

1950

# Tacea Tsouras v. Brighton and North Point Irrigation Company : Brief of Appellant

Utah Supreme Court

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Skeen, Bayle & Russell; Attorneys for Appellant;

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In the Supreme Court  
of the State of Utah

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TACEA TSOURAS,

*Plaintiff,*

vs.

BRIGHTON AND NORTH POINT  
IRRIGATION COMPANY,

*Defendant.*

} Case No. 7454

*By the Court*  
DEFENDANT'S BRIEF

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SKEEN, BAYLE & RUSSELL,

*Attorneys for Appellant.*

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# In the Supreme Court of the State of Utah

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TACEA TSOURAS,

*Plaintiff,*

vs.

BRIGHTON AND NORTH POINT  
IRRIGATION COMPANY,

*Defendant.*

Case No. 7454

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## DEFENDANT'S BRIEF

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This suit was instituted in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, for recovery of damages from the defendant irrigation company for the alleged destruction of crops caused by the overflow of water from its canal upon plaintiff's land in the year 1948, (R. 1, 2 and 3) and damages resulting from the seepage of water from the canal during the Spring and Summer of 1949 (R. 20 and 21). The defendant answered denying generally the allegations of the Amended Complaint and pleaded the affirmative defenses (a) that damage to crops was caused by flooding from the Jordan River; (b) That plaintiff failed and refused to maintain the headgates on the canal adjacent

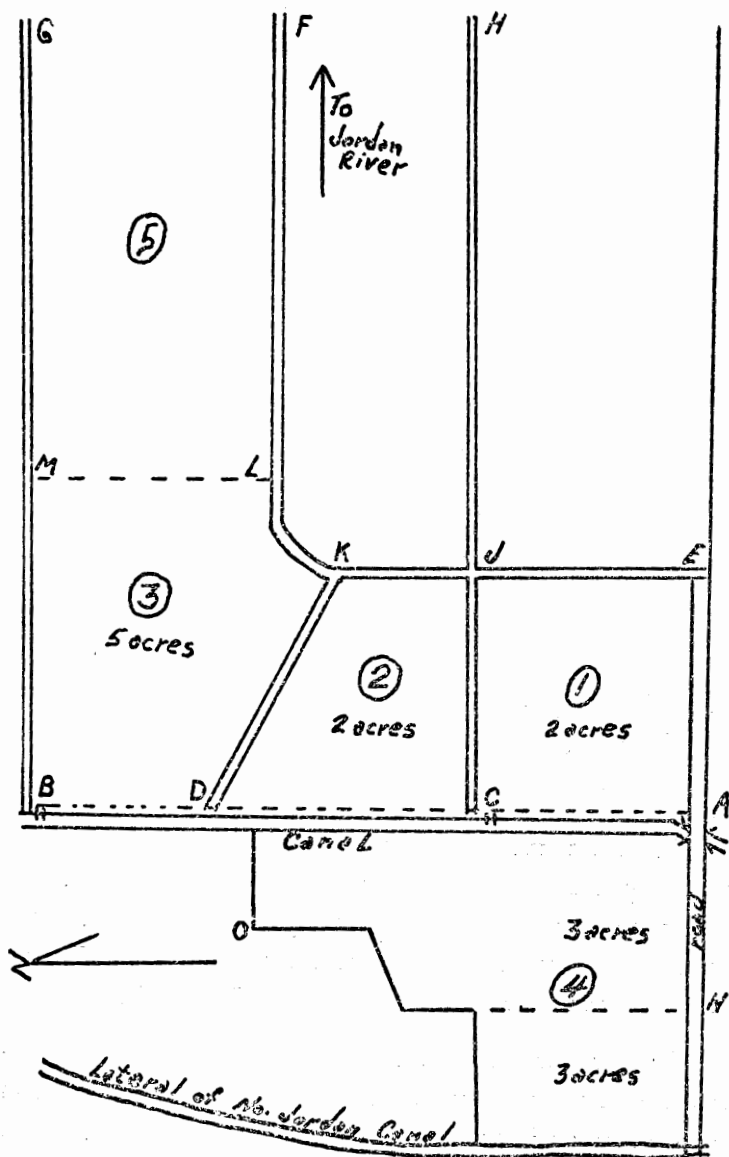
to her land, and (c) that plaintiff failed and refused to mitigate her damages, if any, by diverting the water into drainage ditches (R. 22, 23 and 24). After a trial without a jury, judgment was entered in favor of the plaintiff for \$1837.00.

## STATEMENT OF FACTS

The plaintiff is the owner of a farm situated in Salt Lake County, State of Utah, adjacent to and East of Redwood Road in the vicinity of 30th South. It lies entirely between Redwood Road and the Jordan River (R. 53, 54 and 55). The defendant, the Brighton and North Point Irrigation Company, a corporation, owns and operates the Brighton and North Point Canal which diverts water from the Jordan River in the vicinity of Murray, Utah, and runs thence in a Northwesterly direction to the Municipal Airport, west of Salt Lake City, Utah. The defendant's canal crosses the plaintiff's farm, which will hereafter be referred to as the Tsouras farm, and at that point runs in a general Northerly direction parallel to and West of the Jordan River (Plaintiff's Exhibit M).

For the purpose of clarity and to assist the Court, the following is a rough sketch copied from the one used at the trial, not drawn to scale, but shows generally the relative position of the defendant's canal to the portion of the Tsouras farm involved in this action (Plaintiff's Exhibit M).

The canal enters the Tsouras farm at point A, runs North-erly, and leaves the farm at point B (R. 57). Area 4 is thus bounded on the East by the canal; areas 1, 2 and 3 are bounded



on the West by the canal (Plaintiff's Exhibit M). A lateral of the North Jordan Canal runs North, bounding area 4 on the high ground on the West and adjacent thereto, and is used by the plaintiff to irrigate area 4 (R. 111, 225, 278 and 279).

Area 4 contains about six acres, areas 1 and 2 each contain two acres, and area 3 contains approximately five acres (R. 59, Plaintiff's Exhibit M). A private road of the plaintiff bounds the property on the South and a wooden bridge crosses the canal at point A (Plaintiff's Exhibits A, B and M—Defendant's Exhibit 1, R. 57). There is an irrigation ditch immediately East of the defendant's canal, running between points A and D (Plaintiff's Exhibit M-R). This ditch is used to irrigate areas 1, 2, 3 and 5, by water taken from headgates situated at point C and near point B (R. 121). There are also irrigation ditches running from point C to J to H, and from B to M to G. These latter two irrigation ditches continue Easterly leaving the plaintiff's land at points G and H respectively.

A drainage ditch is constructed from B-D-K-L to F and continues Easterly to the Jordan River. There is also an irrigation ditch between J and K, connecting the ditch C-J with the ditch B-K-K-L and F (R. 58, 59 and 60—Sketch and Plaintiff's Exhibit M).

The general slope of the land involved in this action is from the West, near the lateral of the North Jordan Canal, to the East toward the Jordan River (Plaintiff's Exhibit N, Defendant's Exhibit No. 1). The slope in area 4 is rather abrupt toward



the defendant's canal, and there are two water holes near the West side of the canal, as the irrigating water from the lateral on the North Jordan Canal drains toward the defendant's canal and there is no facility for drainage to the East after it reaches the West bank of the said canal, between points A and D (Plaintiff's Exhibits E, F, H, J and I and N—Defendant's Exhibit 1—R. 224, 225, 369 and 437). The slope in areas 1, 2, 3 and 5 is gradually to the east and toward the Jordan River (Plaintiff's Exhibit K, L and N—Defendant's Exhibit 1).

The Skogg property adjoins the Tsouras farm on the North beyond the line B, M and G (R. 125).

The Tsouras farm is afforded a free water right from the defendant company. The company has the obligation of maintaining the banks of the canal and the plaintiff the obligation of keeping in repair and maintaining the headgates at C and B (R. 279, 280 and 420).

The plaintiff's farm in the area of the canal is poor grade farming land (R. 336, 339, 351, 392, 422 and 423). Sand holes are common throughout the area and there is a high water table. The Jordan River determines this water table (R. 222, 223 and 224). Witness Burnham testified that the areas generally were covered with weeds, salt grasses, red alkali grass, bayonet grass, tules and bulrushes and that area 4 particularly had not been cultivated for several years as evidenced by this variety of vegetation (R. 335, 338, 346, 347—Plaintiff's Exhibits F, G, J and K).

There was no water in the canal in the Spring of 1948 until May 18th or 19th (R. 126 and 370). It had been a dry Spring prior to that time (R. 370). On the day the water

was first turned into the canal, the water master and his assistant went through its course, cleaning weeds and other debris from the channel (R. 397). There was at least a 14-foot open channel traversing the Tsouras farm (R. 205, 206, 228 and 233 and 249). Some three or four days after the water was turned into the canal, it began to rain heavily (R. 370). This continued off and on for the next two weeks (R. 281). This caused the Jordan River to suddenly rise and reach flood stage (R. 124, 281, 282 and 284).

The high water carried large amounts of weeds, trees and other debris down the river, lodging against the weir, where water was diverted into the defendant's canal (R. 230, 231, 281, 282 and 283, 374 and 375). The defendant company had no warning of this flash flood and its water master, assistant water master, and president did everything possible to promptly remove the debris as its weir and to otherwise endeavor to keep the flood waters out of the canal (R. 235, 268, 281, 282, 283, 374 and 375). This flood caused at least 50 per cent more water to flow into the canal (R. 283, 303, 304, 387, 388 and 389).

As a result of this flood, water from the canal overflowed the West bank into area 4, just North of point A on the Tsouras farm. This created a lake covering approximately one-half of the six-acre plot (R. 115). The water remained for several weeks as the terrain afforded no drainage from this area and water flooded into the canal from Jordan River for several days (R. 151, 152 and 306).

The flood also caused water to flow over the headgates at points C and B, as those points were lower than the level

of the bank on the East side of the canal. The water from headgate C flowed into the irrigation ditch adjoining the canal and ran South toward A and covered portions of area 1. Plaintiff could have diverted this water into ditch C-J-H but refused to on the ground that it was the responsibility of the canal company to alleviate the condition (R. 132, 133 and 304).

During this abnormally high water period, the Jordan River flooded extensively and water from it flowed West in the drainage ditch F-L-K and D (R. 124, 125 and 126). All of area 5 was inundated (for which no damage was claimed), about one-third of area 3 was covered with water, and the Northeasterly portion of area 2 was flooded from this source (R. 125, 126, 309, 310, 312 and 433). Water from the defendant's canal also flooded somewhat over the East bank between A, C and D during this period and covered parts of area 2 (R. 88, 89 and 206).

As a result of this flood in 1948 and consequent high water table, the crops in the Easterly one-half of area 4, and those growing in areas 1, 2, 3 and 5 were damaged to some extent (R. 264, 265, 266, 347, 412 and 413).

In the Fall of 1948, the defendant company undertook repairs on the canal and cleaned and removed therefrom silt, weeds, tules and bulrushes Northward from point A to where the canal passed through the Skogg property beyond point B (R. 196 and 197). This work was done by a professional shovel operator and the clay sealer on the banks or bottom of the canal was not disturbed whatsoever during

these operations (R. 197, 198, 199, 202, 274, 299, 318, 319, 327, 350, 358, 359, 362, 363, 364 and 460).

The plaintiff caused her farm to be plowed in the Fall of 1948. The Winter of 1948-49 was one of unusual severity and abnormal snow fall was experienced. The plaintiff contended that after the water was turned into the canal on about May 14, 1949, (R. 484) the areas East of the canal became damp and soggy and could not be used. However, this condition apparently was the same in the Spring before water was turned into the canal as it was in the summer, and was directly due to the high water table present in that entire area as a result of the previous severe Winter R. 444). During the course of the trial, LeRoy C. Chadwick, a professional engineer, made an examination of the Tsouras farm land near the defendant's canal and compared it with the Skogg land North and East of the canal. He found the land in both instances to be damp and three (3) inches below the ground surface, found the soil to be "damp enough to wad up in your hand and stay in a ball." This was in the latter part of September (R. 441). This same condition existed on the Skogg property some 400 feet away from the defendant's canal (R. 441 and 445). Chadwick observed the water table in this entire area to be only about three (3) feet below the surface of the ground at the time of the trial and concluded that it affected the soil because the capillary attraction would bring the water to the surface (R. 442). This same condition existed throughout the area involved in the suit (R. 442, 443, 449 and 451). Chadwick could find no evidence of seepage in the area adjacent to the defendant's canal (R. 445, 446, 447 and 457). There had been no flooding in 1949 (R. 145 and 178).

In 1948 the plaintiff claims to have planted onions in area 1, and wheat and lucerne in areas 2, 3 and 4 (R. 121). In 1949, one-half of area 1 was planted in onions and one-half in wheat, while areas 2 and 3 were not planted (R. 178). Area 4 was also not planted in 1949 (R. 116). The plaintiff hired no labor to perform the work on her farm as her immediate family did the work (R. 137 and 138).

At the conclusion of the trial, the Court in the company of counsel for the plaintiff and defendant, visited the Tsouras farm for the purpose of observing the areas adjacent to the canal (R. 459). Several test holes were present in area 1 and water could be observed about 2½ feet below the surface of the ground. This same damp condition existed throughout the entire area even though no seepage could be observed along the banks of the canal or in the adjacent irrigation ditches.

## STATEMENT OF POINTS

Point I. The defendant is not an insurer against damages resulting from the overflow or seepage of water from its canal and is liable only for its negligence.

Point II. Findings of Fact Nos. 5 and 6 that the defendant was negligent in the operation and maintenance of its canal are not supported by any competent evidence and are contrary to the testimony of plaintiff's own witness Gedge.

Point III. Finding of Fact No. 7 to the effect that defendant had so dredged and widened the canal as to cause

seepage of water upon plaintiff's lands in 1949 is not supported by any competent evidence.

Point IV. The court erred in making and entering Finding of Fact No. 9 that the "condition and operation" of defendant's canal caused flooding and seeping of water on the plaintiff's farm destroying crops planted thereon and making it unfit for growing crops.

Point V. The court erred in making Finding of Fact No. 13 to the effect that it is not true that plaintiff made no effort to mitigate damages.

Point VI. The court erred in finding damages consisting of loss of profits from farm crops, and entering judgment therefor, without taking into consideration the cost of planting, cultivating, irrigating, harvesting and marketing the crops and the salvage value thereof, and in some instances without any supporting evidence.

## ARGUMENT

### POINT I

THE DEFENDANT IS NOT AN INSURER AGAINST DAMAGES RESULTING FROM THE OVERFLOW OR SEEPAGE OF WATER FROM ITS CANAL AND IS LIABLE ONLY FOR ITS NEGLIGENCE.

The rule is well settled in this state that an irrigation company is not liable for damages resulting from the overflow or seepage of water from its canal unless negligence in the

construction, operation or maintenance of the canal is pleaded and proved.

West Union Canal Co. v. Provo Bench Canal & Irrigation Co., 208 P. 2d 1119;

Mackay v. Breeze, 72 Utah 305, 269 P. 1026;

Chipman v. American Fork City, 46 Utah 134; 148 P. 1103;

Jensen v. Davis and Weber Canal Co., 44 Utah 10; 137 P. 635;

Wilkinson v. State, 42 Utah 583, 134 P. 626.

The owner and operator of a ditch or canal is not an insurer against damages to others caused by its water.

West Union Canal Co. v. Provo Bench Canal & Irrigation Co., *supra*.

3 Kinney on Irrigation and Water Rights, 2nd Ed. p. 3080, and cases there cited.

The fact that water flows over the bank of a canal or ditch does not give rise to a presumption of negligence.

Wilkinson v. State, *supra*.

In the case last cited, this Court held:

"The ditch owner is not liable merely because the break or escape occurred but only if it occurred through his negligence. Negligence must be shown. It is not even a case of *res ipsa loquitur*, and negligence is not presumed from the mere fact that a break or escape occurred . . . The ordinary rule of negligence, that there must be a failure to use the care which an ordinary prudent man would have taken under the circumstances, applies."

The rule is quoted from Wiel, *Water Rights in the Western States* (3rd Ed.) Sec. 461.

In 3 Kinney on Irrigation and Water Rights (2nd Ed.) at page 3082, it is stated:

"But negligence cannot be presumed from the mere fact of the breaking of the ditch or canal, without other evidence, so as to shift the burden of proof upon the defendant to relieve himself from negligence."

On pages 3083 and 3084 the author continues:

"The conveyance of water from the natural streams to the place of use for all beneficial purposes, being a legitimate and most necessary enterprise, especially in the Western portion of this country, and protected and encouraged by the law to the fullest extent possible, and the liability of ditch owners for damage from overflow, leakage, seepage or the escape of the water in any manner depending upon the negligence of the ditch owner, and the actual injury caused thereby, there is, therefore, no liability imposed upon the owner of a canal or ditch, existing by lawful authority, for damages resulting from the mere existence of a ditch or canal, ipso facto. In order for the plaintiff to recover damages in ditch and canal cases not only must there have been actual injuries, but those injuries must have been caused by some negligent act upon the part of the ditch owner."

It has been held that where water overflows from a ditch or canal as a result of a flood or storm of unusual severity the irrigation company is not liable. *Wilkinson v. State*, supra. In that case the Court said:

"With respect to this point the fallacy of respondent's contention consists in assuming that unless it is established that the flood causing the damage in ques-



tion was unprecedented, and therefore constituted an act of God, appellants are liable. The law is that in making improvements like the one in question the one making them 'is under no obligation to anticipate or provide against extraordinary floods. A flood within in meaning of this rule need not necessarily be unprecedented.' 3 Farnham, Water and Water rights, sec. 990. Negligence or incompetency under circumstances like those in the case at bar is therefore not established for the sole reason that the flood causing the damages may not have been unprecedented."

## POINT II

FINDINGS OF FACT NOS. 5 and 6 THAT THE DEFENDANT WAS NEGLIGENT IN THE OPERATION AND MAINTENANCE OF ITS CANAL ARE NOT SUPPORTED BY ANY COMPETENT EVIDENCE AND ARE CONTRARY TO THE TESTIMONY OF PLAINTIFF'S OWN WITNESS GEDGE.

It is alleged in the amended complaint (R. 20) as follows:

"5. That prior to May 1, 1948, defendant allowed said canal at the place where it crossed plaintiff's land to become obstructed by debris and vegetation to the extent that it would not carry the water turned into said canal by defendant without overflowing onto plaintiff's land, and allowed the banks of said canal where said canal passed over the property of plaintiff to become out of repair to the extent that said banks became insufficient to contain the water turned into said canal by defendant.

6. That subsequent to May 1, 1948, and on numerous occasions thereafter, defendant diverted water into said canal in such amounts that said water overflowed the banks of said canal, thereby flooding the real prop-

erty owned by plaintiff to a great and damaging extent, and that on each of said occasions, defendant was given notice by plaintiff of such overflow, but that defendant failed and refused to reduce the flow of water through said canal so as to stop such overflow, despite such notice."

The quoted paragraphs contain the only allegation of negligence upon which the claim of plaintiff to damages for flooding is based. It will be noted that the specific acts of negligence charged, consisting of both acts of omission and acts of commission, are (a) allowing the canal to be obstructed by debris and vegetation to the extent that it would not carry the water turned into it by the defendant, (b) allowing the banks to become out of repair to the extent that the canal would not carry the water, (c) that subsequent to May 1, 1948 the defendant diverted more water into the canal than it would carry, and (d) that defendant failed to stop the overflow after notice was given by the plaintiff.

Findings of Fact Nos. 5 and 6 are practically word for word the same as the paragraphs quoted from the Amended Complaint (R. 35).

It will be observed that the pleadings and the findings as to negligence are very general. It is alleged and found that the acts of omission (a) and (b) above occurred sometime prior to May 1, 1948, and the acts of commission (c) and (d) occurred subsequent to May 1, 1948. The testimony of plaintiff's witnesses is equally vague as to time, and a search of the record will reveal no competent testimony to support the findings of negligence. The testimony of plaintiff's witnesses will be analyzed and commented on in some detail.

Andrew Takas, son-in-law of plaintiff, testified that the canal "was full of bulrushes and had weeds and everything and rocks in it, so it would not carry the water" and the water had to go over the bank (R. 61). At a point about 10 feet south of "No. 1 headgate" (we assume the witness meant point C), water went over the bank, the water covered about 3 feet and was two or three inches deep. The court's remark (R. 64) that "He said there was an area ten feet wide" is not supported by the evidence. There is general testimony that at some time or other for an unknown period water ran from the canal on areas one and two. The witness testified that five acres in area three, two acres in area two and two acres in area one "were affected by the water going over" (R. 66). The testimony is that water was going over the west side of the canal practically all the way along flooding three acres in area four. Takas said areas one, two and three were "soggy" throughout the summer.

The only testimony of Takas which indicates specifically when the flooding occurred is given in response to a leading question:

Q. In the month of May did it go over the bank more than once?

A. Yes (R. 62).

Q. How many times would you say?

A. I would say once or twice anyway in the month of May that I saw it.

Q. You say it flooded a number of times in May?

A. Yes.

Exhibits A to L are photographs identified by Takas. It will be noted that Exhibits A and B were taken from the bridge (A on the map) and shows a wide clear open channel with bulrushes only on the side. The standing water shown on Exhibits E and I is on area four west of the canal (R. 72). Exhibit H shows area four (R. 73). Exhibits I and J also show water standing on area four. This water flowed over the bank during the May and June floods hereinafter described and was trapped there (R. 115).

The evidence summarized above is the only testimony of Takas in the record which bears upon the question of negligence. Upon careful analysis it will be observed that the place where the bulrushes, weeds and rocks and "everything" caused the water to go over the bank is not given. The photographs Exhibit A and B show a wide clear channel. There is testimony that water two or three inches deep ran over the east bank. No testimony is given as to the condition of the banks or any alleged acts of neglect with reference thereto. The only testimony of any value is that water went over the banks in certain places.

The testimony of other witnesses for the plaintiff except witness Gedge's testimony which will be considered separately and in detail is equally general, vague, and inconclusive as to the causes of the overflow of water from the canal.

John E. Hill testified at length as to the results of the overflow of water. His only testimony as to any negligence in the operation and maintenance of the canal consists of his conclusion that the canal was not properly cleaned. "It would not take a flow of water because of its not having been clean-

ed (R. 86). Hill did not recall where the water was running over the bank. On cross-examination, his testimony as to details is amazingly indefinite after stating many specific conclusions on direct (R. 87-88). In the light of his evasions and "Don't know" answers to simple questions as to where, when and how water was running over the bank his conclusions have no probative value.

Gus Lambros testified that he saw water going over the banks on plaintiff's property three different times—close together—between four or five days difference (R. 151). He did not testify as to the cause of the water overflowing.

William Domichell testified the condition of the canal was poor. He said bulrushes were clear through it. Clear across and near the middle between A and B and a little ways past C (R. 158). He testified that the water was going over the bank a little North of C in the latter part of May or the first of June. Sometimes in July water was standing on the west part of areas one and two. On cross examination Domichell testified in answer to the question as to whether the only obstruction was bulrushes. A. "There might have been a log down there, I don't know (R. 164). He reiterated that there were bulrushes in it. He expressed an opinion in answer to an improper leading question that the canal was in no condition to carry water (R. 165).

James Tsouras, son of plaintiff, testified in response to leading question after leading question as to the flooding of the farm. The answers are nearly all "yes" or "no." He said the canal was not clean. It was poorly kept up. His counsel in a leading question suggested: Q. Too much water for the

canal? He answered "To much water and too much bulrushes and too much dirt picked up in places for the water to go, and then to back up and go over the bank" (R. 176). A very significant question was asked by counsel for plaintiff. Q. Had you had any trouble with the flooding prior to 1948? *The answer was "No."* There is no evidence that any break in the bank occurred between 1947 and 1948 or that there was any substantial change in the condition of the canal banks.

The direct examination of Louis Tsouras again consists almost entirely of leading questions and "yes" and "no" answers. His testimony was that water went over both banks of the canal nearly every week after May 18, 1948. There is no testimony as to the cause (R. 184-196).

The testimony of the Plaintiff's witness William Gedge is of great significance in this case. His is the only testimony specifically and in detail directed to the causes of the overflow of water from the canal which was elicited without leading questions from plaintiff's counsel. Gedge's testimony should be scrutinized carefully because it explains to a great extent the many generalizations and conclusions of plaintiff's previous witnesses. His testimony is the only testimony offered by plaintiff which is consistent with the known physical facts as shown by the topographic maps and photographs.

On pages 205 and 206 of the record appears the following:

Q. I will ask you, Mr. Gedge, if you will, to describe the condition of this canal between the points A and B as it crosses the Tsouras farm.

THE COURT: In what year?

MR. MULLINER: 1948.

- A. The condition of the canal in 1948, there was bulrushes on both of the banks. I believe there was a 14-foot channel through the center of the rushes. In my observation, during the summer there had been evidence of overflowing the banks. There was evidence also of a seepage from water that accumulated on the west side of the bank and the east side of the property.

On page 212 of the record appears the following question and answer:

- Q. In your opinion, Mr. Gedge, was the canal across the Tsouras farm adequate to handle the water that was being put through the ditch?
- A. It is more than adequate from the standpoint of width and depth and so forth, for that size of canal—I believe it is approximately 50 second feet, that has been taken out of that canal. That canal was made to carry that water, and that has since been taken out of the canal. It is not canal company water; it was private water.

The following testimony is quoted at length because it explains what caused the overflow and high water in 1948.

- Q. (By Mr. Bayle) Mr. Gedge, during the spring and early summer of 1948, were there unusually heavy rains?
- A. Yes, that was in the early spring. We had, I don't know whether you would call it a flashword—the word was passed down the canal—in fact, it is because I irrigate under other canals—the word was passed down the canal to cut the water down, because there was a flash flood coming down the Jordan River. At the time this message reached me, I was on my north farm irrigating, and I ceased irrigating, and I know it was not long after that

that the flood came down, because it was muddy water.

Q. You observed the water in the Jordan River?

A. The canal on the other farm was cut out completely at this time, during the flood stage. When I say "completely" I believe my memory is it was eight days the water was not in the canal, because of the rain. That was the canal immediately above the Brighton.

Q. That is the North Jordan Canal?

A. Yes.

Q. Did you have occasion to observe the water in the Jordan River?

A. Oh, yes. I crossed the Jordan River. I also own a boat. I use that boat on the Jordan River.

Q. Did the Jordan River flood in 1948?

A. Yes, it was exceptionally high.

Q. Did the Jordan River in any way affect the property of the Tsourases, shown on the diagram?

A. It does. When I say "it does" it did in 1948.

Q. Did you observe the water flowing over the bank in the Jordan River, toward the Tsourases?

A. Not over the banks. I assume it came up through the drain ditch "F," and the ground on the bank of the Jordan river is higher than any fields three to five. I assume the water came through this drain ditch. You may call it a small lake of water in area five.

Q. Did that water reach area three?

A. I don't know. I don't know how far, when it comes to be definite, whether it reached field number



three, as near as I can recall three, the low land of patch number three is border-line of patch number five; and I believe the slope, the west half of number five slopes to the west, and I believe patch number three slopes to the east. I don't know whether M is the dividing line between those two slopes or not. The low area is in the area which is back from the Jordan River banks.

Q. This drainage ditch from the Jordan River is F, K, D, is it not?

A. Yes.

Q. And the water from the Jordan River was flowing to the west in that ditch?

A. Any time it was on it, the water was stagnant, standing.

Q. The water in that ditch?

A. Yes, it was standing still. In other words, the water had reached its level, and it was standing in the ditch and in the field.

Q. And in your opinion, the water stood in these areas, three and two?

A. I would say, definitely, yes, because of the physical condition of all the ground in that area.

Q. There is a definite possibility that the water in the ditch then was separating areas two and three in 1948?

A. Especially the east side of area three, and it naturally affected the east side of area two.

Q. You mean the north side?

A. The east of those ditches. There would be no question in my mind this river water would affect the east areas of these fields.

Q. All of this east area?

A. Yes.

Q. And about how far would you say toward the Brighton North Point Canal?

A. I could not say unless I walked over the ground *the* looked at it.

Q. It definitely had some effect in those areas?

A. Yes.

Q. Now, with reference to area one, Mr. Gedge, was the water from the Jordan River flooding up in this area? (Indicating).

A. In my observations, the southwest corner of number one should be free from any soakage from the river.

Q. The southwest corner?

A. The corner closest to the bridge.

Q. And the water from the Jordan River affected the rest of the area?

A. I can't answer that.

Q. I am speaking now of the flood you speak of when the river was high.

A. The reason I can't answer that is that the canal overflowed at the same time this river was high. You had a situation there which was simultaneous, you might say. I can't answer when one stopped or one began.

Q. The water from the Brighton and North Point overflowed as a result of this flash flood?

A. Yes.

Q. When was that, about?

A. It was approximately the last week or two weeks in May.

- Q. Do you have any knowledge of the vicinity of the Tsouras farm, of the water table, speaking of the subterranean water table?
- A. Yes, I have made a test for other concerns on property immediately east of the Tsouras farm. I have done that twice, the last in the spring of '48. The river was high.
- Q. What was the result?
- A. It is a high water table in that whole area, from where the canal is, or west of the canal, that area has a high water table.
- Q. Do you know how far beneath the surface the water is?
- A. It varies.
- Q. The Jordan River?
- A. The Jordan River, it is the deciding factor, because when the river is high the water table is high in this area, and when the river goes down the water table is lower.
- Q. Is it your conclusion that there is seepage from the Jordan River to the west?
- A. With the amount of sand pits that are in the area that have been operated in the area and the old sand holes that have water in them, I would say, without a doubt, there is seepage because there is sand underlying that area. I can't say the entire area, but sand holes are common throughout this area, where they have dug sand out of the ground for building purposes.

Q. At the time the Jordan River was flooded, Mr. Gedge, do you have any knowledge of any washes occurring to the south that would affect the Brighton and North Point Canal?

A. No.

Q. When the Jordan River was flooded, Mr. Gedge, did that have any effect on the Brighton and North Point Canal?

A. Yes.

Q. What effect did it have?

A. It raised it.

Q. It raised it sharply?

A. When you say "sharply" what do you mean—within a matter of days or how? I can't answer that.

Q. Was it raised rather abruptly, suddenly?

A. I don't know, but from the amount of water where I was irrigating, I would say yes.

Q. Did you have occasion to go to the weir of the Brighton and North Point Canal on the Jordan River at that time?

A. Yes, it was right in this time when Mr. Knorr, Joe Knorr, asked me if I would help them get a big tree out that had lodged in the dam.

Q. Was that tree having any effect on the Brighton and North Point Canal?

A. The river and canal, everything, there was an obstruction there, branches and trees.

Q. Was that diverting water into the Brighton and North Point Canal?

A. There was a flood. It could not help it.

Q. Was that at the weir, where the water was flooding?

A. Yes.

Q. (By the Court) Could that flood have been prevented from going into the canal, by lowering the headgate?

A. It was impossible to lower the headgate. There was a big stump lodged underneath the headgate. We had to raise the headgate to get the stump out.

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Q. In your opinion, were these bulrushes affecting the flow of water through the canal?

A. No, not directly, to my knowledge; they were left there deliberately.

Q. They were deliberately left there?

A. Yes.

Q. Who, would you say, left them deliberately?

A. The sediment came in on the side of the channel, and it was so wide, there was such an expense taking them out, and there was no need to take them out in the opinion of the directors.

Q. Was that your opinion?

A. I was one of the directors who came to that conclusion.

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Q. I show you this picture. Isn't the fence on the bank in picture A; is that it?

A. This is the fence you are referring to, right here?

Q. Yes.

A. The fence line there is on the west side of the canal bank.

Q. The east side?

A. The west side of the canal bank. It is on the west side of the east bank of the canal.

Q. How wide would you say the canal is there?

A. Twelve feet or 14 feet—I am guessing. I am referring to the edge of the bank. The banks could be 30 feet apart, there, almost.

Q. Looking at this picture, Exhibit C, would you say the bulrushes or tules appearing in that are retarding or expediting the flow of water?

A. In the channel here, (indicating) they have no effect on it, in my opinion.

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Q. I will ask you one question, Mr. Gedge: At the time of the flood, from your observation of the water in the canal, was any water going over the head-gate at point C?

A. I was not there when the canal was at its highest point. I was there the day after, and I saw evidence that it had gone over at point C.

MR. BAYLE: I think that is all.

### REDIRECT EXAMINATION

Q. (By Mr. Mulliner) You were out there three or four times during the summer and saw where water had gone over into area two, didn't you, Mr. Gedge?

A. No. I was out there three or four times. I believe I said previously that I made one observation or two, and, in my mind, the lucern was dying, and that is the last time I paid any attention to area two. Two was grazed off with cows, and I paid no more attention to the soil condition or crop condition on two; and the point where I made my observation and walked out in it, I made only one observation of the crop condition on two, to my memory, in '48.

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The testimony of Gedge, plaintiff's witness, shows no negligence on the part of the canal company with respect to operation and maintenance of the canal. It is entirely consistent with the detailed explanation by Sterzer and Knorr of the causes of the flooding and the action taken to prevent it.

Sterzer said that from about May 25, 1948 through June 4 the Jordan River was unusually high, that a lot of debris consisting of tree trunks and bushes was floating down the river and collecting against the wier (R. 281). This condition caused at least 50 per cent more water than usual to flow down the canal (R. 283).

J. W. Koer (referred to in the record as J. W. Knorr), the assistant water waster for the irrigation company, testified that he had lived in the vicinity of the Brighton and North Point Canal from 1919 to 1926 and from 1932 to the present time (R. 369). He said that on May 29, 1948 the water in the Jordan River was the highest he had ever seen it (R. 371). His testimony as to the efforts made to control the water in the canal is contained on pages 386 to 390. It does not indicate negligence but on the contrary shows great diligence

in an effort to prevent damage from the unprecedented flow of water in Jordan River.

To summarize: The evidence is clear that at some time during the spring and summer of 1948 water went over the banks of the canal. There is testimony that between points A and B there are bulrushes in the canal but plaintiff's witness Gedge testified there was a 14-foot open channel entirely adequate to control the water and his testimony as to the open channel is corroborated by the photographs exhibits A and B. The canal had never flooded before 1948 and there is no evidence of any changed conditions between 1947 and 1948. Gedge's testimony corroborated by that of Koer and Sterzer and the United States Geological Survey record (exhibit 2) indicates clearly that the flash flood in the Jordan River and tree trunks, brush and debris against the wier caused the canal to overflow on a number of occasions over a period of several weeks and water backed up from the river on the Tsouras river bottom farm. It is submitted that there is no competent evidence to support the very general findings of negligence.

### POINT III

FINDING OF FACT NO. SEVEN TO THE EFFECT THAT DEFENDANT HAD SO DREDGED AND WIDENED THE CANAL AS TO CAUSE SEEPAGE OF WATER UPON PLAINTIFF'S LANDS IN 1949 IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE.

For the convenience of the Court all evidence pertaining to dredging and widening of the canal in the fall of 1948 and



the effect thereof on seepage from the canal will be briefly summarized.

Plaintiff's son-in-law, Andrew Takas, testified that in the fall of 1948 the canal was cleaned by means of a drag line. "They got all the bulrushes out, most of them, took a lot of the clay that was on the bottom of the canal" (R. 67). Who the witness meant by "they" is not indicated in the record.

John E. Hill testified that when the clay sealer is taken from the bottom of a canal it has to be replaced or it will take a year or two for the silt to form a sealer (R. 79). Counsel for the plaintiff asked the witness specifically if a shovel were put in the canal and the bottom of the canal pulled out and put on the bank in the manner shown in the photograph, Exhibit G, would that break the sealer? Hill said:

"All I could do is to state my experience. Whenever I have used power equipment and taken the fill out of a canal, I have to be very careful not to go below the sealer, or else I break the seal and lose the water" (R. 79-80).

There is no testimony by this witness as to whether or not the sealer was actually removed or whether the soil on the Tsouras farm was pourous and the canal required a sealer.

James Tsouras testified that areas two and three were wet in 1949. He said:

"When they dug out the canal, they have taken the base that it had laid in there before, that clay and stuff that accumulated in the bottom, so there would not be any seepage. That is where it is coming from."

Q. What is the condition on the east side of the bank as to water?

A. What do you mean by that?

Q. From the canal bank onto your property does the same wet condition exist?

A. It is the same thing from the bank on over to the ground?

Q. Water in the ground?

A. Yes—soggy.

Q. And because of that condition, it is your conclusion that it is seepage from the canal?

A. Yes (R. 178-179).

Tsouras, however, testified that there was no water seeping into the ditch that runs parallel to and along the east side thereof—between the canal and the "soggy" farm land although the ditch is lower (R. 182).

It is clear from the record that the testimony that the sealer or base was removed was a mere conclusion based upon the fact that the ground was wet. How much clay was removed and where is not shown. The witness stated his conclusion again on page 181 of the Record.

Louis Tsouras testified that a crop of wheat and lucern were planted in area 3 and the wheat turned yellow.

Q. What happened to it?

A. It seeped.

Q. What do you mean by seeping?

A. The water seeped from the canal. They make the canal too deep and dug the clay out.

Q. Were you there when they dug it out?

A. Yes.

Counsel for plaintiff then asked two leading questions:

Q. Since that time, when they turned water in, this spring, you have had water in the area three, have you?

A. Yes, the water seeped into the field.

Q. There was water in the field?

A. Yes (R. 187-188).

On cross examination the witness said that by "seepage" he meant the ground was wet (R. 190).

William Gedge testified that the water table is high when the Jordan River is high (R. 173-174). When the canal was built a sealer was placed in it by Gedge's father (R. 246). If the sealer were taken out of the canal it would seep (R. 250, 266). Areas one, two, three and five are all river bottom land (R. 271). Gedge examined the canal banks during the trial of the case and testified as to the soil deposits on the bank as follows:

Q. In your opinion, the evidence of the work done on the canal last October is piled upon the banks and indicated by the dirt (indicating). This is merely silt and dirt that was cleaned out?

A. As far as I can see. I could see no evidence of sand.

Q. Or clay?

A. I saw evidence of clay.

Q. Was that a type of clay that which is attributable to the smelter?

A. The red streaks, or the mineral streaks in it, the mineral streaks we have always attributed to the smelter from this point where they ran their tailings from the smelter.

Q. And the dirt also is indicative of silt taken from the canal.

A. Yes. In walking over the bank today, I saw no clear, white building sand like I saw when the canal was first made (R. 274-275).

It will be observed that there is no expert testimony adduced by plaintiff as to whether the canal leaked. The general testimony that the base or sealer was broken is characterized by the witnesses themselves as their conclusions.

The shovel operator who cleaned the bulrushes and debris out of the canal in the fall of 1948 testified in detail as to his operations (R. 196-202). He said he did not disturb the banks or bottom of the canal (R. 197-198). He had worked at the business of cleaning canals for ten or fifteen years and was familiar with the sealer or base in the canal. The substances cleaned from the canal were placed on the bank (R. 356-357). Gedge saw no material on the bank that indicated the seal may have been broken (R. 274).

The lands comprising areas 1, 2, 3 and 5 are described by Gedge as river bottom land with a high water table affected by the Jordan River (R. 173, 271). There is an obvious reason why low river bottom land will be wet following two years of high water like 1948 and 1949—the water table will be high. The only expert witness who testified in the case said that during the trial the water table was only about three feet below the surface. He dug down in areas 1, 2 and 3 about

two inches deep and found the soil to be so damp it could be wadded up into a ball. He repeated the same test on an area 500 or 600 feet north—on land just north of the Tsouras property and got the same result.

- Q. When the table is that close to the surface does it have a tendency to affect the ground above it?
- A. Capillary water in that type of soil—it is a clay soil capillary water will flow up through that. Capillary attraction will bring it to the surface. With the dust on top, it will evaporate as it hits the surface (R. 441-443).

The test was made by Chadwick in late September. It is certain that in the spring and early summer of 1949 following the long winter and deep snow of 1948-49 the water table would have been higher. The following testimony of Chadwick is very instructive.

- Q. That flood water, taking into consideration the rains that had been falling, would that in any way have a tendency to affect the level of the ground water underneath areas 3 and 2 and 1?
- A. That flood water, and of necessity the rains in a wet season, would affect the ground water in all of that area, not only in this area 3, but all over, the water table would be higher, naturally.
- Q. Why?
- A. For the reason in that heavy soil the rate of percolation is very slow. It takes a considerable time for that rain water, after being so saturated in this ground, all winter, and in the spring it takes time for it to drain out.
- Q. Which direction is the drainage there?

A. The drainage is from west to east, the natural drainage is.

Q. So it is your opinion that the flooding back of the water would affect the water table to the west side of the flooded area?

A. It would, naturally, some.

Q. Have you had occasion to observe the vegetation growing in areas 3 and 2 recently?

A. Yes, the vegetation growing there appeared to be a sort of a salt grass.

Q. Was that down through areas 2 and 3?

A. It was.

Q. Did you have occasion to observe area 1?

A. Yes.

Q. What was there?

A. The northerly portion of area 1 has been cultivated recently. The southern portion of it shows a few straggling onions and some more or less of a joint grass. I am not able to identify the grass, or that sort of vegetation.

Q. Is that type of vegetation normally growing in areas where there is a high water table?

A. It is. We find that wherever we have a high water table.

Q. Would the moisture from year to year affect the water table?

A. Certainly. In wet years and in a wet long winter, the water table will be higher. In a dry winter or a dry spring, the water table is lower, which means the soil will be dry one year and wet the next. In a wet Spring you will be unable to plow

that ground 'till late in the Spring. It is hard to work it (R. 443-445).

Chadwick examined the canal bank along the east side of the canal (adjacent to areas 1, 2 and 3) and could find no evidence of seepage (R. 445). There is a ditch along the east side of the canal opposite area 2 a foot deeper than the bottom of the canal and opposite area 1. The bottom of the ditch is a foot higher than the bottom of the canal. There was no water in the ditch. He said,

"I can't see how it could help but show if there was water going through the bank. It would go into the ditch and it would show there when it was seeping. There would be moist spots along the bank (A. 446).

This was also the testimony of the witness Burnham who made an examination of the canal bank during the trial (R. 336-387).

A study of the topographical map, defendant's exhibit 1, will be helpful. It shows a difference of one to two feet in elevation between area 1 where crops grew in 1949 and areas 2 and 3 where they did not grow. In view of the difference in elevation and the high water table the reason is clear.

There is a very significant statement by Takas which indicates that the wet soil in 1949 was caused by a high water table. The land in areas 2, 3 and 5 was too wet to plow even before the water was put in the canal. Wheat was not planted in areas 3 and 5 because the ground was too wet in April (R. 483). Water was not put in the canal until May 14, 1949 (R. 484).

The finding that water seeped from the canal is based merely on speculation. If it were not for a wet spring the high water flow, the heavy snow fall, the high water table, the salt grass and other weeds which grow only in land over a high water table, there might be some doubt as to the reason for the crop failure in 1949. The physical facts explain the wet ground and it cannot be assumed that because the ground was wet the canal must have leaked.

This Court has held that the fact that water escaped by seepage and damaged the property of the plaintiff does not establish a prima facie case.

Mackay v. Breeze, 72 Utah 305, 269 P. 1026. The court said:

"Plaintiff is not entitled to a money judgment or injunctive relief merely upon proof of an injury. He must also establish negligence or want of ordinary care. This is not a case of *res ipsa loquitur*, and negligence or the want of ordinary care cannot be presumed from the mere fact that seepage water escaped from the new ditch."

Here we do not even have proof that the canal leaked in 1949! We do not have any evidence that any negligent act was performed by the defendant. The plaintiff has failed to adduce any competent evidence to sustain Finding No. 7 that in dredging and widening the canal the defendant—"caused the banks and bottom to become porous and unable to hold the water flowing therein"—and that as a result seepage existed rendering the land unfit for cultivation in 1949.



## POINT IV

THE COURT ERRED IN MAKING AND ENTERING FINDING OF FACT NO. 9 THAT THE "CONDITION AND OPERATION" OF DEFENDANT'S CANAL CAUSED FLOODING AND SEEPING OF WATER ON THE PLAINTIFF'S FARM DESTROYING CROPS PLANTED THEREON AND MAKING IT UNFIT FOR GROWING CROPS.

Finding of Fact No. 9 is an inept effort to find that the negligence of the defendant proximately caused loss of crops in 1948 and made the plaintiff's farm land unfit for growing crops in 1949. What is meant by the generalization that the "condition and operation" of the canal caused the flooding is left to conjecture. As indicated above all that has been proved is that at some times in 1948 and at some places water went over the banks of the canals and that in 1948 and again in 1949 certain river bottom land was soggy and wet. There is an absolute blank in the record as to causation. This is not difficult to understand because plaintiff has not indicated specific acts of omission or commission which were negligent and therefore there is no starting point from which a chain of causation could run.

The record, as indicated in detail under Point II, shows that the water ran over the banks because of unusually high water on the Jordan. It is equally clear as to the cause of the soggy ground. Chadwick and Gedge both testified as to the high water table (R. 173, 271, 442, 444). In the latter part of September the water table was only approximately three feet below the surface of the Tsouras river bottom land.

In the spring and summer it was undoubtedly much higher. Gedge testified that the water table in this type of land followed the rise and fall of the Jordan River (R. 222). When in 1948 the Jordan River was flowing as much as 870 second feet as against a mean of 324 (Plaintiff's exhibit 2) the soggy ground is explained without any reference to the trifling amount of water going over the banks. Plaintiff's son-in-law Takas testified that the water going over was only two or three inches deep in areas a few feet wide (R. 12, 13).

It is of course a well known fact that salt grass, red alkali grass, and bayonet grass grow only in swampy areas where the water table is high. This was the vegetation in area 4 (R. 335). Burnham testified that water raising under the surface will bring up the alkali (R. 348). He said area 1 which is the onion land was not fit for raising onions because it is too damp and there was too much alkali (R. 351). His observations and conclusions further demonstrate that the high water table in the area following the high water on the Jordan caused the damage to crops growing in 1948 and the dampness in the soil that prevented crop production to any great extent in 1949. It is clear that the alfalfa, normally a deep rooted plant, and the grain planted in 1948 turned yellow and died because of the high water table and the lack of drainage.

The topographic map, Defendant's exhibit 1, tells the story. The elevation of Area 1, (Northeast of the bridge and south of the drain) ranges from 93 near the canal to 88 at the extreme east end. Areas 2 and 3 (north of the drain) vary in elevation from 91 near the canal to 87 on the extreme

east end. Area 1 where some crops were raised in 1949 is from 1 to 2 feet higher than the soggy area 2 and 3. Much of area 4 is lower even than areas 2 and 3. Thus it is apparent why, with an extremely high Jordan River and consequent high water table in the summer of 1948, the crops died in areas 2, 3 and 4 and the northeast corner of 1 (which is low). The rising water table brought up the alkali laden water and the grain and alfalfa turned yellow. It is very significant that the loss of crops occurred a few weeks after the rising of water in and flooding from Jordan River. When water went over the canal bank as a result of debris, tree trunks and brush in the wier it would, of course find channels (see ditches and drains on accompanying sketch) and run to the east to the low ground and mingle with the standing water from the Jordan River. It would not spread all over the ground and remain at elevations 92 and 91 when the land slopes very definitely to the east. The testimony of William Domichell that sometime in July he saw water standing on the western part of areas 1 and 2 (R. 162-163) is of course absurd in view of the slope of the land as shown on the topographic map.

The story of the plaintiff's witnesses as to what happened to the crops in 1948 and as to the condition of the ground in 1949 can be explained only by the action of the water table. The water running over the bank in one or two places on the east bank would not spread all over the nine acres of land east of the canal and stand on sloping land long enough to kill crops. By the same token, if we assume for sake of argument that the seal in the canal was broken in the fall of 1948 and water leaked out of the canal, it would not leak

in such a way as to make nine acres of sloping land soggy all over and it would not seep only to the Skogg fence line and follow that down through the field so as to prevent cultivation on the Tsouras side of the fence and permit cultivation on the Skogg side. The physical facts which are shown by the topographic maps indicate clearly that any seepage in 1949 (which the record does now show) and intermittent flooding in the spring and early summer of 1948 did not, and could not have caused the loss of crops as found by the trial court. It is apparent from a study of the maps together with the testimony that the damage was caused by a high water table following the flood and extremely wet spring of 1948 and long wet winter of 1948-1949. Plaintiff may have assumed that because her crops died in 1948 after the wet spring and because her land was soggy in 1949, the canal company was to blame but she has failed to prove causation. It is significant that no expert witness was called by plaintiff. Her case rests entirely on conjecture.

#### POINT V

THE COURT ERRED IN MAKING FINDING OF FACT NO. 13 TO THE EFFECT THAT IT IS NOT TRUE THAT PLAINTIFF MADE NO EFFORT TO MITIGATE DAMAGES.

In answer to the Amended Complaint it is alleged in paragraph 4 that the plaintiff made no effort to repair leaks around the headgates or to control water flowing from the canal although by removing a few shovels full of soil any

water flowing over the bank of the canal could have been diverted into a drain and conveyed away from the irrigable portions of plaintiff's farm. It is further alleged that during the emergency caused by the unusually severe storms in May and June, 1948, plaintiff failed and refused to take any action whatever to prevent leakage from the defendant's canal and the flooding of her land (R. 24). Finding of Fact No. 13 states in effect that it is not true that the plaintiff made no effort to avoid damage.

The law with respect to mitigation of damages in cases involving flooding of land is reviewed at length in the case of *Jenkins vs. Stephens*, 71 Utah 15, 262 P. 274.

This Court quoted with approval the rule in *Atchison T. & S. F. R. R. Co. vs. Jones*, 110 Ill. App. 626 as follows:

"We believe the law to be that if the plaintiff could by a reasonable expenditure under the circumstances, in the exercise of reasonable diligence, by work on his own land, have lessened the damages or obviated them in whole or in part, it was his duty to have done so. In such case the measure of damages would be the loss sustained before he could in the exercise of reasonable diligence have abated the nuisance, together with all cost and expense of abating it. The authorities seem to be unanimous that in an action for the recovery of damages for a breach of contract, it is the duty of the injured party to use reasonable diligence and prudence to avoid unnecessary damages. The rule seems to be the same in actions for tort."

"The court then quotes from 8 Am. & Eng. Ency. L. the following paragraph at page 605:

"As it is the duty of a party injured by a breach of contract or tort to make reasonable effort to avoid

damages therefrom, such damages as might by reasonable diligence on his part have been avoided are not to be regarded as the natural and probable result of the defendant's acts. There can be no recovery, therefore, for damages which might have been prevented by reasonable efforts on the part of the person injured."

In Farnham on Water Rights, at page 2630 the rule is stated as follows:

"Under ordinary circumstances, one about to receive an injury which he may avert by slight expense is bound to do so; and if he does not he will not be permitted to throw the whole loss upon the wrongdoer. Under this rule one injured by an obstruction in his drain, who, neglecting to make reasonable means to save himself from injury, suffers damage to a large amount, which a small outlay would have prevented can recover only the latter sum."

It appears from plaintiff's exhibits M and N and defendant's exhibit 1 that the general slope of the ground on the east side of the canal is from west to east. A ditch parallels and adjoins the bank of the canal along the west (R. 120). From this parallel ditch run ditches to the east at points C-J-H, D-K-L-F and at B-M-G. All three ditches will drain from the canal to the east (Plaintiff's exhibit N) (R. 60-61) (R. 177). Any water flooding over the east bank of the canal runs immediately into the parallel ditch A-C-D-B (R. 88). At point C this parallel ditch could be so blocked to force the water to run either North or South (R. 120, 175, 176 and 376).

Plaintiff made no effort to divert the water from his land into the drainage ditches. The following testimony of plaintiff's witness Takas (R. 132) shows plaintiff's attitude:

Q. If the water goes over the canal and floods your land, you were under no obligation to—"

A. Not our duty.

.....

Q. If the water goes over the bank of the canal, do you think that you are under any obligation, duty or obligation, to avoid the flooding onto your land?

A. Not according to what the agreement of the farmers, those three water right holders have with the canal company, I don't think it is their duty to keep the canal. Their duty was to keep the headgates only.

Q. You are speaking of whose duties?

A. The farmers.

Plaintiff admitted no attempt was made to shut off the water flowing South in the parallel ditch to force it into the drain ditch (R. 135).

Witness Sterzer, in this regard, testified as follows (R. 285).

A. I asked Mr. Takas why he did not close the gate going south, upon the bank, northward, to allow this excess water to flow into the drain ditch paralleling the canal from C to D.

Q. Would that have been possible?

A. Certainly.

Q. What did he say?

A. He said it was the canal company's responsibility to control the water.

Q. Was anything else said at that time between you and Mr. Takas?

A. Yes, he informed me that he was going to file a claim for damages. I think he spoke of some sum of \$5,000.00 to \$7,000.00, and I asked him how he could estimate damages before the harvest time.

At point C (plaintiff's exhibits M and N is a headgate. This headgate is 12 to 18 inches wide and about 3 inches lower than the bank of the canal (R. 284). Plaintiff had the duty of repairing the headgate (R. 18-A). Sterzer and Knorr (R. 376) testified that water was running over the headgate as point C to a depth of 3 inches when no water was running over the banks of the canal. Burnham testified that about two weeks prior to the trial he examined the area and found the only seepage at headgate C (R. 336). The water so running over was going into the ditch paralleling the canal and running South into area one. If plaintiff had closed the ditch immediately South of point C the water would have flowed north in the ditch paralleling the canal to the drain ditch D-K-L-F and thus away from the plaintiff's lands.

A study of plaintiff's exhibits M and N and defendant's exhibit 1 will show that, with very little effort, a ditch can be blocked off and waters flowing therein diverted to the east.

Exhibit 1 shows that the elevation of area 1 adjacent to the canal is 93 as compared to 91 immediately to the north. A drain ditch designated C-J-H runs to the east. It is readily apparent that any water reaching the area 1 could have been diverted to the drain ditch with little or no expenditure of money.

*There is not one word of evidence that plaintiff turned a shovel full of soil to control or prevent flooding. She was con-*



tent to sue. Had plaintiff made any effort whatsoever to divert the waters flowing on to her land, or had plaintiff repaired and maintained the headgates upon her property, as was her duty under the cases cited above the resultant damages would have been slight, or none at all. The court erred in making finding of fact No. 13 because it is contrary to the evidence. It was also error to disregard the law with respect to mitigation of damages.

## POINT VI

THE COURT ERRED IN FINDING DAMAGES CONSISTING OF LOSS OF PROFITS FROM FARM CROPS, AND ENTERING JUDGMENT THEREFOR, WITHOUT TAKING INTO CONSIDERATION THE COST OF PLANTING, CULTIVATING, IRRIGATING, HARVESTING AND MARKETING THE CROPS AND THE SALVAGE VALUE THEREOF AND IN SOME INSTANCES WITHOUT ANY SUPPORTING EVIDENCE.

This Court has repeatedly held that damages for loss of crops cannot be assessed without taking into consideration the cost of producing crops.

Cleary v. Daniels, 50 Utah 505, 167 P. 825.

Cleary v. Shand, 48 Utah 640, 161 P. 453.

Sharp v. Cankis, Gianilakis, 63 Utah 249, 225 P. 337.

Naylor v. Floor, 51 Utah 382, 170 P. 971.

In Cleary v. Daniels, the court said:

“There is no testimony in the record as to the cost of labor necessary to harvest and market the hay or as

to the cost of harvesting and stacking the hay upon the premises. Neither is there any testimony as to the cost of cultivating and irrigating the land on which the crops were grown. In the absence of some proof as to these facts, there was nothing before the court or jury by which the actual damages sustained by respondent could be determined."

15 American Jurisprudence, page 259, Section 76.

The findings of the trial court as to damages appears in Finding of Fact No. 9 (R. 36, 37). Losses of profits are shown by years and by the areas designated in the sketch used at the trial and reproduced on page 5 of this brief. No formula is given as to how the amounts were arrived at by the court, but by reference to the testimony it is clear that the court did not take into consideration the cost of planting, cultivating, irrigating, harvesting and marketing the crops and did not consider the salvage value of crops actually produced.

The evidence supporting the finding as to each area for each year will be summarized for the convenience of the court.

1948

*Area #1.* Two acres planted to onions (R. 75). Finding of loss of profits—\$362.40 (R. 37). At harvest time plaintiff's witness Hill and other neighbors examined the onion crop, and Hill testified that they felt there was at last a 50 per cent loss of crop (R. 84). Takas testified that 300 crates worth \$500.00 were harvested on the two acres (R. 100). The evidence as to the cost of producing the onions on the basis of a full crop of 600 crates is as follows: Seed cost \$60.00 (R. 109, 136). Topping cost 25 cents per crate or \$150.00 (R. 135, 343). Sorting cost 10 cents per 100 (approximate weight

of crate R. 136) or \$60.00. Cultivation, weeding and irrigation would cost \$75.00 per acre or \$150.00 for two acres (R. 343). Cost of twelve hundred 50-pound bags—15 cents for marketing would be \$185.00 (R. 343). The total cost of producing 600 crates of onions would therefore be \$605.00. The profit on 300 crates shortage on the crop would be one-half of the difference between \$605.00 and \$1,000.00, the sale price would therefore be \$197.50. The items of costs of producing and value of crops produced on area #1 in 1948 are not contradicted. It is therefore apparent that the trial court, when it found the loss of profits to be \$362.40 did not deduct all costs of producing onions in 1948. Burnham testified that in 1948 the cost of producing onions was greater than the receipts (R. 355).

*Areas #2.* Two acres were planted to wheat and lucerne (R. 75). Takas testified that the yield of wheat in 1948 should have been 50 bushel worth \$120.00 (R. 101). The cost of harvesting would have been \$7.00 per acre or \$14.00 for the two acres (R. 109). The trial court found the loss of profit on wheat on area #2 was \$106.00 (R. 37). This is \$120.00 minus \$14.00 for harvesting so it is clear that the court ignored the cost of seed, the cost of planting and the cost of irrigating.

*Area #3.* Five acres were planted to wheat and lucerne (R. 102). Takas said the yield in wheat should have been 25 bushels to the acre or 125 bushels at 4 cents per pound or \$300.00 (R. 102, 103). The trial court found the loss of profit in wheat for area #3 was \$265.00, (R. 37) which would be \$300.00 less \$35.00 for harvesting five acres at \$7.00 (R. 109). It is clear that there was no deduction made for other

expenses of producing the crop. There is no evidence in the record as to these costs.

*Area #4.* Three acres planted to wheat and lucerne (R. 106). Takas said the yield of wheat was 25 bushels to the acre and the value was \$180.00. The trial court found the loss of profits was \$119.25 (R. 37). There is no explanation as to how this figure was arrived at except that there was testimony that in area 4 there was a low sand pit which always contained water and could not be farmed. There is no evidence as to the cost of planting, cultivating and harvesting.

*Areas 2, 3 and 4* were planted to lucerne as well as wheat in 1948, and the trial court found a loss of profits of 7 acres of alfalfa hay amounting to \$210.00. In view of the fact that loss of profits was claimed on the same land for wheat there would be at most only one cutting of hay, if any. The loss of profit on hay was obviously figured on the basis of \$30 per acre, but there is nothing in the record to indicate how the amount was computed. There is no evidence in the record as to the cost of planting and irrigating. The cost of mowing, raking and delivering hay is \$6.00 a ton and plowing and harrowing would cost \$8.00 per acre according to Burnham's testimony (R. 344, 345).

1949

In 1949 onions and wheat were planted in area #1 and a good wheat crop was harvested from one and a fourth acres out of the two acres in that area. That left three-fourths of an acre in onions (R. 123). About twenty crates of onions were growing on the three-fourths of an acre (R. 139). *There is no evidence as to the market value of onions in 1949, except*

that in the spring of that year the price got as low as 50 cents a hundred (R. 355). The finding that the loss of profit on three-fourths of an acre of onions was \$209.70 is not supported by any competent evidence. If the trial court assumed the same production as in 1947 and assumed the same price as 1948 there was still no deduction and costs of production. *This item must be stricken because there is no evidence in the record to support it.*

The Court found that on areas #2 and #3 the loss of profit on hay was \$467.00. There is evidence in the record as to the price of hay in 1949 ranging from \$15.00 (R. 105, 151) to \$26.00 (R. 161) but there is no evidence as to the cost of producing it except Burnham's testimony mentioned above that it would cost \$6.00 per ton for mowing, raking and delivering (R. 344, 345). There is no evidence as to the cost of irrigating, or other labor necessary to produce a crop. Plaintiff's witness Gedge said these were not hay-producing areas. His reason was no doubt because of the high water table (R. 232).

The finding that in area #4 (3 acres) the plaintiff suffered a loss of \$97.65 on three acres of land is not supported by any evidence as to price or cost of production. This finding is somewhat remarkable in view of the uncontradicted testimony of Takas that on three acres of land in Area #4 admittedly unaffected by any water, the total harvest was only 10 bushels! (R. 117).

The land in all areas except #1 were pastured and there is no testimony in the record as to salvage value for this pasture (R. 116, 275).

The trial court's findings as to damages of \$1837.00 for loss of profits on 12 acres of salt grass, river bottom land which Karl D. Hardy, an appraiser of admitted ability, said is only worth a total of \$1050.00 (R. 423-425), are shockingly excessive. The only explanation is that the trial court based its findings on an exaggerated notion of gross valuations without proper deduction of the cost of producing the crops. This was clearly error justifying a reversal of the case.

### SUMMARY

A mutual irrigation company performs a vital function in this state and it should not be held liable for damages except in cases where negligence in the construction, operation or maintenance of its canal is proved by competent evidence. Speculation cannot be the basis for liability. A chain of causation between specific acts of negligence must be shown. The plaintiff has failed to prove negligence and proximate cause. The judgment herein cannot be sustained except on the theory that the irrigation company is an insurer. This is not and should not be the law.

It is respectfully submitted that the judgment in favor of the plaintiff should be reversed.

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