

1950

# William D. Jackson v. Spanish Fork West Field Irrigation Company et al : Petition for Re-hearing and Brief in Support Thereof

Utah Supreme Court

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P. N. Anderson; Dilworth Woolley; Attorneys for Plaintiff and Respondent;

Elias Hansen; Attorney for Defendants and Appellants;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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WILLIAM D. JACKSON,

*Plaintiff and Respondent,*

vs.

SPANISH FORK WEST FIELD IRRIGATION  
COMPANY, a corporation, SPANISH FORK  
SOUTH IRRIGATION COMPANY, a corpo-  
ration, SPANISH FORK SOUTHEAST IR-  
RIGATION COMPANY, a corporation, THE  
SALEM IRRIGATION AND CANAL COM-  
PANY, a corporation, SPANISH FORK  
EAST BENCH IRRIGATION AND MANU-  
FACTURING COMPANY, a corporation,  
LAKE SHORE IRRIGATION COMPANY, ED  
WATSON, State Engineer of the State  
of Utah, a corporation, and WAYNE  
FRANCES,

*Defendants and Appellants.*

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PETITION FOR RE-HEARING AND  
BRIEF IN SUPPORT THEREOF

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APPEALED FROM THE FOURTH DISTRICT COURT,  
UTAH COUNTY

HON. WILLIAM STANLEY DUNFORD, *Judge*

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

ELIAS HANSEN,  
*Attorney for Appellants.*

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WATSON, State Engineer of the State  
of Utah, a corporation, and WAYNE  
FRANCES,

Case No. 7450

*Defendants and Appellants.*

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### PETITION FOR RE-HEARING AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE MEMBERS OF  
THE SUPREME COURT OF UTAH:

Come now the defendants who are appellants in  
the above entitled cause and respectfully petition this

court to grant defendants and appellants a rehearing of the above entitled cause for the following reasons and upon the following grounds:

1. The court erred in affirming the judgment rendered by the trial court wherein and whereby the trial court awarded a judgment against the defendants quieting title in the plaintiff and against the defendants for a "continuous flow throughout the entire year of one cubic foot per second of the water of Thistle Creek, a tributary of Spanish Fork River." That such award is without support in the evidence and especially an award of a continuous flow of one second foot of water for the irrigation of about 19 acres of land in Spanish Fork Canyon, Utah during the winter season is contrary to law as heretofore announced by this Court and against the public policy of this state as provided in its statutory law.

2. The trial court erred in holding that the witness Hart, water commissioner in 1906 "did not shut off the water although it was flowing onto the land." The evidence of the witness Hart is directly to the contrary in that Mr. Hart testified that "May I say that Mr. Simmons wasn't using the water, it simply ran through his place right close to his house in a narrow almost vertically sided ditch about a foot wide" (Tr. 612).

3. The trial court erred in holding that "The right to the use of the 1 cubic foot per second accord-

ing to the testimony for plaintiff was perfected prior to the existence of rights of the Strawberry Project on the part of his predecessors in interest and before any exchange contract with the lower users had been made.

4. The court erred in holding that plaintiff's evidence by several witnesses established the adverse use for the requisite length of time.

5. The court erred by in effect holding that the evidence shows that water was being adversely used by plaintiff's predecessors in interest from 1899 to 1914.

6. The court erred by in effect holding that the evidence shows that plaintiff's predecessors used the water adversely from 1914 to 1923.

7. The court erred in holding that the evidence shows that the McCarty decreed water and Strawberry Reservoir water were used only infrequently on this land according to the testimony and then only to increase the flow so as to irrigate remote and hilly parts of the land.

8. The court erred in holding that "little McCarty decreed water and little Strawberry water was used on the land and these rights held by Jackson and his predecessors in interest was used on other lands."

9. The court erred in holding that the evidence of Dr. Farnsworth supports a find that a continuous flow of one second foot of water in addition to the

Strawberry and McCarty decreed water can be beneficially used to irrigate the Jackson property.

WHEREFORE, your petitioners pray that this court re-examine the evidence and the law in this case to the end that the opinion correctly reflects the evidence and that the law touching beneficial and adverse use of water be applied to the evidence when so corrected to the end that the Decree and Judgment rendered in the above entitled cause be reversed.

ELIAS HANSEN,

*Attorney for Defendants  
who are Appellants.*

### CERTIFICATE OF MERIT

I, Elias Hansen, hereby certify that I am the attorney for the defendants who are appellants in the above entitled cause that I have carefully re-examined the evidence in the above entitled cause and in my opinion the foregoing Petition for a Rehearing is meritorious and that the record in the above entitled cause should be re-examined to the end that the errors alleged in such petition be corrected.

ELIAS HANSEN,

*Attorney for Defendants  
and Appellants.*



## BRIEF IN SUPPORT OF PETITION FOR REHEARING

THERE CAN BE NO BENEFICIAL USE OF ONE SECOND FOOT OF WATER ON THE JACKSON PROPERTY THROUGHOUT THE ENTIRE YEAR.

The Decree entered in the above entitled cause contains among its provisions the following:

“That as against all of the defendants in this action, the plaintiff is the owner, and for more than 35 years next prior to the commencement of this action he and his predecessors in interest and in title have been the owners of the right to the use of a *continuous* flow throughout the entire year of one cubic foot per second of the waters of Thistle Creek, a tributary of Spanish Fork River.”

The law in effect since and before Utah became a State is that “Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.” *U.C.A.* 1943, 100-1-3. This Court has so frequently and uniformly had occasion to apply the law above cited that we do not deem it necessary to cite cases in support of that doctrine. Cases dealing with various situations where the doctrine has been applied will be found collected in footnotes to the section of the statute above cited.

We have made a search for cases in this jurisdiction where it is held that water may be beneficially used for irrigation throughout the entire year, but

have been unable to find any such case other than the present one. If counsel for the plaintiff is able to find a case, other than the instant case, where this court has held that water may be beneficially used for irrigation throughout the entire year, especially in a Utah canyon, their efforts will be rewarded in an undertaking where *ours* have utterly failed. We digress to remark that it would indeed be a startling sight to see someone on the Jackson farm with a shovel in the middle of the winter engaged in the irrigation of the Jackson farm. Heretofore this Court has been committed to the doctrine that water may not be beneficially used for irrigation during the winter season. *Hardy vs. Beaver County Irrigation Company*, 65 Utah 28, 234 Pac. 524. It will be noted that in the case just cited, an attempt was made to show that by permitting water to gather into pools on the surface of the earth in the winter time it was claimed that the water level underneath the surface would raise to supply water for the crops during the summer season. This court rejected such a contention. In this case there was not even an attempt made to show that winter irrigation was either practiced or beneficial. It would seem obvious that a second foot of water which flows approximately 730 acre feet throughout the year, which for 19 acres amounts to more than 38 acre feet per acre per year, cannot possibly be used beneficially. That is 12 times the quantity of water allowed by the State Engineer for the irrigation of lands. The amount of water per-

mitted by the State Engineer is 3 acre feet per annum per acre, or a maximum of one second foot of water for 60 acres of land. We find it difficult to believe this court intends to establish as the law in this State that more than 38 acre feet of water per acre may be annually used to irrigate land especially in its canyons, where there is a good water right for summer irrigation, or that a second foot of water may be beneficially used for irrigation during the winter season.

In connection with what we have said, we are mindful that there is some evidence that some livestock were kept on the Jackson property both before and after the same was acquired by him. No evidence was offered as to the amount of water that might have been used by such livestock, nor that it was necessary to divert water from the river to provide water for livestock during the winter. A second foot of water flows 450 gallons per minute, or 64,800 gallons in 24 hours. The amount of water necessary, according to the authorities, to supply one person with culinary water, is about 300 gallons per day so that a second foot of water will supply a town of more than 2100 persons with a sufficient supply of water for culinary uses. Yet in the face of such facts, the trial Court awarded the plaintiff a continuous flow of one second foot throughout the year in addition to the water right which he had under the McCarty Decree and the Strawberry Project. In the opinion heretofore written, that award has been affirmed.

In calling the attention of the Court to the foregoing facts, we are mindful that the defendants did not show or attempt to show that they had a beneficial use of the water involved in this controversy during the winter season.

During the course of the trial, we were of the opinion that the burden was on the plaintiff to establish his right to the water claimed by him, and that if he failed to so establish his right, he was not entitled to a Decree quieting his title. While our conviction that such is the law has been somewhat weakened by the results reached in this case, we cannot believe that this Court intends to adopt any other or different doctrine. To put the matter in the language frequently used by the Courts, the plaintiff must prevail, if at all, upon the strength of his own title, and not upon the weakness of the title of his adversary. 44 *Am. Jur.* 67, Section 83 and cases there cited. As applied to a water right, the law fixes the right to water in the public except the right to that which is beneficially used. *U.C.A.* 1943-100-11 provides that "All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof."

It would seem that this court and the trial court may take judicial notice of the fact that waters flowing down Spanish Fork River are in demand and most if not all are beneficially used. The winter waters that find their way into Utah Lake are there stored

and used during the summer season to irrigate the lands in Salt Lake County. It may be that the courts may not take judicial notice of the fact that during the winter season when the flow of Spanish Fork River is low every available drop of water that finds its way to the mouth of Spanish Fork Canyon is there used for the purpose of supplying hydraulic power to operate two hydro-electric power plants which are owned and operated by the lower water users for generating power for lighting and operating machines in the various communities in the south end of Utah County. So scarce is the water during the winter that the water available must be stored during the day time in order to secure sufficient water to supply electrical energy to light the cities and towns in the south end of Utah County during the evenings when the power plants are required to carry their peak loads.

It may well be that this court may not take judicial notice of the facts just recited and we recite them for the purpose of illustrating the vice and probable evils that are likely to follow from awarding a water right to a water user, especially upon the upper portion of a river or other source of supply that he cannot possibly put to a beneficial use.

We may be pardoned if we pursue this matter a step further. Assuming it to be the fact, which incidentally it is, that the defendants' herein have a pecuniary interest in the power plants near the mouth of Spanish Fork Canyon, which power plants are

dependent upon a uniform flow of the waters of Spanish Fork River for their operations, would it be necessary to offer proof of such fact in order to defeat the water right awarded to the plaintiff to use one cubic foot of water per second throughout the entire year? I wonder what the trial court would have said if we had offered proof to show that there were two hydro-electric power plants near the mouth of Spanish Fork Canyon that were frequently in dire need of water for power purposes during the winter months and that if one cubic foot per second was diverted and consumed on the Jackson property, the power plants would suffer irreparable injury. We apprehend that if any such proof had been offered the trial court would promptly have said that such evidence was not admissible because the plaintiff had not and could not establish any right to the use of such water during the winter season and therefore it would be a waste of time to make inquiry into such matters.

In short, until the plaintiff showed that he had or could beneficially use such water, no useful purpose would be served by making inquiry into the need of the two power plants near the mouth of Spanish Fork Canyon to have a constant flow of water during the winter season.

Before leaving this phase of the case, there is a further observation. A number of witnesses did testify that throughout the years, water was running in the ditch near the road on the west side of the

Jackson farm land. It is apparently upon such evidence that the decree rests awarding Jackson one second foot of water throughout the entire year. In other words, because water was being diverted from Thistle Creek near the South end of the Jackson property and coursed through the ditch along the west side of such property for the period necessary to acquire title by adverse possession, that therefore a title to such water was acquired by adverse use. In other words, the mere fact that water is diverted from a natural river justifies a finding that the water so diverted is being adversely used. It is submitted that the statement just made is not an overstatement of the sole basis for the Decree awarding plaintiff a second foot of water throughout the entire year. Since this case was decided, we have reread the record twice with the thought in mind of trying to find some evidence other than the evidence touching the matter of water running in the west Jackson ditch that supports the conclusion that Jackson or his predecessors in interest used one second foot of water adversely through a seven-year period or even a one-year period, but we are unable to find any such other evidence. There were some who testified about at times seeing someone irrigating the Jackson property during a part of the summer season. We would be very much surprised if anyone could find evidence that the Jackson property was being irrigated during such months as December, January and February. Yet if plaintiff's witnesses are to be believed, water was being coursed through the ditch to the west of

the Jackson property during those winter months the same as during the summer season. We entertain very grave doubts that anyone in his right mind would irrigate land during the early spring, late fall, or winter months; yet a number of plaintiff's witnesses testified that water was being coursed through the ditch to the West of the Jackson property during those months, and founded upon this fact, the Court awarded Jackson a decree for one second foot of water throughout the year, in addition to the McCarty decree and Strawberry water. Here again we find it difficult to believe that this Court wishes to lay down the rule that one who merely diverts water from a natural stream through a ditch along his land thereby acquires a right to such water if the diversion continues for seven years.

If it be reasoned that the owner of the property now owned by Jackson was not foolish enough to irrigate his land throughout the season but must have diverted the water which he diverted into his ditch back into the river, then the conclusion is inescapable that much of the water which was diverted from the river into his ditch during the summer was probably diverted back into the river without being used upon the Jackson land. We shall presently direct the Court to the evidence which shows that the water diverted into the Jackson ditch during the irrigation season was not all diverted onto the Jackson property, especially during the early days. It would be going far afield to say that all that is necessary to establish title by



adverse use is to show that water is diverted into a ditch which extends along one's land, especially where as here the evidence fails to show that such water was being used on the land of the one who diverts the same and on the contrary the evidence shows that at times the water was not being so used, and at other times when the water was being so diverted in the winter season it must have been diverted back into the river because no sane person would use the same upon his land if indeed it was possible to do so.

IN THE OPINION HERETOFORE WRITTEN, THIS COURT MISCONCEIVED THE EVIDENCE OF THE WITNESS HART IN THAT IT INCORRECTLY SAID THAT HART TESTIFIED THAT IN 1906 WHEN HE WAS WATER COMMISSIONER AND VISITED THE PROPERTY HERE INVOLVED THE WATER WAS RUNNING ON THE SIMMONS PROPERTY, WHILE HE STATED THAT THE WATER WAS NOT RUNNING ON SUCH PROPERTY.

At the top of page 4 of the opinion sent out by the Court, it is said, "Some of defendants' evidence tends also to show the flow to be near one c.f.s. Witness Hart, water commissioner in 1906, measured the stream flowing in the ditch at .98 c.f.s. which he did not shut off, although it was flowing onto the land."

The testimony of the witness Hart will be found on pages 604-614, Volume 2 of the transcript. We summarize such portions of his testimony as we deem necessary to an understanding of the purport thereof.

"That he is a consulting engineer; that he was water commissioner, beginning in 1906, all of the sea-

son of 1906, all but one short period in 1907 and one month in 1908'' (Tr. 604). That fundamentally his duties were to see that the provisions of the McCarty decree were carried out; that part of the duties was to see that the water in Spanish Fork Canyon was distributed according to the McCarty Decree (Tr. 605). That in 1906 typewritten postcards were sent out to all secondary and tertiary water users in the canyon that the river was falling, and that at that time the tertiary rights were cut off. Then the second set of cards was sent out when the secondary rights were terminated, based on the flow of the river. Then after the owners had a chance to receive these cards and so in 1906 I secured the services of Mr. Newell Monk and drove up the canyon examining and visiting all of the ranches being just above the mouth of Spanish Fork Canyon proper, up Soldier Fork, up Thistle Fork and up Diamond Fork to check on whether the cards had been received and whether the instructions were being obeyed (Tr. 607). That he went to the Simmons ranch which is close to Clinton. That everyone on the Fork where the Simmons Ranch is located had complied with the instructions; that Mr. Simmons or the one who was the owner of the Simmons Ranch was interested in knowing the amount of water flowing in the ditch and Mr. Hart measured the same and it flowed .98 of a second foot (Tr. 609). Mr. Simmons asked if the owner of land was entitled to a spring on his land and the witness informed him that he was not. That Mr. Simmons made no claim

to any water except that covered by the McCarty Decree (Tr. 609). That in 1907 the witness was called East for several weeks, and Mr. Frank R. Clark was chosen to do the work of sending out cards during his absence. That Mr. Hart did not visit the ranches in 1907 or 1908 (Tr. 610). On cross-examination he testified: "That Mr. Simmons was not using the water—it simply ran through his place right close to his house in a narrow, almost vertically sided ditch about a foot wide" (Tr. 612). He was asked this question and gave this answer: Q. And this ditch was—did that run through his place and into the main channel?

A. I presume that it got back into the stream because nobody was using it at that time. I didn't trace it clear through, out right into the stream (Tr. 613).

In light of the fact that the sole purpose of the visit of Mr. Hart in Spanish Fork Canyon was to ascertain if the people in the canyon had complied with the Notice sent to them, it cannot within reason be said that Mr. Hart was mistaken when he said the water was not being used on the property now owned by plaintiff.

In connection with the testimony of Mr. Hart to the effect that when he was Water Commissioner in 1906 and went to the Simmons property the water was running in the ditch to the west of the Simmons property but was not running upon his land, we direct the attention of the court to the manner in which the water was diverted from Thistle Creek and when not actually ap-

plied on the land diverted back into the creek. Mr. David Warner testified that he was Water Commission in 1934 (Tr. 411). That during that year when Mr. Warner was about to turn the water off the Simmons property, Spencer Simmons, plaintiff's predecessor in title, was there and requested Warner to turn the water back into the creek some distance down the ditch and not cut through the dam used to divert the water from the creek. That the dam across the creek was made of timber, rocks and maybe a load of straw or something like that. That a short distance down the stream it was safe to cut the water back into the creek without causing damage to the dam which diverted water from the creek. That it was a common practice in all of the ditches in the canyon to divert the water from the creek into ditches and then when the water had coursed down the ditch some distance, the same was diverted back into the creek. It is easy to understand why that practice was generally followed in Spanish Fork Canyon and for that matter in other parts of Utah, where water is diverted from Mountain streams for use in irrigation. It is expensive to install and maintain cement gates, especially where the same is in a turbulent mountain stream, so also it is obvious that to pull out a dam of rocks, timber or straw or other similar material after each irrigation would entail considerable work. It is much easier to put a dam of rocks, timber and straw in the creek and leave it there at least throughout an irrigation season and then as was done by Mr. Warner at Spencer Simmons'

request, divert the water back into the creek at some convenient point below the dam where the water is being diverted.

Unless the Court is to ignore the testimony of Mr. Hart that is what was being done in 1906 when he visited the Simmons property, so also that must have been the practice that was being followed at the time that various witnesses testified that water was continuously flowing in the ditch along the road to the west of the Simmons property. The writer of this brief and probably some members of this Court have had some experience in irrigating farm lands. We have already discussed the extreme improbability if not the impossibility of running one second foot of water on about nineteen acres of land throughout the entire year. Moreover, the evidence shows that grain was frequently grown on the property now owned by the plaintiff during the time the same was owned by Simmons (Tr. 103; Tr. 125, 180, 190).

It is also made to appear that grain in Spanish Fork Canyon is irrigated twice a year (Tr. 217, Tr. 198).

We believe that it is a matter of common knowledge of which the Court will take judicial notice, that it would be ruinous to irrigate a grain crop before it is at least a few inches high, and that if, as the evidence shows, two irrigations of grain crops is all that is required on the property here involved it would be impossible to use and actually consume a second foot of

water on 19 acres of land, when the same was planted to grain. That being so, if, as some of the witnesses testified, there was always water flowing in the West Jackson ditch, it necessarily follows that the same was coursed back into the river as was the case when Hart visited the property in 1906.

That such was the practice finds support in the testimony of plaintiffs witness Ole C. Anderson "The land north of the house was completely meadow, it was too wet. As I remember there were several little sloughs and he raised meadow hay there all the time. I can't ever remember of any of that being plowed at all". (Tr. 262).

There is another significant fact in connection with the testimony of plaintiff's witnesses. A number of them testified that the ditch running along the West of the Jackson property crossed the road four times (some said three times) And that it was always full of water. The evidence also shows that water is diverted into the ditch at the South end of the Jackson property that runs north a distance of 2031 feet (Tr. 11). If the water which was being diverted for Thistle Creek at all times filled the ditch to the west of the Jackson property, it could not have been used to irrigate the Jackson property. Thus while this water was being used to irrigate the extreme south end of the Jackson property, it would not even reach the road, because the water is and has been at all times diverted from Thistle Creek at the Southeast corner of

the property. So, also, while a southerly part of the Jackson property is being irrigated there would not be any water running in the North end of the ditch. All of the witnesses who testified for the plaintiff as to the ditch being full at all times made no distinction as to the north and south end of the ditch, or as to the quantity of water in the ditch when it crossed the road the fourth time to the North. If, as appears from the evidence, the ditch was at all times full at the North end thereof, the water diverted from Thistle Creek could not have been used at such times to irrigate any of the Jackson property except possibly the extreme North part thereof. It must have flowed into the slough testified to by Ole C. Anderson and thence into the river.

If it were not for the fact that one of the water Commissioners of the early days had become incompetent and another has died, these defendants would probably have been able to have produced direct and positive evidence as to how any water which was coursed through the ditch to the west of the Jackson (formerly the Simmons) property was handled.

In light of the fact that the ditch to the west of the property here involved, ran near and parallel with a public road where it could at all times be seen and determined whether the water was or recently had been used for irrigation, we can readily understand why water Commissioner should not be especially concerned as in the case of Commissioner Hart, because the



water was running in the ditch so long as it was not being unlawfully used for irrigation. However, it does test our credulity to and beyond the breaking point to believe that a water commissioner, for a period of seven successive years, while being employed to see that the McCarty Decree was carried out, deliberately passed and saw water running on the Simmons property immediately adjacent to the road, contrary to the decree, and did absolutely nothing about it. It is equally, if not more difficult, to believe that during the latter part of the time Spencer Simmons owned the property, he, upon numerous occasions, would be present when the water was turned off and on one occasion directed how it should be turned off if in fact he claimed a right to the use of such water. Not only did Simmons do that, he and plaintiff's other predecessor in title, including the plaintiff herein, upon numerous occasions knew about the water being turned off without so much as uttering a word in protest, or making it known that they claimed any interest in the waters of Spanish Fork River, except such as were decreed in the McCarty Decree, and later the waters purchased from the Strawberry project. But lest it be said that we are merely making general statements which do not aid the Court in arriving at a proper conclusion, we shall direct the attention of the Court specifically to the evidence and where it may be found in the transcript.

**THERE IS NO SUBSTANTIAL EVIDENCE THAT THERE WAS ANY ADVERSE USE OF THE WATER AWARDED TO THE PLAINTIFF BEFORE THE CON-**



TRACT WAS MADE FOR THE PURCHASE OF STRAWBERRY WATER AND THE EVIDENCE CONCLUSIVELY SHOWS THAT ANY WATER THAT MAY HAVE BEEN USED WAS NOT UNDER CLAIM OF RIGHT.

The contract for the exchange of water was entered into in 1915 (see defendants Exhibit 4). During the same year 1915 a contract was entered into between the canyon water users and the United States Government, Defendants Exhibit 3. The only evidence which sheds any light on what occurred with respect to the coursing of water through the ditch to the west of the property now owned by plaintiff is that of Commissioner Hart, which we have heretofore in part quoted, and the testimony of Mariah J. Shepherd, Joseph H. Shepherd, and A. Mitchell.

Mariah J. Shepherd's testimony will be found on pages 99 to 117. It is to the effect that she lived up at Crab Creek with her husband from 1909 to 1920. That during that period, she travelled the road going along the West of the property now owned by plaintiff, every Tuesday, Thursday, Saturday and Sunday, on her way to and from Thistle (Tr. 102). That there were good crops, at times grain, and at other times hay, growing on this property now owned by plaintiff. The ditch along the west side of the property was always full of water, except when the ditch was being cleaned out. That was true in both winter and summer (Tr. 104). That she saw them using the water to irrigate the land. On cross-examination, she testified that "I couldn't state whether it was held out of the creek all

the time when it went through there (by the barn) but I know it was sometime" (Tr. 111). "I don't know whether it went back into the river or on the land" (Tr. 112).

The testimony of Joseph H. Shepherd, the husband of Mariah Shepherd, will be found on pages 118-139. He testified that he lived up on Crab Creek from 1909 to 1920. That he went by the property now owned by plaintiff every Sunday and sometimes during the week on his way to and from Thistle. That in making these trips he did not remember seeing the ditch to the west of plaintiff's property when it did not have water in it, except possibly in the winter time when there was generally ice in the ditch and you couldn't tell (Tr. 122). It was always full of water during the spring, summer and fall (Tr. 123). That wheat, oats, barley and hay was raised on the land (Tr. 125). Potatoes were also grown on the property (Tr. 126). That he knew Leven Simmons irrigated the land then owned by him, but he wouldn't say that he irrigated in July and August (Tr. 129). On cross-examination, he testified that they usually harvested their grain crops in that area in the latter part of July (Tr. 129). That grain crops are given the last irrigation in the latter part of June (Tr. 130).

That when the State built their highway, they put in some blasts and flung a lot of rocks and grass over on the lower end of this piece which made it more rough (Tr. 135-136). That he wouldn't be able to tell

how many times he saw water in the ditch to the west of the property now owned by the plaintiff. That he didn't know where the water went that was in the ditch but he has seen them irrigating (Tr. 137), but he didn't know whether they used it all the time or not. That he didn't know whether it emptied back into the river (Tr. 138).

The testimony of David A. Mitchell will be found on page 174 to 187 of the transcript. He testified that he first took up residence in the vicinity of Thistle in 1889. That at that time the road up the canyon was west of what is now plaintiff's property. That when he travelled that road he saw water in the ditch along the west side of the then Simmons property; every time he passed by the ditch was full (Tr. 178-179). That the crops raised on the Simmons property were generally good (Tr. 179). The crops were average crops and consisted of hay and grain (Tr. 180). That he remembered the people from down in the valley coming up into the canyon when the river fell down and shut them off (Tr. 188). That he didn't notice whether the flow in the ditch to the west of plaintiff's property changed after the people from down in the valley came up to the canyon (Tr. 184). I don't know whether the people in the valley ever interfered with the waters used by Simmons (Tr. 185).

T. E. McKean was called as a witness of the plaintiff. His testimony will be found on pages 188 to 197 of the transcript. He testified that he has lived up in

Spanish Fork Canyon since 1910. That Spencer Simmons owned the Jackson place in 1910. That Spencer Simmons raised good crops consisting of grain and hay (Tr.190). That he didn't remember of seeing the ditch to the west of the Simmons property when it did not have water in it (Tr. 192). That he didn't remember Simmons having a crop failure. That he had cattle on his place (Tr. 193). On cross-examination, he testified that they usually irrigate grain twice, the first time about the middle of May and the second time about the 1st to the 10th of June. They begin irrigating wild hay about the 1st to the 15th of April, and it is irrigated to November (Tr. 198). Hay crops are irrigated three or four times (Tr. 199). That he saw water in the ditch most of the time he went by (Tr. 200). That every time he went by he saw water running in the Spencer Simmons place (Tr. 201).

James Hicks testified for plaintiff (Tr. 207 to 226). That he was acquainted with the Spencer Simmons place since 1912, when he first assisted him on the farm. That he always had good crops (Tr. 208). He had cattle on the place (Tr. 209). Simmons raised hay and grain on his land and at times potatoes (Tr. 212). They were watered during the summer months during June, July, August and September (Tr. 212). There was probably a little better than a second foot of water flowing in the West Simmons ditch (Tr. 213). That during the time he lived in the canyon, he passed by the Simmons property, about once a week, and did not remember seeing the ditch dry (Tr. 214). That farms in

the canyon generally irrigate three times (Tr. 216). That they irrigate in the canyon depending on the weather (Tr. 217). That he generally irrigated about July 1 and then again about two weeks later (Tr. 218). That he recalls the people down in the valley coming up in the canyon and cutting off the water. That was usually about July 1st and sometimes later (Tr. 220). That the people in the canyon all bought one acre foot of water because they needed more water. And as he remembered, they paid \$60.00 for an acre foot (Tr. 222). That they raised as good crops before they got the Strawberry water as they did after (Tr. 225). That when he worked for Simmons, they used water from the well which was generally good, but there were times that it wasn't good but dried up.

In the foregoing statement we have set out the substance of all of the evidence that tends to support the claim that plaintiff's predecessors in interest acquired a right to the use of one second foot of water throughout the entire year prior to 1915 when water was purchased from the United States and a contract was entered into for the exchange of such water for an equal amount of water in Thistle Creek.

As against such evidence we have the following direct and circumstantial evidence:

1. If the water was running in the ditch to the west of the property now owned by the plaintiff throughout all or substantially all of the year, it must, during at least a greater part of such time, flow back

into the creek, because even if it were possible to keep the water on the land such an exclusive and continuous use of water would have destroyed any crops growing thereon other than grasses which grow in swampy wet land.

2. Mr. Hart testified that while Commissioner and in 1906, he sent notice to the water users in Spanish Fork Canyon that they were placed on regulation and to cease using any water except that decreed to them. Later he went to see if the water users in the canyon had complied and found that they had, including the owner of the property now owned by plaintiff.

3. At and prior to 1915 Leven Simmons and Luna Simmons, predecessors in title of plaintiff, as well as numerous other water users in Spanish Fork Canyon did not have sufficient water to irrigate their lands in Spanish Fork Canyon and therefore entered into a contract to purchase water from the United States Government to irrigate such lands and agree to pay \$45.00 per acre foot therefore, together with cost of maintenance. Defendant's Exhibit 3.

4. That the water purchased in 1915 was evidently insufficient to supply the needs of Leven Simmons and Luna Simmons, predecessors in title of plaintiff, because in 1919 they purchased additional water from the United States and agreed to pay therefore the sum of \$51.75 per acre foot, together with maintenance costs. Defendants Exhibit 2. It will be observed that by the first contract of purchase in 1915, Leven Simmons and

his wife purchased 50 acre feet (see page 12 of Defendants' Exhibit 3) and by the second contract of 1919 they purchased 20 acre feet (see page 9 of Defendants' Exhibit 2). The land now owned by plaintiff was given as security for the water purchased (see Plaintiff's Exhibits 1 and 11). It is also worth noting that when the water was purchased it, as a matter of law, became appurtenant to the land for which it was applied. Laws of Utah 1905, page 162. Later U.C.A., 1933, 100-1-14.

5. In 1914, L. P. Thomas in the presence of Spencer Simmons, who was in charge of the property now owned by the plaintiff, turned off the water then being diverted.

6. During many years while Spencer Simmons owned the property he was present when the water was turned off the property now owned by the plaintiff, and upon one occasion he directed how it should be turned off but he never at any time made any objection to its being turned off or claimed any right to any water other than that covered by the McCarty Decree and that purchased from the United States. As heretofore stated Newell Monk was Water Commissioner from 1909 to 1920, Tr. 355). At the time of the trial he was 88 years old and incompetent. It also appears that from the time of the entry of the McCarty Decree, the people in the valley whenever the flow of the river fell to a point where the canyon people were cut down sent someone up into the canyon to see that the Decree

was being complied with. Other than Commissioner Hart, the first commissioner of the river who was alive and available at the time of the trial was Lorin W. Jones, who served as Commissioner from 1923 to 1928, both years inclusive. That he made trips up into Spanish Fork Canyon about once a week, sometimes oftener beginning along in June when the flow of Spanish Fork River receded (Tr. 379-380). That during the time he made his trips up Spanish Fork Canyon during the years 1923 to 1928, both inclusive, he went to where water was being diverted from Thistle Creek to the Simmons property "probably once every two weeks" (Tr. 380). That he kept notes, but the same have been lost. That very frequently when he turned the water out of the Simmons ditch he had a conversation with Spencer Simmons who was operating the farm (Tr. 383). That every time that he turned the water off "he, (Jones) would notify him (Simmons) that he was not entitled to the use of the water and he (Simmons) would tell me to either turn it off or he would do it himself." That at no time did Simmons make a claim to any water other than the McCarty decreed water and Strawberry water. When Mr. Jones called Simmons' attention to the fact that he was under the regulation of the company (Clinton Irrigation Company) Simmons stated that his company would not function (Tr. 384). The attention of the court is directed to the fact that the canyon people were required by their contract with the corporations who diverted water below the mouth of Spanish Fork Canyon "to appoint a water



master whose duty it shall be to notify the land owner of the time that each shall have the use of the water, said water master shall also measure out the water into the irrigation ditches of the land-owners (people in the canyon) when requested so to do by the Commissioner aforesaid, but not otherwise." See defendants Exhibit 4 Page 6. We shall have more to say about the manner of regulating the water in Spanish Fork Canyon after 1915 later in this Brief. The point we wish to make at this point is that at no time during their lifetime did either Leven Simmons or Spencer Simmons make any claim to any water in Spanish Fork River other than the McCarty decreed water and the water purchased from the United States, but on the contrary they, upon numerous occasions, recognized that they had no right to any water other than those two rights.

But let us proceed to a consideration of what Spencer Simmons did with respect to the water claimed by him during the remainder of the time he operated the farm now owned by plaintiff.

James A. Anderson followed Lorin Jones as Commissioner of Spanish Fork River. He served during the seasons of 1929 and 1930. He testified that during the years he was Commissioner he made two trips each year. That only on one occasion was water running in the Simmons ditch (Tr. 401.)

David Warner was the next Commissioner called as a witness by the defendants. He served in 1934 and

about six weeks in 1930 (Tr. 411). That Ole Anderson was the water master for the canyon people who were operating as the Clinton Irrigation Company (Tr. 413). He testified that he went to the place where Spencer Simmons diverts water from Thistle Creek on several occasions. That he turned the water off the Simmons property several times (Tr. 414). We have heretofore directed the attention of the court to this testimony of Mr. Warner "at one time Spencer Simmons was there when we turned it off. I remember that, that one time that he was right there." "He wanted us to turn it off farther down the ditch, as I remember it, and not cut through his dam in the main stream" (Tr. 415).

Mr. Warner gave the following answer to the following question:

Q: "Was any of the water then permitted to course West Simmons ditch?"

A: "Not below where we turned it out wherever it was." (Tr. 417).

Angus D. Taylor was called as a witness by defendants and testified that he was a deputy water commissioner during 1937, 1938, 1938 and 1940 (Tr. 426). That his duties were to supervise and regulate the water of Spanish Fork River in the canyon (Tr. 427). That during the years he was deputy commissioner, he visited the Simmons ditch about on the average of once in a week or ten days (Tr. 429). That during the time he served as deputy commissioner he

turned the water out of the Simmons ditch at least six times each season. That while Mr. Simmons was in charge of the place in 1937, he left word at Simmons home that he had turned off the water. In 1938 Max DePew was in charge of the place. That Mr. Taylor always left word at the home when he turned off the water if anyone could be found to leave word with (Tr. 438). That he did not, during the time he was commissioner, see water running in the Simmons ditch contrary to his instructions (Tr. 431).

Benjamin F. Simmons, a witness called by the defendants, testified that he was deputy water commissioner in Spanish Fork Canyon in 1943 (Tr. 437). That in 1943, Max DePew was in possession of the property formerly owned by Simmons and now owned by plaintiff. That he turned the water off the DePew land and at one time DePew wanted him to let some water leak through the gate so that his cattle could get water to drink and he complied with the request (Tr. 439). On page 448 and 449 of the Transcript, Mr. Simmons testified at considerable length as to when the water was turned into the ditch to the west of plaintiff's property and when it was turned off.

Willis Hill was called by the defendants. His testimony will be found on page 454 to 464 of the Transcript. He served as Commissioner in 1944 in Spanish Fork Canyon. He saw Mr. Jackson, the plaintiff, and made arrangements with him that when he, Jackson, wanted water he should hang out a red flag

(Tr. 456). That when the red flag was out, Commissioner Hill would call at the Jackson place and ascertain how much water was wanted and take that information to Mr. Oberhausley, the water master of the Clinton Irrigation Company, who would order the water for Jackson. That Mr. Jackson agreed to that arrangement which was followed that year (Tr. 457 to 458). That on one occasion, Mr. Jackson informed Mr. Hill that he had turned off the water (Tr. 458). That Jackson ordered water in and out of the ditch during that season (Tr. 459).

Orla Stewart was called as a witness by defendants. His testimony will be found on page 464 to 489 of the Transcript. He served as assistant water commissioner of Spanish Fork River in the canyon during the years 1942 and 1945. That in 1942, Max DePew was operating the land now owned by Jackson. That Stewart visited the head-gates on the property then operated by DePew nearly every time he went up the canyon. That he kept a memorandum of what he did and the quantity of water that was put in the ditch to the west of the property. The time that water was running in that ditch and when it was not will be found given on page 468 of the Transcript. That Max DePew's little girls frequently tried to help turn the water off when it had not already been turned off by DePew; that it was difficult to shut the water off completely because of the gate that was in use (Tr. 469). When the gate was down it backed the water up so it

would run over the dam. That he saw DePew on a number of occasions but not at the dam (Tr. 470-471).

Mr. Stewart also testified as to the time he diverted the water into and out of the ditch running west of the property now owned by the plaintiff in 1945 (Tr. 472-473). He repeated his testimony on cross examination (Tr. 477-478). His testimony in such particular was from memorandums kept in a book which he had.

Victor P. Sabin was called as a witness by the defendants. His testimony will be found in the Transcript on page 489 to 540. He served as deputy water commissioner in Spanish Fork Canyon in 1946, 1947 and 1948 up to the time of the trial of this cause. He testified in detail as to the times when water was in and out of the ditch to the west of the property now owned by the plaintiff during each of the years. His testimony as to when it was in and out of that ditch in 1946 will be found on page 491-493, of the transcript. His testimony as to 1947 will be found on pages 496-498. His testimony as to 1948 will be found on page 499 to 500 of the transcript.

We have directed the attention of the court to the testimony of the commissioner whose duty it was to supervise the distribution of the water in Spanish Fork Canyon to the various users who were stockholders in the Clinton Irrigation Company from 1923 to the time of the trial. During all that time the deputy commissioner of Spanish Fork River regulated the waters of Thistle Creek. Time after time (when the

water should not be running in the ditch on the west of the plaintiff's property) the commissioner turned off the water running in that ditch, but not once prior to 1947 was any protest made because the water was turned off. Not once during that period of 24 years did the person who was operating the property now owned by plaintiff make any claim to a second foot of water or to any water other than that decreed to Simmons by the McCarty Decree and the water purchased by Simmons from the United States under the Strawberry Project.

It is true that defendants were unable to offer any direct proof touching the manner in which the water was regulated on the Simmons property during the entire period extending from the date of the entry of the McCarty Decree up to the time that water was purchased from the United States government in 1915. The failure of defendants to offer any direct evidence in such particular was due to the fact that Mr. Fowler who served as commissioner during part of that time was dead (Tr. 610). Newell Monk who served from 1909 to 1920 was, because of age, incompetent (Tr. 355).

We have understood the law of this state to be well settled that where title by adverse use is claimed the facts necessary to establish such right must be established by clear and convincing proof. It is said in *Wellsville East Field Irr. Co. v. Lindsay Land and L.*

Co., 104 Utah 448, 137 Pac. (2d) 634 at page 641 of the Pacific Report that:

“It is well established that the person asserting title by adverse use has the burden of proving it. The cases generally hold that there is a presumptive against such acquisition of title, *Smith v. North Canyon Water Co.*, supra, *Spring Creek Irrig. Co. vs. Zollinger*, supra, *Ephrain Willow Creek Irr. Co. vs. Olsen*, supra, *Weil, Water Rights in Western States*, 3rd Edition, Vol. 1, page 579. In *Smith v. North Canyon Water Co.*, 16 Utah 194, 52 Pac. 283-286, we stated that “The right of the defendant in the water would become fixed only after seven years continuous, uninterrupted, hostile, notorious, adverse enjoyment, and to have been adverse it must have been asserted under the claim of title with the knowledge and acquiescence of the person having the prior right.”

We have carefully gone over the evidence received at the trial and cannot find one scintilla of evidence that either Leven Simmons or Spencer Simmons ever, or at all, during their lifetime claimed any water in Spanish Fork River other than that decreed by the McCarty Decree and that purchased from the United States Government. If the judgment here questioned is to become the law of this state, it must be solely because of the evidence of those witnesses who testified to having passed along the west of the property now owned by plaintiff and at all times seeing water flowing in the ditch to the west thereof. If Leven Simmons, dur-

ing the time he owned the property now owned by the plaintiff, claimed to own the right to one second foot of water to irrigate about 19 acres of land, it would indeed be strange for him to purchase at least one acre foot of water for that tract of land and pay for a part of the water purchased \$45.00 per acre foot and \$51.75 for a part thereof. Defendant's Exhibits 2 and 3.

Notwithstanding L. P. Thomas in 1914 turned off the water and notwithstanding various of the water commissioners in the presence of Spencer Simmons turned off the water from the ditch to the west of the property now owned by the plaintiff, not one word of protest was offered by Spencer Simmons because the water was so turned off. Indeed as heretofore pointed out, when Commissioner Warner was about to turn off the water, Simmons told him to turn the water back into the creek by cutting the ditch some distance below the dam. Not only are such actions on the part of Spencer Simmons inconsistent with a claim of a right to the water here in controversy, but on the contrary by such actions extending over a period of more than 20 years, it would seem that there is no escape from the conclusion that if Spencer Simmons ever claimed any right to any water in Spanish Fork River by reason of adverse use, he by such actions effectively disclaimed any such right. To permit the plaintiff to, in 1948, assert a right which it is claimed existed prior to 1915 but which has not been asserted or relied upon since at least 1923, and after the Commissioners who were in charge of the regulation of the river are either dead



or because of age become incompetent to testify, is to ignore the doctrine of laches and equitable estoppel. If Spencer Simmons, during his lifetime while Newell Monk was possessed of his faculties and Richard Fowler was still alive, had asserted the right to some water in Spanish Fork River in addition to the McCarty decreed and Strawberry water, the defendants could have established the true state of facts. As it is defendants are deprived of such evidence because plaintiff's predecessor in interest at all times recognized the right of the defendants to such water. 30 C.J.S. Sec. 112, page 520 and cases there cited.

THE EVIDENCE FAILS TO SHOW THAT PLAINTIFF OR HIS PREDECESSOR IN INTEREST USED ADVERSELY ANY OF THE WATER TO WHICH DEFENDANTS WERE ENTITLED AFTER 1915 WHEN THE PLAINTIFF'S PREDECESSOR IN INTEREST PURCHASED WATER FROM THE UNITED STATES.

It will be observed that in 1915, Leven Simmons and his wife, Luna Simmons and others owning water in Spanish Fork Canyon entered into a contract with the United States Government for the purchase of water under the Strawberry Project. By that contract, Defendants' Exhibit 3, page 7, it was among other things provided:

"The contractors' water master selected in accordance with the agreement of September 6, 1915, between the contractors and the owners of prior rights around Spanish Fork, shall have power to receipt for

Government water on behalf of the contractors and each of them, and to represent the contractors as their agent in requesting for the contractors the discharge change of rate of discharge, or cessation of discharge of stored water from the Government reservoir. The United States may require each of the contractors to file evidence of membership in a water users' association to be formed to regulate the diversion and distribution of water from Thistle Fork and its tributaries, and upon the failure of any contractor to become a member of such corporation, the United States may at its option refuse to turn out water for such delinquent contractor or contractors.”

A similar provision is made in Article 6, page 5 Defendants' Exhibit 2 of the contract entered into on July 22, 1919. Pursuant to such provision it is made to appear that the water users in Spanish Fork Canyon formed the Clinton Irrigation Company. That Company regulated the water among its stockholders through their water master. Apparently R. L. Mitchell was water master of the Clinton Irrigation Company for a time (Tr. 409). Ole Anderson was water master of that company for a time (Tr. 413), and Bert Oberhausley served for a number of years (Tr. 428). A number of the deputy water commissioners who served in Spanish Fork Canyon explained the manner in which the water in Spanish Fork Canyon was regulated after the organization of the Clinton Irrigation Company. This is the method followed: A water user under the Clinton Irrigation Company who desired water would

notify the water master of his company of the time and amount of water that he desired, and the water master would then direct the river commissioner as to the amount of water desired by the stockholders of the company during any given time and then the river commissioner would order turned into the river from the Strawberry Project a sufficient amount of water for the use of the lower users to make up for the river water diverted by the water users under the Clinton Irrigation Company. Because of Newell Monk being incompetent, we were unable to show how the water was regulated immediately after the contract between the canyon people and the government was first entered into. Mr. Lorin Jones who served as water commissioner from 1923 to 1928 explained the manner of handling the water as follows:

“There was a company organized up there to handle the water. We didn't keep an accurate record of each individual. We kept a record of the whole canyon as a whole the apportioning of the water among the canyon people was not done by the river commissioner but by the canyon people. That was the arrangement provided for by the contract between the water users in Spanish Fork Canyon and the companies diverting water below the mouth of Spanish Fork Canyon. Defendants' Exhibit 4, pages 4 and 5 makes provisions for the manner of regulating the water.

Mr. Angus Taylor who served as deputy water commissioner during the years 1937, 1938, 1939 and

1940 explained the manner of regulating the water as follows:

“Bert Oberhausley would tell us, tell the Commissioner, tell me, I’ll say how much water and in what ditches was wanted. I called at his place each day to get those orders. Those requests were given in writing and taken to our head commissioner down at the office at the powerhouse” (Tr. 429). That when a water user had used the water for the time requested, it was turned off either by the water user or the Commissioner (Tr. 433).

Mr. Wayne Frances, Water Commissioner of Spanish Fork River from 1941 to the date of the trial, explained somewhat in detail the manner of regulating and controlling the water in Spanish Fork Canyon during the time he held that office. As the plaintiff did not acquire the Simmons property until 1944, Mr. Frances was Commissioner during all the time that plaintiff operated the property formerly owned by the Simmons. His testimony will be found on pages 546 to 594 of the Transcript.

When the Clinton Irrigation Company orders water it is made in writing and the ditches to which it is to be diverted are named so that the deputy commissioner in the canyon may know where the water is being diverted (Tr. 559-560). Exhibits 5 and 6 show the manner in which water was ordered. It should be kept in mind that the Clinton Irrigation Company, the same as other corporations, is treated as a unit for the

purpose of making delivery of water, that is to say, the Clinton Irrigation Company as such, orders water for its stockholders the same as other corporations who have water rights in Spanish Fork River and when the water is delivered it is charged against the corporations. The only difference is that the corporations which divert water below the mouth of Spanish Fork Canyon have only one point of diversion while the stockholders of the Clinton Irrigation Company have several points of conversion. That being so, it is necessary when the Clinton Irrigation Company orders water for it to designate the ditch into which the water is to be delivered.

Some evidence was offered by the plaintiff to the effect that even after plaintiff purchased the Simmons place in 1944 he used more water than that called for by the McCarty Decree and that purchased from the United States. To overcome any such evidence, we offered the actual record kept by the Commissioner as to the water used by the Clinton Irrigation Company during the years 1932 to 1947, both inclusive. The figures will be found on page 563. From that record it will be seen that in no year did the Clinton Irrigation Company use all the water to which it was entitled. That being so, if the plaintiff received any water in excess of that to which he was entitled, it was water belonging to the other stockholders of the Clinton Irrigation Company and not the water to which anyone of these defendants was entitled. So that the court will have before it without examining the transcript, the rec-

ords of the Commissioner show that in 1935 there was 40.7 acre feet to which the canyon people were entitled that they did not use. In 1936 there was 450.1 acre feet; in 1937 there was 5.9 acre feet; in 1938 there was 128.4 acre feet; in 1939 there was 112.3 acre feet; in 1940 there was 61.9 acre feet; in 1941 there was 103.6; in 1942 there was 75 acre feet; in 1943 there was 108.8 acre feet; in 1944 there was .6 of an acre foot; in 1945 there was 264.3 acre feet; in 1946 there was 15.1 acre feet and in 1947 there was 2.7 acre feet to which the canyon water users were entitled, but which they did not use. Of the amount not used by the canyon people according to the river commissioner, two thirds thereof was water to which the stockholders of the Clinton Irrigation Company were entitled (Tr. 563). Upon reflection of this evidence, its importance becomes apparent. Plaintiff and his witnesses testified as to what good crops he raised prior to 1948 on this property and also that he had a continuous stream the year round (Tr. 27 and 31). Unless the court is to ignore the record made by the Commissioner and Deputy Commissioners of Spanish Fork River during the years that plaintiff operated the property now owned by him, he did not use one drop of water that belonged to the defendants or any of them. We have always understood the law to be that when officers whose duty it is to keep records and who have no interest in the results of a litigation and they do keep such records, that the verity of such records may not be overcome by the oral testimony of one who is directly interested in the

outcome of a trial. Especially should that be so where, as here, the burdens on the person attacking the verity of the recorded evidence to overcome the same by clear and convincing proof. Further as to that, we have heretofore directed the attention of the court to the testimony of Deputy Commissioner Hill to the effect that in 1944 when plaintiff first took over the operation of the property owned by him, arrangements were made and carried out whereby Jackson put out a red flag at his gate when he wanted water; that when the red flag was put out Hill would call at the house and find out how much water was wanted and for how long. Deputy Commissioner Hill would then take the information to the water master of the Clinton Irrigation Company who would order the water from the river commissioner. This testimony is not denied. It is corroborated by defendants' Exhibit 5 as to how water was being ordered for the Jacksons and other ditches in 1947. If Jackson had a constant flow of one second foot, there would be no occasion to order additional water. If the evidence and records of the Commissioners may be overcome by the oral testimony of a water user under circumstances such as are here present, then and in such case no useful purpose will be served by employing water commissioners and requiring them to keep a record of the distribution of the waters of our streams. It may be said that plaintiff's claim to the use of water does not depend solely on his own evidence.

Let us briefly refer to the other evidence offered by the plaintiffs' witnesses after the contract was en-

tered into by the canyon people for the purchase of the strawberry water. Ole Anderson testified that he was acquainted with the property now owned by the plaintiff since about 1922 to 1924. He testified to the raising of crops on the land to the South of the house and that the land to the North of the house was completely meadow, it was too wet. "As I remember there were several little sloughs, and he raised meadow hay there all the time. I don't ever remember of any of that being plowed at all" (Tr. 262). He further testified that the ditch to the West of the Simmons land was always full of water (Tr. 263). He testified that he was secretary of the Clinton Irrigation Company in 1932; that it was not until 1932 that there was any attempt made to regulate the water in Spanish Fork Canyon; that he served as secretary for two or three years (Tr. 265). On cross-examination he testified that the people in the canyon would just give the people in the valley a blanket order for their Strawberry water and then help themselves to the river water. He testified that they operated that way for ten years (Tr. 268). That testimony is in sharp conflict with that of Commissioner Loren Jones, Deputy Commissioners James A. Anderson, David Warner, Angus D. Taylor, Benjamin T. Simmons and if true would render it impossible for Commissioner Frances to have secured the data heretofore mentioned and as shown in the Transcript, page 262.

Moreover, even though the testimony of Ole Anderson to the effect that for a time the lower users of



the waters of Spanish Fork River consented to an exchange of such water as the canyon people might desire to use for the water that the canyon people had purchased from the United States, such arrangement would not be the basis for adverse use. If such an arrangement were in fact had there could be no adverse use of the exchanged water by either of the parties to the transaction. Quite the contrary, adverse use carries with it the right to sue by the party whose property is being used by another. In the absence of such right, there is no adverse use.

What we have said about the testimony of Anderson is also applicable to the testimony of Earl Gardner, whose testimony can be found on Tr. 139 to 146. He testified that he was acquainted with Spencer Simmons; that he worked in Spanish Fork Canyon from 1923 to 1935; that he was acquainted with the Simmons property and that good crops of grain and alfalfa were grown thereon; that he had secured water from the Spencer well; that the water was good (Tr. 141 and 142). He testified that when he worked on the road he often nooned at a grove of trees at the southern end of the Simmons property, that the ditch to the West of the Simmons property was always full of water; that during the years he was road supervisor there was more water running in the ditch than at the time of the trial (Tr. 145-146). On cross examination the witness testified that there was twice as much water running in the ditch as there was at the time of the trial (Tr. 148). That is, there was two second feet (Tr.

149). He further testified that Spencer Simmons used a second foot of water on eight acres of land (Tr. 149-150). Here again if the testimony of Mr. Garner is to be believed we must disbelieve the testimony of the Water Commissioners who served during that period of time and who testified as to numerous times when the water was turned into and off from the Simmons property when Spencer Simmons was present. So also if the testimony of Gardner is to be believed, the water diverted into the West Simmons ditch must have had an outlet into Spanish Fork River. As we have heretofore stated, it is to say the least, highly improbably that one second foot of water can be consumed on 19 acres of land throughout the year, and when the amount of water is raised to two second feet, the improbable obviously becomes the impossible.

In addition to the plaintiff and Spencer Simmons and his father owning and operating the property now owned by the plaintiff after water was purchased from the United States, one, Max DePew owned and operated the land from 1930 to 1944 (Tr. 230). When he took possession of the property 20 acre feet of Strawberry Water was used on the property and later an additional 20 acre feet were transferred onto the property (Tr. 235). When Simmons operated the place 20 acre feet of water was used on the place, and in 1939 the additional water was transferred thereto (Tr. 236). There was a small stream always in the ditch when he was there (Tr. 236). Some years they regulated the water and some years the Commissioner

seemed to let the water go (Tr. 237). That the Strawberry and McCarty decreed water was used mostly on the land South of the house (Tr. 238). That the well at the house would go dry if the little stream was shut off (Tr. 238). That when he watered the field, it would take only a short time—some twelve or fifteen hours (Tr. 241). It will be noted that a substantial part of the time that DePew operated the property now owned by plaintiff is covered by the data produced by Wayne Frances, the River Commissioner, when, according to such data, the stockholders of the Clinton Irrigation Company did not use all of the Strawberry and McCarty decreed water to which they were entitled (Tr. 563.)

As we have heretofore pointed out that notwithstanding, the Commissioners, upon numerous occasions during each year when DePew was in possession of and operating the property now owned by plaintiff, turned off the water running onto that land. Mr. DePew made no objection to the water being turned off, nor did he, except upon one occasion when all of the water was turned off, turn it back onto the property and then only a sufficient quantity to reach his barn to supply water for his cattle. Thus at no time prior to the fall of 1947 is there one scintilla of evidence which shows or tends to show that plaintiff's predecessor in interest claimed any of the waters of Spanish Fork River other than the Strawberry and McCarty decreed water, except possibly enough water to take care of the well and water for livestock.

All of the authorities so far as we are advised which deal with the law of acquiring title by adverse use make one of the essential elements a claim of right. In some jurisdictions such claim must be expressed, in others the claim may be established by acts which clearly show that the use is made under claim of right. In this case, it is, we believe, made clear that the owner of the property now owned by the plaintiff at all times recognized the rights to the use of the waters of Spanish Fork River as fixed and limited to the rights awarded in the McCarty decree and the rights purchased from the United States Government. If plaintiffs predecessor in interest made any claim to any additional water their behavior belied any such claim. To stand by and permit the water commissioner to regulate the water for a quarter of a century without so much as offering a word of protest when the water was turned off is inconsistent with a claim of right to the use of the water being turned off.

To purchase at least one acre foot of water for each acre of land at a cost of \$45.00 to \$51.75 per acre to supply land that already has a full water right is not the actions of the normal person. To have water diverted from the river into a ditch and then direct that it be cut back into the river at a point some distance below the place where it is diverted from the river in order to save the labor and expense of reconstructing the diverting dam is not consistent with a claim of a right to the use of the water so diverted back into the river.

In connection with the foregoing acts, all in the nature of a disclaimer, the attention of the court is directed to the further fact that notwithstanding each water user on a natural stream or other source of supply is and since 1919 has been required to pay his pro rata expenses of the distribution of the waters of such natural stream or other source of supply, no claim is or could truthfully be made that plaintiff, or his predecessors in interest, ever paid one cent because of a claim of any water in Spanish Fork River acquired by adverse use.

*U.C.A.*, 1943, 100-5-1, *Bacon, State Engineer v. Gunnison Fayette Canal Co.*, 75 Utah 278, 284 Pac. 1004.

*Bacon v. Plain City Irr. Co.*, 87 Uta. 564, 52 Pac. (2d) 427.

THE EVIDENCE SHOWS THAT AT LEAST TWENTY ACRE OF THE McCARTY DECREED WATER RIGHT AND AT LEAST TWENTY ACRE FEET OF THE WATER PURCHASED FROM THE UNITED STATES GOVERNMENT WERE USED ON THE ABOUT 19 ACRES OF LAND INVOLVED IN THIS CONTROVERSY.

It is said on page 4 of the Opinion sent to us that "McCarty decreed water and Strawberry Reservoir water were used only infrequently on his land according to the testimony and then only to increase the flow so as to irrigate remote and hilly parts of the land." We have carefully gone through the evidence in an attempt to find the evidence to support the foregoing finding, but without success. We believe

it very important to ascertain whether or not the McCarty decreed and Strawberry water was or is not appurtenant to the land here involved. If such water is appurtenant then and in such case that water must be held to be at least a part of the water right that makes up the entire water right to the 19 acres. That is to say, the water right consisting of the McCarty decreed water and the Strawberry water, which is appurtenant to the 19 acres must be applied to the 19 acres before the plaintiff is entitled to apply any part of the claimed second foot to make up a full water right. We have already directed the attention of the court to the law in effect when the Strawberry water was purchased making such water appurtenant to the land for which it was applied. *U.C.A.* 1933, 100-1-14. Other water not represented by shares of stock is appurtenant to the land upon which it is being used. *U.C.A.* 1943, 100-1-11. With this law in mind, let us examine the evidence. The only witness who testified as to where the Strawberry and McCarty decreed water was used were the plaintiff and Max DePew. Indeed they were the only living persons who had used the water, and hence who could testify from actual knowledge. The plaintiff testified that he used 35 shares or acre feet on the 19 acres (Tr. 59). Upon being further interrogated, he testified that he had 37 acres of irrigable land in that vicinity. In answer to the following question, he gave the following answer:

Q: So am I right in saying that there is substantially one acre foot of water that you have under the Strawberry project for each acre of land that is irrigable and has been irrigated?

A: Yes, Sir, that's near that (Tr. 61). That he also had 20 shares of McCarty decreed water which he applied on this 37 acres (Tr. 62). That credit is given for the Strawberry and McCarty decreed water and when that water is wanted the water master of the Clinton Irrigation Company, Bert Oberhausley, is notified and the water delivered (Tr. 63). Max DePew testified that when he first purchased the property now owned by plaintiff there was 20 acre feet with the place and he purchased an additional 40 acre feet of Strawberry water (Tr. 235). There was also 20 shares of McCarty decreed water on the place (Tr. 237). He was asked this question and gave this answer:

Q: Where would you use the principal amount of this secondary water and the Strawberry water?

A: Why it would be more or less on the land South—some over South of the house, and it would be up at the Crab Creek and what we always call the lower field and field east of the house (Tr. 238).

In light of the fact that since 1939 the law prohibits the acquisition of a water right by adverse use, it would seem that what has occurred since that date cannot be of any material aid in arriving at the law applicable to this case, except as it may shed light on what occurred before 1939. In its Opinion however, it

seems that because Mr. Jackson testified that the ditch on the West of his property did not extend to any land to the north thereof was of some importance. Of course, the fact that the ditch did not extend to the north of the Jackson property in 1944 would be of little if any value in determining as to the condition that prevailed prior to 1939. That the ditch to the west of the Jackson property did extend back into the river during much of the period when it is claimed that such ditch was running full of water is, we believe, established by the evidence. We have already pointed out that such ditch must have had its northern outlet in the river because otherwise it is inconceivable that it would have been permitted to be full of water if such was the fact throughout the year. Moreover, the evidence shows these facts which tend to show that the ditch along the west of the property now owned by plaintiff emptied back into the river. The fact that in 1906 when Commissioner Hart visited the property now owned by the plaintiff water was running in the ditch to the west of the property but not onto the land. Ole Anderson testified that there were several little sloughs at the north end of the property now owned by plaintiff where it was always wet (Tr. 262). Mr. Jackson testified that water was standing in the low place north of the house (Tr. 54). Of course, the condition of the ditches that existed when Jackson purchased the property in 1944 would not shed much light on the condition of the ditches when Simmons owned the property.



THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE COURT THAT ONE SECOND FOOT OF WATER CAN BE BENEFICIALLY USED ON THE ABOUT NINETEEN ACRES OF LAND.

Plaintiff called numerous witnesses who testified that prior to 1948 good crops were raised on the Jackson property. Plaintiff testified that in 1944 to 1947 he raised good crops on his property. He enumerated the crops he raised during the four years he operated the property and upon which he claims the right to a flow of one cubic foot per second throughout the entire year.

We have heretofore in this Brief directed the attention of the court to the records of the Water Commissioner of Spanish Fork River from which it is made to appear that during each of the years that plaintiff claims to have raised his bumper crops, the Clinton Irrigation Company, from which plaintiff derives his water, did not use all of the water to which it was entitled because of the McCarty decreed water and the Strawberry water which was purchased by its stockholders. We again call to the attention of the court such data which will be found on page 563 of the transcript. Those figures were compiled by water commissioners as a part of their duties and at a time when there could not have been any motive in misstating the facts. We also again direct the attention of the court to the evidence of deputy commissioner Warner who served in 1934 (Tr. 411 to 425); Angus D. Taylor who served from 1937 to 1940, both

dates inclusive (Tr. 426-435); Benjamin F. Simmons who served in 1943 (Tr. 436-454); Willis Hill who served in 1944 (Tr. 454 to 464); Orla Stewart who served in 1942 and 1945 (Tr. 464 to 489); Victor Sabin who served during 1946, 1947 and 1948 (Tr. 489 to 540); Burges Larsen who served in 1935 (Tr. 594 to 596). Each of these deputy commissioners testified at considerable length and in great detail as to what they did while acting as deputy commissioners on Spanish Fork River and that the amount of water distributed to the property now owned by the plaintiff was the McCarty decreed and Strawberry water to which it was entitled. If by the application of such water to the irrigation of the Jackson property such good crops as plaintiff's witnesses testified were raised thereon, we can conceive of no more convincing evidence that the McCarty decreed and Strawberry water is fully sufficient to take care of the needs of the Jackson property. However, the trial court and this court seem to have overlooked the foregoing evidence or to have concluded the testimony of the witness Farnsworth is more convincing or more reliable. We had always believed that results brought about by the actual application of water, especially over a series of years, is entitled to much more weight than the mere opinion of an expert, be he ever so able. After all any opinion worthwhile must be founded upon actual experience. If throughout a period of several years good bumper crops were, as the plaintiff's evidence shows, raised on the property now

owned by Jackson by the application thereto of the water lawfully available for its irrigation (not water claimed by adverse use), we can conceive of no evidence more convincing as to its reliability.

It appears from the Opinion that the court regarded the water covered by the McCarty Decree as of but little value. The evidence shows that before Strawberry water was purchased, the people in the canyon got along and raised crops by the use of that water (Tr. 221). There is in the evidence a schedule, Defendants' Exhibit "1" which shows the time the waters of the river required regulation. It will be noted that it was well into May and often after June before the river fell to a point where the canyon people were regulated. When there was a rain so that all of the water was not needed in the valley, the canyon people were advised that they could use the water. Some wet years there was ample water for everyone and one or two years the United States turned water into the river from the Strawberry Reservoir without making a charge therefor.

Let us examine briefly the testimony of Dr. Farnsworth. He testified at some length about the soil. From his testimony it appears that there is a considerable difference in the nature of the soil. Some of it being a clay loam, some sandy and some sandy loam (Tr. 315-317). After devoting several pages to a lecture on holding capacity of soil, wilting point, evaporation, plant transpiration of water, amount of water

applied that is used by the plant, etc. etc. (Tr. 316 to 333), he finally placed the amount of water necessary to irrigate the land here involved at from 15 to 48 inches during the irrigation season (Tr. 334). In giving this opinion, he apparently included a lower field and the land upon Crab Creek (Tr. 333). Just why Crab Creek and the lower field were included, we are at a loss to understand as there is no evidence that any part of the claimed one second foot was used upon those lands. He was then asked this question and gave this answer:

Q: " With reference to the nineteen acres which are comprised with the areas A, B, C, and D and the garden, have you a judgment as to whether or not a second foot diverted through the West Jackson Ditch upon this land for irrigating the forage thereon can be beneficially used upon that land and area during the season after high water?"

A: "Yes, I believe it can, it can be used beneficially on that area" (Tr. 335).

It will be observed that Dr. Farnsworth was not asked, nor did he state that a second foot of a continuous flow could be beneficially used to irrigate the 19 acres of land. On cross-examination Dr. Farnsworth testified that for a crop of barley, it would require between 15 and 23 inches (Tr. 338). That for alfalfa, between 36 and 60 inches or an average of 48 inches (Tr. 339).

It is a cardinal rule that the testimony of a witness is no stronger than its weakest link and that being so, the testimony of Dr. Farnsworth will not support a finding that the 19 acres of land here involved has a duty of water to exceed 15 to 48 inches per year. We have heretofore pointed out that at least one acre foot of the water used upon the land was Strawberry water. That water was, by law, made appurtenant to the land, and as we have also heretofore pointed out, the evidence shows that such water was actually used on the land. We have also directed the court to the schedule, Defendants' Exhibit 1, which shows that up to the middle of May in some years and to as late as June 11th in other years, there is sufficient river water to supply the needs of all water users on the river, and after the flow of the river is regulated, the canyon people are entitled to 2% or 1% of the flow of the river until it recedes to a flow of 118 cubic feet.

The evidence of Dr. Farnsworth falls short of supporting a decree awarding the plaintiff a flow of one second foot through the entire year. We have heretofore discussed the excessive award made to the plaintiff and shall not repeat what is there said. It is, so far as we are advised, the uniform practice of the state engineer in permitting filing on waters in this state and of courts in making decrees adjudicating water rights to fix not only the flow of water in second feet, but also the number of acre feet per annum that may be used, together with the period that the

water may be used on a specific tract of land. Anything short of this leaves water rights uncertain. This court has, so far as we are advised, uniformly condemned uncertain decrees. Of course, we do not contend that the decree here involved is uncertain, but we do most earnestly contend that if it is given full effect according to its express terms, it leads us into an absurdity.

We have heretofore directed the attention of the court to the case of *Hardy v. Beaver County Irrigation Co.*, 65 Utah 28, 234 Pac. 524. That case is somewhat analogous to this case. In that case, it is held that a decree, to be valid must fix not only the quantity of water, but also the time that the water, which is the subject of the litigation, may be used. In this case, if the decree appealed from is permitted to stand, it is certain to lead to confusion and future litigation. It is of the utmost importance in the regulation of the waters of Spanish Fork River to know whether the plaintiff may use his McCarty decreed and Strawberry water, which has heretofore been used on the nineteen acres of land here involved, for other lands, and then use water which he claims to have asquired by adverse use on the nineteen acres of land involved in this controversy. It is especially of vital concern to the water users of Spanish Fork River to know if the mere fact that water was diverted from the river into the ditch to the west of the property now owned by plaintiff without proof of the actual use of such water for beneficial purposes is sufficient to

establish title by adverse use. As appears from the record, it is and throughout the years it has been the practice in Spanish Fork Canyon for water users to divert water from the river into ditches and to avoid the necessity of tearing out the dam and divert the water back into the river at some lower point. If a mere diversion of water from a stream into a private ditch without proof of actual use is sufficient to establish title by adverse use then indeed may we expect a flood of actions on Spanish Fork River by those who have thus diverted water from that river. We may add that one of such actions has already been commenced and tried and taken under advisement pending the outcome of this proceeding.

We respectfully submit that a rehearing should be granted, the record re-considered and upon a further hearing, the errors herein specified corrected and the judgment reversed.

Respectfully submitted,

ELIAS HANSEN,

*Attorney for Appellants.*