according to the general rule, all persons interested in a suit ought to be parties to it, but one of the exceptions to this rule is that where a decree with reference to the subject-matter of the litigation may be made without concluding in any way the rights of a person having an interest, such person is not a necessary party to the action.”

Reed v. Wing, supra, cites for its authority *Story v. Livingston*, 13 Peters 375, 10 L. Ed. 200, and *Lytle Creek Water Co. v. Perdew*, 65 Calif. 455, 4 Pac. 426. In the latter case it is said:

“... It is only where the Court can not determine the controversy between the parties before it without prejudicing the rights of any of the co-owners, or of any other person, that other parties must be brought in. When the contest can be settled without affecting the rights of others, there is no ground or reason for bringing in any other parties. Nor is such procedure required by Section 389 Code of Civil Procedure.”

And we find that Section 104-3-25 UCA 1943, cited by Appellants is comparable to Section 389 of the California Code of Civil Procedure, as shown in foot-note to section 104-3-25.

The holding in *Reed v. Wing*, *supra*, is approved in *Enid Oil and P. L. Co. v. Champlin*, (Okla) 240 Pac. 649.

In discussing the subject of parties, American Jurisprudence, Vol. 39, Section 27, page 889, as does also the *Oklahoma Supreme Court in Bank v. Eppler*, 77 Pac. 2nd 1158, recognizes an old leading authority in the case of *Gaines v. Chew*, 2 How. 619, 642, 11 L. Ed. 402, wherein it was said:

“Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the Court must exercise a sound discretion on the subject.”

We submit, that there is no effect that can be given the judgment and decree entered which prejudices Spanish Fork City in its rights, nor concludes the City from asserting its rights. But as between the defendant corporations and the plaintiff the judgment and decree is a full and complete determination; it determined that plaintiff is entitled to the use of the 1 C. F. S. of water of Thistle Creek and that the said defendants have that much less water right; that said defendants herein must not shut off plaintiff from the use of his water, and must pay him damages for having shut this water off. The judgment and decree entered herein does not amend the McCarty Decree. Ownership to the right to the use of the 1 C.F.S. has changed from the corporate defendants to the plaintiff, but in no different ultimate effect than if said defendants had conveyed it to the plaintiff, and certainly a conveyance would not have amended the McCarty Decree.

It is noted from the testimony of Commissioner Francis (Tr. 557) that Spanish Fork City does not take any water from Spanish Fork River, but obtains its water supply for culinary use from Springs in the mouth of Spanish Fork Canyon. In the McCarty Decree Spanish Fork City was awarded the right to divert its "water from said river by a canal, etc" (Decree page 5 lower par.)

Appellants' Point Six

Referring to Appellants' Point No. Six wherein it is claimed that the Court erred in striking out certain testimony of the witness L. P. Thomas. Referring to witness' testimony at page 359 of Transcript we quote:

Answer: "We turned off the water on this ditch, it would be my opinion about between four and five o'clock in the afternoon, shut it dry."

Q. Do you recall who has been in possession of this property that now is referred to as the Jackson home?

A. Spencer Simmons.

Q. At this or subsequent times did you have any conversation with Spencer Thomas about his claim of water right?

A. Yes, Sir.

Q. Can you give us about when and where that was?

A. It was when Mr. Oberhansley and Mr. Mitchell was the officers of the Clinton Irrigation Company. We were holding a meeting in

the school house at Thistle—Birds Eye.

Q. Then known as Clinton?

A. Yes.

Q. All right, tell us just what was said and done there by you and Spencer Simmons.

A. Spencer Simmons claimed that if we would go and measure the water in the river just above his ground, and then he take his stream of water out, then for us to go and measure the water at the lower end of this field again.

Q. Now is that the upper field, the field where Jackson now—

A. The field around his house there.

Q. All right.

A. And then he would be willing to take a charge of whatever he shorted the river, that he would take a charge for that and figure that his water right in that way. But owing to the conditions around there, the land north of his house as they have explained wet, and also the ground on his old place, about three acres, that sub-irrigations, and other conditions, we figured we couldn't do that. We don't know the condition of the river and—

MR. ANDERSON. We move to strike that answer, "We figured we couldn't do that."

THE COURT: I think that is well taken.

Q. Was that matter discussed with Spencer Simmons?

A. Yes sir.

Q. All right, did Mr. Simmons at that time or at any time that you recall make a claim to one second foot or any other quantity of water except that which he was given by the McCarty Decree and Strawberry water?

A. He did not."

The plaintiff having objected to this witness testifying to any conversations which he had with Spencer Simmons on the ground that he was incompetent under the Dead Man's Statute Section 104-49-2 U.C.A. 1943, moved to strike all such testimony. This motion was granted by the Court, Tr. 372.

This ruling was not error in view of the record and under the authorities:

The Chamberlayne TRIAL EVIDENCE
 Sec. 295, page 269
 70 C. J. Sec. 318, page 251
 4th Jones on Evidence Sec. 789, page 1449.

Further and more, the ruling of the Court being indefinite the Court did not strike the testimony of L. P. Thomas, for the Court weighed that testimony along with the other evidence in the case when making its findings, as appears from his summation of the testimony of said witness. See J. R. 78.

Finally, the statement of Spencer Simmons as testified to by L. P. Thomas indicated that Simmons claimed the water, for Simmons claimed that if we would go and measure the water in the river just above his ground, and

then he takes his stream of water out, etc. (Italics writers').

We respectfully submit that the judgment appealed from is fully sustained by the facts in the case and the law, and that it is reasonable and just.

Respectfully submitted,

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Plaintiff and Respondent.*