

1950

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Mulliner, Prince and Mulliner; Attorneys for Plaintiff;

Recommended Citation

Brief of Respondent, *Tsouras v. Brighton and North Point Irrigation Co.*, No. 7454 (Utah Supreme Court, 1950).
https://digitalcommons.law.byu.edu/uofu_sc1/1272

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

TACEA TSOURAS,
Plaintiff and Respondent,

vs.

BRIGHTON AND NORTH POINT
IRRIGATION COMPANY,
Defendant and Appellant.

Case No.
7454

Respondent's
~~PLAINTIFF'S~~ BRIEF

MULLINER, PRINCE AND MULLINER,
Attorneys for Plaintiff.

FILED

MAY 20 1950

INDEX

	Page
STATEMENT	1
ARGUMENT	3
Point I. The preponderance of the evidence showed that respondent's crop loss in 1948 was the result of appellant's canal overflowing its banks throughout the Summer, and that such overflowing was the direct result of the condition and manner of operation of this canal by appellant.	3
Point II. The preponderance of the evidence shows that respondent's crop loss in the Summer season of 1949 was due to seepage from appellant's canal, resulting from the improper dredging of the canal in the Fall of 1948.	17
Point III. The Trial Court did not err in its findings on damages.	27
Point IV. The findings of fact of the Trial Court upon conflicting evidence should not be disturbed on review.....	31
CONCLUSION	32

CASES CITED

Jenkins v. Stephens, 71 Utah 15, 262 P. 274.....	16
Knight v. Utah Power and Light Co. (Utah 1949), 209 P. (2) 221	16
Molyneux v. Twin Falls Canal Co., 35 P. (2) 651, 94 A.L.R. 1264, at 1277.....	28
Waverly Oil Works Co. v. R. B. Epperson, Inc., 105 Utah 553, 144 P. (2) 286.....	32
Western Union Canal Co. v. Provo Bench Canal and Irrigation Co. (Utah 1949), 208 P. (2) 1119.....	16
Wilcox v. Cloward, 88 Utah 503, 56 P. (2) 1.....	32

TEXTBOOKS

3 Am. Jur., p. 470.....	31
3 Am. Jur., p. 471.....	31
15 Am. Jur., p. 576, sec. 158.....	27, 28
Digest of Utah Water Law, Vol. 1, State Engineer.....	16, 17

IN THE SUPREME COURT of the STATE OF UTAH

TACEA TSOURAS,
Plaintiff and Respondent,

vs.

BRIGHTON AND NORTH POINT
IRRIGATION COMPANY,
Defendant and Appellant.

Case No.
7454

PLAINTIFF'S BRIEF

STATEMENT

Respondent sued appellant for damages arising from losses to crops planted on her farm, and was granted judgment for damages suffered in 1948 and in 1949, a period of two seasons.

The damages for each year arose from entirely different factors.

In the year of 1948, the loss was suffered by reason of the canal of appellant overflowing its banks throughout the summer, thereby depositing too much water on the land adjacent to the canal, and making the growing of crops, already planted there, impossible.

The damage in 1949 arose because the canal was dredged improperly in the Fall of 1948 by defendant and, when water was turned into the canal in the Spring of 1949, a seepage condition arose by reason of the sealer from this canal being removed the previous Fall, which affected parts of respondent's farm, by causing the ground to become so damp that it would not grow crops, nor was it capable of cultivation, for the year 1949.

Considerable confusion, in analyzing this case, can be averted, if these two features are kept separate. Appellant has failed to do this in its brief. These two aspects will be discussed separately in this brief.

The first five points, raised in appellant's brief, deal exclusively with the proposition that the evidence of respondent was not sufficient to support the two matters above referred to. Considerable confusion results from its discussion, by failure to distinguish the cause of damage for the two years separately.

The points raised by appellant are purely evidentiary. It relies on the proposition that the evidence does not support the trial court's findings. Rather than inject an extended discussion of the evidence in this part of the brief, this evidence will be set out under the points raised by respondent herein.

No legal problems are involved, or raised, in appellant's brief.

Substantially all of appellant's defense, in the presentation of its evidence, was directed to the fact that a flash flood of the Jordan River, in the latter part of

May 1948, caused water to stand on a portion of respondent's farm, described as Area 5, for a period of four or five days. No damage is asked, nor was any judgment given, as a result of the conditions caused by this flash flood in Area 5, and the positive evidence is that crops were produced on this area in the year of 1948.

Plaintiff's case and evidence was directed entirely to the damage caused by water overflowing the banks for the year 1948. And, if the matter of the flash flood is eliminated from the evidence presented in behalf of appellant for this year, there is no defense presented, at all, for the year 1948.

Respondent will not undertake to reproduce the diagram, Exhibit "M", inasmuch as it has been copied on Page 5 of appellant's brief, and can, therefore, be placed before the reader during the discussion contained herein.

POINT I.

THE PREPONDERANCE OF THE EVIDENCE SHOWED THAT RESPONDENT'S CROP LOSS IN 1948 WAS THE RESULT OF APPELLANT'S CANAL OVERFLOWING ITS BANKS THROUGHOUT THE SUMMER, AND THAT SUCH OVERFLOWING WAS THE DIRECT RESULT OF THE CONDITION AND MANNER OF OPERATION OF THIS CANAL BY APPELLANT.

The two grounds of negligence alleged for the damage in the year 1948 are:

1. That the canal, at the place where it crossed respondent's farm, was allowed to become run-down and

inadequate to carry the water placed therein by appellant.

2. That appellant diverted too much water into the canal, after notice that it was flooding was given appellant by respondent; i.e., appellant was charged with notice, and did know, that the water placed in the canal, throughout the Summer of 1948, was flooding during the whole Summer.

The evidence of respondent showed that she and her husband had farmed this area for more than forty years (R. 184), and that over this period the ground involved produced good crops. It also stands undisputed that no trouble or damage arose from appellant's operation of this canal, until the Summer of 1948.

It is also undisputed that appellant caused work to be done, by way of cleaning the canal previous to 1948, both immediately North and South of respondent's farm, but that nothing had been done to the particular portion where the canal crossed respondent's land.

The most significant fact, regarding the dispute in the year of 1948, is simply this: that this canal did not flood or overflow its banks during the Summer of 1948 at any place, except on the farm of plaintiff.

And, there is abundant evidence, as will be hereinafter set out in more particular, to the effect that this flooding was caused by the run-down condition of the canal during this period.

It is also important to note that, after the reeds and debris were cleaned from the canal, no flooding occurred in the following year.

These two facts point conclusively to the proposition that it was the condition of the canal that caused the damage.

The Court's attention is directed to the testimony of the following witnesses, substantiating the proposition that the canal had been allowed to reach such a deplorable condition.

Witness Takas (R. 61):

“Q. Was the condition of the canal about the same during the whole season, from Spring to late Summer, of 1948?

A. Yes, it was.

Q. You say it was dirty. Can you characterize it, and tell us what you mean by that?

A. It was full of bulrushes and had weeds, and everything, and rocks in it, so it would not carry the water.

Q. What happened to the water as it went down the canal?

A. The canal was full of bulrushes and stuff, and it had to go over the bank.

Q. Have you seen it go over the bank?

A. Yes, I have.”

Mr. John E. Hill's testimony, in this case, is sufficient in and of itself to support the judgment, as entered herein. This gentleman had been the Bishop of the Ward, and was, at the time he testified, the President of the Stake. His testimony was never impeached, and he was wholly and completely independent, as to either party. With regard to the condition of this canal, in the Summer of 1948, he testified as follows (R. 86):

“Q. In the year 1948, did you have occasion to observe, while you were on the Tsouras farm, the condition of this canal?

A. Yes.

Q. Can you describe it?

A. Yes. The canal was not properly cleaned. It would not take a flow of water because of it not having been cleaned in the Spring of the year, and it was overflowing its banks.

Q. Was the fact that it was overflowing its bank on the Tsouras farm evidenced in the condition of the land and other things?

A. Very, very evident.”

Mr. Domichell, another local farmer, who was familiar with farming conditions in this area and a wholly independent witness, testified as follows (R. 156, 157):

“Q. Did you hear a conversation, or were you a party to a conversation, between Mr. Takas and Mr. Sterzer (Mr. Sterzer was the President of appellant company)?

A. Yes, sir.

Q. And yourself?

A. Yes.

Q. What do you recall of that conversation?

A. Well, we were talking about the canal, and he admitted the canal was in poor shape, but he said he could not do nothing about that flooding. Mr. Takas said something had to be done, and he said, “The only thing is to take it to Court and see what you can get.”

Q. At that time, the water was clearly going over the bank?

A. That is right.”

And further (R. 157, 158) :

“Q. In your business there in 1948, did you have occasion to observe the canal proper, as it went through the Tsouras farm?

A. Yes, because I was the watermaster at one time, and I had a ladder. I took care of things. I liked to see them clean.

Q. What was the condition of the canal?

A. The condition of the canal was very poor, very poor. The bulrushes were clear through it.

Q. The bulrushes were all through this canal?

A. Yes (indicating).”

Mr. Domichell farmed land a short distance South of the Tsouras property, on ground very similar. He testified that the canal, as it passed through his farm, had been cleaned in the year of 1947, and that a canal should have the weeds burned out of it every Spring, to be properly maintained (R. 165).

This man was a farmer of considerable experience in raising crops in this area, having done so for over twenty years, and was particularly conversant with the canal in question. At Page 165 of the Record, he testified as follows:

“Q. (By Mr. Mulliner) In your experience, and from your observation of canals, was this canal, from the point A to B, as it crosses the Tsouras farm, in any condition to carry the water they were putting through it? (1948)

A. No.”

Mr. James Tsouras, son of respondent, had lived

on this farm for thirty-four years, and was thoroughly familiar with its history, and the trouble occurring in 1948. He testified (R. 175, and following) :

“Q. What was the condition of the flooding during the Summer (1948)?

A. How do you mean?

Q. Did it flood just in May, or did it keep going on?

A. It flooded all Summer long.

Q. Do you know why it did?

A. The canal was not clean. It was poorly kept.

Q. Too much water for the canal?

A. Too 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.

Q. Is that what was going on?

A. Yes.

Q. Had you had any trouble with the flooding prior to 1948?

A. No.”

Mr. Gedge was a director of appellant company during the Summer of 1948, and was called in behalf of respondent. He testified (R. 211) :

“Q. Isn't it a fact that the flooding on the Tsouras farm and your farm was due to the putting in too much water for stockholders to the North?

A. Partly, yes.

Q. (R. 268) At any time, did you observe any other flooding condition during 1948 from the Jordan River into the Brighton and North Point Canal?

A. There was times the canal was too high.

Q. Was that due to the waters from the Jordan River?

A. No."

The foregoing excerpts from testimony of the witnesses is the only testimony, as to the condition of the canal, presented. And, it is directly to the effect that the condition of the canal was very poor, which points undisputably to the proposition that appellant negligently maintained it.

In order to dispel any question that may arise, as to whether the canal overflowed its bank continuously during the Summer of 1948, and caused the damages alleged, and to point decisively to the fact that no damage was caused by the flash flood occurring in 1948, as is apparently the contention of appellant, the following testimony was adduced:

Mr. Takas (R. 62):

"Q. You saw the water go over the banks?

A. Yes.

Q. Between the month of, say, May to September, all that year (1948), how often have you seen it?

A. Well, I haven't got the correct dates on it. I might remember all the dates since May 17th, when they turned the canal in. It practically went over all the year around. I could not say just when. Sometimes it would go over, and sometimes the canal would go down, and it would not go over."

Again, on cross-examination (R. 133, 134):

"Q. Have you observed the water going over

the canal, when it could be diverted into one of those drainage ditches?

A. It was going in a drainage ditch.

Q. It could be easily diverted into one of those drainage ditches or diversion ditches by placing a few shovels of dirt in the diversion point, and diverted down the canal to D, and drain toward the Jordan River; do you think you could do that?

A. If it was just for a matter of one or two days—but the way the water was going all Summer long, we would have to sit there all Summer long to keep the place closed.”

Mr. Domichell confirms this at Page 157 of the Record.

Mr. James Tsouras (R. 169, 170) :

“Q. And during the *Summer* of 1948, did you have, or did you actually see the water flooding in on your mother’s farm?

A. Yes, I saw it in Areas 1, 2, 3 and 4.

Q. On more than one occasion?

A. Yes, at three different occasions.

Q. Will you describe the appearance, what it looked like, what you recall of that?

A. Number 4 was nothing but a swimming hole, and 1, 2, and 3 was not quite a swimming hole, but it would have been a good big “Hunting Club.”

Q. The water was standing there the biggest part of the Summer, was it?

A. Yes.”

Louis Tsouras, husband of respondent (R. 185) :

“Q. Now, in 1948, that is the Summer before

this last one, did you have some trouble with the canal?

A. Yes.

Q. What was that trouble, what happened?

A. The canal flooded the banks, and the water broke out.

Q. Onto your property?

A. Yes, onto my property.

Q. Were you out there every day?

A. Twice a day.

Q. How often would you say this canal was going over the banks?

A. After the 18th of May, every week, pretty near.

Q. Pretty near every week, after the 18th of May? Is that what you said?

A. Yes.

Q. Would it flood on both sides?

A. Both sides."

Mr. Gedge (R. 206) stated: "In my observation, during the Summer there had been evidence of overflowing the banks."

Mr. Sterzer (R. 315, 316) :

"Q. Did you ever have your attention brought to the fact that this canal was flooding their land?

A. Yes; there was a time or two I got word about it, to that effect.

Q. In August?

A. July or August, later in the Summer."

Mr. Koer, the assistant watermaster of appellant company, in testifying about the banks in this par-

ticular portion of the canal, and, after stating that they were wet, answered as follows (R. 410) :

“Q. Was that general throughout the Summer, more or less?

A. Yes, the bank was wet throughout the Summer.”

And, again (R. 414) :

“Q. During the course of your visits there in the Summer, that land was pretty wet most of the Summer, was it not?

A. In a considerable number of places, yes, sir.”

The foregoing testimony indicates conclusively that the water was going over the banks throughout the entire Summer.

The reporter, in compiling the transcript, has made the mistake of calling the witness Koer by the name of Knorr. Mr. Knorr was, at the times involved herein, the watermaster of appellant company, and he was not called as a witness, but his testimony was referred to by way of admission, in a number of instances.

At Page 99 of the Record, Mr. Takas testifies that he was a witness to a conversation, where Mr. Knorr told respondent :

“A. If she takes that to Court, she will get every penny she has coming out of it, because he had asked the canal company to clean out the canal, and they never did it. We asked them to cut the water down. He would cut the water down, and they would turn around and tell him to put more water in.

Q. Did he tell you that?

A. Yes."

Mr. Louis Tsouras (R. 185, 186) :

"Q. Did you have a conversation, at some time during last Summer of 1948, with the watermaster out there?

A. The watermaster called. I told him to cut down the water, but the company said more water. The watermaster told me.

Q. This is what the watermaster told you?

A. Yes.

Q. Say that again, what he told you.

A. I told the watermaster to cut down the water, because it flooded my crops, and he said the company told him to put more water in. He said, "The company asked me to turn more water in"."

Mr. Gedge made the following statement (R. 214) :

"Mr. Tsouras said he did not want any trouble; that he would much rather settle it otherwise. He had worked hard, and I told him I would try to be fair, both being a stockholder and a director, and, you might say, a personal friend of his, and that I would do what I could to settle this thing, so it would be a permanent benefit to them and the canal company. It would be, you might say, the answer to this problem of flooding this farm."

The Court's attention is directed to the photographs admitted as exhibits. One series of these photographs was taken the latter part of August, 1948, and show clearly that Area 4 was nothing but a large lake, admittedly caused by the canal overflowing its banks. These

pictures, and particularly Exhibit "I", show the clogged condition of this canal in the Summer of 1948.

There is also positive testimony that the West bank of the canal, which adjoins Area 4, is higher than the East bank, and, therefore, the only reason that a lake condition was not present on the East bank is that there was drainage there (R. 144, 180).

There is not one word of evidence presented by appellant to the effect that this canal was in good condition, or that it did not overflow the banks during the Summer of 1948.

It is an undisputed fact, also, that the various areas, as set out and described in Exhibit "M", suffered complete and total damage, to the extent that the water reached these areas, and that there resulted therefrom a total crop failure.

Keeping in mind the above testimony and evidence, as to the flooding throughout the Summer, Mr. Gedge, a director at that time of appellant company, fixes the responsibility, in just those terms, upon the canal company for this damage.

At Page 264 of the Record, this testimony appears as follows:

"Q. Coming back to last year, when you saw the water going over the bank here, is there any doubt in your mind but what the canal was responsible for the condition that existed on Area 2 in 1948?

A. I don't believe there is any doubt in my mind. I will include patch 1 and patch 2, the West portion of those fields; whether it is

from the canal or from this large amount of water that flooded over in patch 4, that is a contributing factor, and I think it was responsible."

On the question of knowledge of the canal company, and the canal's actual condition in the Summer of 1948, the testimony of Mr. Koer is very important, when he testifies as follows (R. 419):

"Q. It is a fact, is it not Mr. Knorr (Koer), that this is probably the worst spot in the whole canal, or was in 1948?

A. Well, I would not say the worst spot but it was a bad spot, yes, we had trouble there."

Respondent has no argument with the legal proposition, as set out under Point 1 in appellant's brief, to the effect that an irrigation company is not an insurer against damage from overflow or seepage, but is only liable for its negligence.

It is equally true, as a matter of law, that an irrigation company is charged with knowledge of the condition of its canal throughout its entire course. The condition of this canal, and this proposition is undisputed, was such that it would not carry the water placed in it by the agents and servants of appellant company. The failure of this canal company to place this canal in a condition to carry the water so put in it, is an omission, and breach of duty toward this respondent.

There is no need to rely on presumption, or the doctrine of *res ipsa loquitur* in this case. Respondent

relies on direct evidence of at least eight witnesses, whose testimony is quoted above, that this duty was not maintained. And, finally, the direct statement of the director, who was most familiar with this canal's operation, that he had no doubt but what the condition of the canal was responsible for the flooded condition of respondent's property.

It is difficult to conceive of a situation wherein a factual matter could be presented more conclusively or more strongly.

As to the duty to maintain canals, see *Knight v. Utah Power and Light Co.* (Utah 1949), 209 P. (2) 221, and *Western Union Canal Company v. Provo Bench Canal and Irrigation Co.* (Utah 1949), 208 P. (2) 1119.

There is some intimation that appellant could have averted this overflow. This is not sustained by the evidence, and particularly by the testimony of Mr. Takas, quoted above.

In addition to the fact that it was humanly impossible to determine when the canal company was going to put too much water into this canal, in the light of the testimony of this case, to stop the overflow would have required respondent to rebuild practically the whole bank, on both sides, of this canal.

In view of the holding in *Jenkins v. Stephens*, 71 Utah 15, 262 P. 274, this duty would not be respondent's, in this case.

See Vol. 1, *Digest of Utah Water Law*, State Engineer, where, in commenting on the *Jenkins* case, it is said:

“The court stated that it had serious doubts that the rule of contributing negligence technically applied to a case where the defendant by placing an unlawful obstruction in a water course caused water to flood on to and damage the plaintiff’s land. The more apt rule and doctrine to be applied is the doctrine of ‘avoidable consequences’. In such case the plaintiff has done nothing to cause the injury. However, it is the plain duty of the plaintiff to give notice to the defendant that he is being injured by the unlawful obstruction and give the defendant an opportunity to prevent the injury or to remove the obstruction himself, and thereby avoid the danger. In both cases the defendant would have been charged with expense necessarily incurred in removing the obstruction.”

POINT II.

THE PREPONDERANCE OF THE EVIDENCE SHOWS THAT RESPONDENT’S CROP LOSS IN THE SUMMER SEASON OF 1949 WAS DUE TO SEEPAGE FROM APPELLANT’S CANAL, RESULTING FROM THE IMPROPER DREDGING OF THE CANAL IN THE FALL OF 1948.

In the Summer of 1949, the land adjacent to this canal was again subjected to a thorough soaking.

In Area 1, in 1949, wheat was planted, and an abundant crop produced, the evidence being that over 70 bushels was harvested from a little more than one acre of this plot. This wheat was grown on the North half of Area 1, but onions, planted on the South half, would not grow (R. 96), although the ground levels are the same (R. 264, Ex. “N”), because the ground was too wet for onions to grow.

There is also positive evidence that the water table in this Area was lower in 1949 than it was in 1948.

Levels, run by the County Surveyor, indicate that the Skogg farm field, immediately North of Areas 3 and 5, has a general ground level ranging approximately a foot lower throughout than Areas 3 and 5 (Ex. "N"), yet, wheat was grown on the Skogg farm in the Summer of 1949, and, during the trial, the Skogg farm was dusty, whereas Areas 2 and 3 on respondent's farm, even as late as the Fall of 1949, were still wet.

This fact shows conclusively that the soggiess of the ground on respondent's farm was not due to a high water table.

There is no dispute that Areas 2, 3 and 4 were so wet that they could not even be cultivated after the canal was turned in, while Area 1 was cultivated (R. 95, 96, 178, 179, 180, 181, 187, 262). There can be no explanation for this erratic condition, except that the sealer in this canal was disturbed by the dredging operation.

This dredging occurred only on the section of the canal that passed through the farm of respondent (R. 263, 462).

Mr. Hill testified that he had considerable experience in the operation and maintenance of canals in this area, and that, in the event of a shovel operating in a canal, the sealer must be replaced. Upon being shown pictures of the results of this dredging, he testified that, in his opinion, this dredging operation would break the sealer on *this* canal.

Mr. Hill was a member of the Board of Directors, and, also, Superintendent of the North Jordan Irrigation Company, which operates canals in the same district as that in which the canal of appellant is operated, and his testimony, in this respect, is as follows (R. 78 to 80):

“Q. Is the North Jordan Irrigation Company an irrigation company with canals in operation here in Salt Lake County?

A. Yes, it is a member of the Board Canal Association.

Q. In this capacity, what do your duties consist of?

A. Cleaning canals, supervising and delivering water to all stockholders.

Q. Have you been in that type of business, and are you familiar with that type of farming, have you been for practically all your life?

A. That is right, for years.

Q. You have seen canals dredged, cleaned, and operated, managed generally?

A. I have.

Q. Will you tell the Court what is meant by sealing the bottom of a canal?

A. In my experience, in sealing the bottom of a canal, I have found that whenever I have disturbed the original bottom of the canal it becomes necessary that I replace it and put a sealer there, in order to keep the water from flowing out through the porous soil which I have caused by taking the old bottom out of the canal.

Q. This sealer, or whatever you call it, is what kind of dirt or substance?

- A. When I replace a bottom, after I have taken it out, I will add clay as a sealer.
- Q. Your operation is out west of Redwood Road, here generally?
- A. Yes.
- Q. In the flat of the Salt Lake Valley?
- A. Yes, we have a very flat country.
- Q. And the flat country contains sand and clay?
- A. Some—there is a variation.
- Q. It is not a natural sealer?
- A. No.
- Q. So that a canal, when it is being operated, has to be sealed by clay, silt, or something of that nature?
- A. If the sealer is not placed at the time or after the bottom has been taken out, then it takes possibly a year or two years for the silt to form a sealer.
- Q. So the canal will seal itself?
- A. Yes, within a year or two years' time.
- Q. That is characteristic of the district out there?
- A. That is how I have found it.
- Q. You are acquainted with the Tsouras farm?
- A. Yes.
- Q. The farm of the plaintiff?
- A. Yes.
- Q. That is the characteristic of the land in that area?
- A. It is similar to certain lands under the system where I manage.
- Q. If a canal, Mr. Hill, had been operated and assuming it was in this area that you are familiar with, if a shovel was put in there and the bottom of the canal pulled out and placed on the bank, in much the same manner as appears in the photograph marked

“Exhibit G”, would that break the sealer, in your opinion?

MR. BAYLE: I object to that, Your Honor, as not having reference to the canal that is involved in this litigation and the operations of the defendants; unless he is familiar with the operations I think the objection is well taken.

THE COURT: The objection is overruled.

A. Yes. 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 I lose water.

Q. By losing water, what do you mean?

A. I mean the seepage, the water that flows from the bottom of the canal after the sealer is broken, and the water seeks its level on the lands below the canal.

Q. Below and adjoining?

A. That is right.”

It is difficult to conceive how any more positive testimony can be obtained, with regard to the land characteristic in this area and the necessity of maintaining a sealer in the canal bottom.

Tons of debris and reeds were removed from the bottom of this canal, which resulted in water seeping onto the adjacent areas, all of which were lower than the water level in the canal.

Mr. Gedge, the director of appellant company, with regard to sealer and seepage in this area, testified as follows (R. 250):

“Q. Now, going back to this sealer proposition. When sealer is taken out of a canal, it normally seeps, does it not?

A. It depends on the soil conditions.

Q. I mean these soil conditions.

A. It would. I am assuming it would, *and it had.*

Q. With your knowledge of this soil, on this particular farm; if the sealer was taken out, it would seep?

A. Yes.”

During the course of the trial, Mr. Gedge, during a recess, went over the ground, and testified positively that the ground levels in Areas 2, 3 and 4 were lower than the canal. This is easily evident from the photographs.

Mr. Gedge also testified that clay was present in the debris, removed from the bottom of the canal (R. 274).

Mr. Sterzer, President of appellant company, testified positively that the bottom was taken out of this canal (R. 319):

“Q. So they have scraped out the bottom, and have taken it up on the bank, haven't they?

A. That could be, yes.

Q. And it runs about two or four feet high, the whole length of the canal, the way it is now, does it not?

A. Yes.

Q. On your direct examination, you said that the banks had not been disturbed.

A. The original banks had not been disturbed.

Q. Well, had they been disturbed to this extent, that the bank had been taken out and moved over a little?

A. No, sir."

(R. 320):

"Q. So that the dirt, sand and silt, as you put it, as appears in Exhibit "G", must have been taken from the bottom and piled over.

A. That is right."

(R. 321):

"Q. Then he went down to the bottom and pulled that clear over the top, outside of the original bank?

A. That is probably right.

Q. That is the way it looked, anyway?

A. Yes."

With the testimony of Mr. Sterzer, as above quoted, in mind, Mr. Gedge, who was thoroughly familiar with this canal and farming, as has been previously indicated, states definitely that, if the bottom of this canal was disturbed, it would seep and account for the condition existing on this farm (R. 266):

"Q. I will ask you, Mr. Gedge, if the seal had been broken in this canal from A to B, would the seepage and dampness which you saw evident on the ground—could that be attributed to the breaking of the seal?

A. You could say that. That is an assumption, but if the original bottom of that canal had been disturbed, it could account for the wet condition of these patches, with my previous knowledge of the soil conditions in there."

This testimony was presented immediately upon Mr. Gedge's return from a trip to the premises involved, taken during the trial in the latter part of September, 1949, and refers to the dampness of Areas 1, 2, 3 and 4, at this late date.

This testimony establishes three definite propositions:

First, that the land adjacent to the canal was affected to the extent that crops would not grow thereon, because of the presence of too much water.

Second, that the removal of the sealer of a canal in this area, without the same being replaced, results in seepage.

Third, that tons of material were removed from the bottom of this canal.

These three factors were shown to exist in the Summer of 1949, but there are other conditions that indicate even more strongly that the damage to this land resulted from seepage.

The chief one is that Areas 1, 2 and 3 were plowed, harrowed, and planted in the Fall of 1948 and in the Spring of 1949, but, when the water was turned into the canal, moisture appeared in these areas, so that in July of 1949 (R. 482) the ground was so wet that one could not go into Areas 2 and 3 (R. 482).

Mr. Takas testified to this effect at Page 102 of the Record, in speaking of the Spring of 1949 and the crops on Areas 2 and 3:

“Q. You could not take any wheat off it?

A. After going with the canal out last year, the

grain dried out, and there was no water in the canal. We plowed it in the Fall and we harrowed it this Spring, before the canal turned the water in there. As soon as the canal turned the water in, it seeped through, and the wheat did not grow. It stunted it right there. The same thing we planted in 1948 we planted in 1949."

(R. 479):

"Q. When did the ground become soggy there?

A. The ground became soggy after the canal went through there.

Q. When was that?

A. After they turned the canal in.

Q. Up until the time the canal come in, the ground was not soggy in any place?

A. That is right. We planted the wheat the same time we planted onions in that patch."

In view of this testimony, it is difficult to understand why there can be any question as to the cause of this crop failure.

In addition to this evidence, there are other factors, which will be quickly stated, which further confirm this result.

An examination of the pictures indicates that the water at point A, in looking North, is not so obstructed for the first few hundred feet. But, the other pictures, and particularly Exhibit "I", show that a little farther up the channel, opposite Areas 2 and 3, there is considerable obstruction by way of weeds and reeds.

The shovel operator testified that he proceeded from South to North, and it is reasonable to presume

that, in dirtier sections of the canal, he dug deeper, thereby causing seepage.

This is the only explanation that could be given of the fact that wheat would grow on the North end of Area 1, but would not grow on Areas 2 and 3, immediately adjacent; all the testimony being that the ground conditions in the various plots were the same.

Mr. Chadwick, the engineer produced by appellant, was at a total loss to explain why crops would grow on the Skogg farm, immediately North of Area 3, but would not grow on Area 3 (R. 449, 450). He was equally at a loss to explain why wheat would grow on Area 1 and not on Area 2 (R. 451):

“Q. Can you account for the fact that a good stand of wheat, or crop of wheat, was taken off of 1, when 2 was so wet that a tractor could not get into it?

A. I could not explain it, because they are similar in elevation.”

During the trial of this action, Mr. Gedge, the Trial Court, and counsel observed the condition of the soil, as to seepage in the year 1949, and, as late as September of that year, when the trial took place, this seepage was very evident.

The Engineer, Mr. Burnham, who was there during the course of the trial, also indicated that the ground had been subjected to seepage, by reason of the alkali present there (R. 336).

Mr. Gedge, after returning from his trip to these premises, during the trial, testified that Areas 2 and 3

were wet, and that the field North of Area 3, the Skogg property, was dusty (R. 262, 263).

POINT III.

THE TRIAL COURT DID NOT ERR IN ITS FINDINGS ON DAMAGES.

The respondent and her husband are old people, and all the help that was furnished on this farm, in producing crops, was donated by the children of respondent and their son-in-law, so that there was no overhead or cost to respondent for any labor performed in producing these crops (R. 110, 137, 138, 175). This situation, of course, results in a more favorable operation than is ordinarily the case.

Another advantageous situation is that respondent had a free water right, so that there was no cost involved in furnishing the necessary irrigation water.

Respondent, therefore, was in a position where she realized more cash from her crops than another person might if such a person had to pay for labor and water.

Respondent agrees with the statement of appellant that the damages for loss of crops cannot be assessed without taking into consideration the cost of producing them. But "cost", as used in this rule of law, means only the cost to a particular plaintiff.

At 15 *Am. Jur.*, p. 576, sec. 158, the rule is stated:

"Elements of cost which are to be taken into consideration must depend largely upon the particular facts in each case. They generally include the cost of labor, materials, and superintendence,

and, where the use of machinery is involved, the cost in wear and tear of the same and in time of its use. *The cost of performance to the plaintiff must be considered, and not what it might have cost someone else.*”

See also *Molyneux v. Twin Falls Canal Co.*, 35 P. (2) 651, 94 A.L.R. 1264, at 1277 :

“Elements of cost which a claimant for lost profits is required to prove must necessarily depend largely upon the particular facts in each case, bearing in mind that the court is concerned with claimant’s costs and not with what it might have cost someone else.”

In view of this situation, cultivating, weeding, irrigation, and items of this nature, have no materiality as to this particular crop loss, because all this was furnished respondent, free of charge.

In discussing the matter of damages for the two years involved, a distinction must be made as between the two years.

In the year 1948, the cost of preparing the ground and seeding the ground was already expended by respondent, so, as to the crop damage for those years, the harvesting is the only deduction to be made against the market price. Otherwise, this deduction would be figured twice. Appellant overlooks this fact entirely, in its argument.

The only deduction against the \$500.00 crop loss, which, incidentally, was testified to as a net loss, would be the cost of sorting and the sacks, which the Court

did deduct, in arriving at its figure of \$362.40 for the 1948 onion crop loss.

The Court, in this case, carefully computed and deducted the cost of harvesting, and this is the only allowable deduction, as has been indicated above, because respondent had already expended the other items of cost, before the crops were destroyed. Appellant completely ignores this throughout its argument, as to the 1948 damage.

It must be noted, in this connection, that the Court, in computing the damages for 1948, used the lowest market price testified to by anyone, and allowed only two-thirds of the amount of yield testified to by Mr. Takas and the other parties familiar with this particular farm.

In order to understand the method by which the 1949 damage was assessed, a brief statement as to the farming procedures for this area is necessary.

In the ordinary course of events, and if this ground had not been affected, grain would have been planted, with alfalfa, in Areas 2 and 3. In these areas, a grain crop and one cutting of alfalfa would have been taken off Areas 2 and 3 in 1948, and, in 1949, these two areas would produce three cuttings of hay from seed planted in 1948, and there would not be any costs of preparing the ground or providing seed in 1949. It, therefore, becomes unnecessary to deduct such items as part of the cost of producing the hay for the year 1949.

The onion loss in Area 1, and the wheat loss in Area 4 for 1949, both of which were allowed, included

deductions for seed, and properly so, as, under normal conditions, both crops would have to be started over again in this particular year.

It is readily apparent that these deductions were made by the Trial Court, in computing this loss, by comparing the amount of damages allowed in 1949, for the same acreage in wheat, and the same is true as to onions; i.e., the damage to onions in 1949 is \$152.70 less than that allowed in 1948, which sum is represented by the cost of the seed and preparation of the ground.

It is submitted that the Trial Court, in assessing this damage, was very conservative, in view of the testimony presented at the trial.

It is also submitted that the argument of appellant, as to the cost to be included, is erroneous, in view of the fact that these services were furnished free, and the manner and time of sowing the crop, with relation to the time when the damage occurred.

The Trial Court very carefully computed these items to the last penny, and, in arriving at this judgment, assumed the natural and prospective yield of this ground for two years, in view of the planting program of respondent, which must be done, if an intelligent result is to be arrived at.

Over the two-year period, crop losses occurred on twenty-two acres of ground. This resulted in a loss at a little over \$75.00 per acre on land planted to wheat, onions, and hay. And, in view of the fact that no labor cost can be assessed, it becomes readily apparent that this judgment of \$1837.00, as rendered by the Court, is,

by no means, excessive. In view of the previous history of crop yields on this farm, as testified to by the persons operating the same, this judgment is not even fully compensatory.

POINT IV.

THE FINDINGS OF FACT OF THE TRIAL COURT UPON CONFLICTING EVIDENCE SHOULD NOT BE DISTURBED ON REVIEW.

This is a law action, and the Court made its findings of fact based on evidence upon which there was very little conflict.

In such a case, the authorities are uniform, as this Court has pronounced in a great number of cases, to the effect that, in a law case, findings of a Trial Court will not be disturbed, unless clearly against the weight of the evidence.

3 Am. Jur., 471:

“Again it is said that findings based on conflicting evidence will not be reversed on appeal, unless it is clear from the evidence that the findings are wrong, or unless they are clearly against the preponderance of the evidence.”

3 Am. Jur., 470:

“The weight of conflicting evidence in an action tried by the court without a jury is exclusively for the trial court, and the appellate court must accept as true that which tends to sustain the decision, and reject any testimony in conflict with it.”

This rule has been confirmed in two recent decisions by this Court. See *Waverly Oil Works Co. v. R. B. Epperson, Inc.*, 105 Utah 553, 144 P. (2) 286; *Wilcox v. Cloward*, 88 Utah 503, 56 P. (2) 1.

As has been indicated in Point I and Point II, there is substantial evidence to prove that this ground was damaged, and that it was damaged as a result of the condition and manner of operation of the canal involved. Even appellant's witnesses, including its President, its Watermaster and its Assistant Watermaster, testified that the canal was in bad shape. To this is added all the testimony presented in behalf of respondent, parts of which are set out hereinabove, which leaves no doubt, at all, as to the cause of this damage.

The same principle applies, when the amount of damage is involved, and the findings on this fact should not be disturbed. On this feature of the case, there was a wide variance in matters of market price, costs, etc., and from this conflicting evidence, the Court drew its own conclusion.

CONCLUSION

The chief contention made by appellant in this case is that the findings of the Trial Court, as to the cause of crop damage involved and the amount thereof, are not supported by the evidence.

The foregoing excerpts from the evidence clearly substantiate the Court's finding as to the cause of water being on the land of respondent.

The Trial Court assessed the amount of damage

based on the normal planting procedures, as discussed hereinabove, which, at first glance, appear to be somewhat confusing; but, if studied carefully, as was done by the Trial Court, results in the logical conclusion which it reached.

Appellant, in arguing as it does, fails to follow the planting procedures adopted by respondent during the planting season of 1948, at which time respondent committed the land to a program of raising crops which continued through the year 1949, and possibly 1950.

If this fact is kept in mind, the confusion injected into the case by appellant's argument is avoided.

The Trial Court, in this case, is to be highly commended for the time spent in receiving evidence, and in studying the matter, before rendering this judgment which, in all respects, is correct.

Respectfully submitted,

MULLINER, PRINCE AND
MULLINER,

Attorneys for Plaintiff.