

1955

# Leland W. Simper v. Harry Thorsen and Mildred Thorsen : Brief of Defendants and Appellants

Utah Supreme Court

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Civil No. 8305

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

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**LELAND W. SIMPER,**  
*Plaintiff and Respondent,*

— vs. —

**HARRY THORSEN and MILDRED  
THORSEN, husband and wife,**  
*Defendants and Appellants.*

FILED

MAR 29 1955

Clerk, Supreme Court, U. of U.

**BRIEF OF DEFENDANTS AND APPELLANTS**

**Appeal from the District Court of the Sixth Judicial  
District in and for the County of Sevier  
HONORABLE JOHN L. SEVY, JR., Judge**

**CARVEL MATTSSON**

**AND**

**JOHN T. VERNIEU**

**FOR**

**GUSTIN, RICHARDS & MATTSSON**

*Attorneys for Defendants and  
Appellants*

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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LELAND W. SIMPER,

*Plaintiff and Respondent,*

— vs. —

HARRY THORSEN and MILDRED  
THORSEN, husband and wife,

*Defendants and Appellants.*

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Civil No. 8305

BRIEF OF DEFENDANTS AND APPELLANTS

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This is an action to recover damages wherein the Plaintiff, Leland W. Simper, alleged that the Defendants Harry Thorsen and wife, had unlawfully appropriated and diverted to their own use and benefit certain waters belonging to the Plaintiff. Defendants admitted the use and appropriation of said water but denied that Plaintiff owned any right, title or interest therein. By way of Counterclaim Defendants alleged that they were the owners of certain real property and appurtenant water rights situated in Sevier County, State of Utah, and

Defendants prayed that their title in and to said appurtenant water rights be quieted as against any and all adverse claims of the Plaintiff. Defendants further prayed for damages by reason of Plaintiff's unlawful use and appropriation of said water.

Defendants appeal from a Decree of the lower Court which determined that Plaintiff is the sole owner of certain of said water rights and in which the Court refused to decree ownership of certain other of said water rights to either Plaintiff or Defendants. Appellants also appeal from the Order of said Court denying their Motion for a New Trial. Appellants contend that the lower Court committed reversible error at law and has misapplied proven facts, that the Court's Decree (R. 18-19) is contrary to all the admissible evidence and must be reversed, and that a new Decree should be entered in Defendants' favor.

## STATEMENT OF FACTS

The Defendants since 1946 have been the owners of and in possession of a certain ranch located at Gooseberry, Salina Canyon, State of Utah, and located South of the Plaintiff's farm. (See Exhibits "A", "B", "C" and "G"). The Defendants grow grain and alfalfa and graze sheep and cattle on their ranch. At the time they took possession and obtained title to said property the Defendants also obtained certain water rights for use on the ranch. In addition to the Gooseberry Creek Water used jointly by Defendants and Plaintiff and other land-

owners in the area, which water is not involved in this litigation, the Defendants obtained title to a portion of a certain Spring Area which is located immediately South of the South Boundary line of their property. This is the area shown in blue on Exhibit "A" and is referred to therein as "Spring Area No. 1." This area is composed of several distinct springs, each one of which has a well defined channel running from it. The Spring located at the immediate Northwest Corner of Spring Area No. 1 flows out of a pipe and follows a natural channel a short distance into a pond shown on Defendants' Exhibit "A" and referred to as the Ernel Peterson Pond. This particular spring of water will hereinafter be referred to as the "piped spring." Thereafter, all of the water from said piped spring flows out of the pond and into "C" Ditch (Exhibit "A") where it intermingles with Gooseberry Creek water and subsequently flows in a Northerly direction down a wash and eventually finds its way to the Plaintiff's land. *The Defendants make no claim whatever to any of the water flowing from the Ernel Peterson Pond.*

Also flowing out from Spring Area No. 1 are waters through two additional channels. Both of these water sources have well-defined channels running therefrom as shown on Exhibit "A". The water flowing from these two springs goes on to Defendants' land immediately North of Spring Area No. 1, where it is beneficially used and employed by Defendants for crop and pasture irrigation.



Also, the Defendants claim title to an additional Spring Area designated on Defendants' Exhibit "A" as "Spring Area No. 2". This area consists of a number of "seeps" from which a small quantity of water flows on to adjoining land owned by the Defendants. Since the year 1946, they have maintained a pasture for animals on this tract. Defendant Thorsen testified (R. 293) that it was his understanding and belief from the terms and provisions of his Deed to said property and from oral representations made to him that Spring Areas 1 and 2 were appurtenant to his land and that he obtained title thereto at the time he purchased said farm property.

During the month of May, A.D. 1951, Defendants began for the first time to have trouble with the Plaintiff regarding this water. Both of the ditches at Spring Area No. 1 which conveyed water to Defendants' land were cut and dammed off and the water therefrom diverted to the Plaintiff through the Ernel Peterson Pond and "C" Ditch. This occurred approximately twenty (20) times during the summer of 1951, and as a result most of the water from Spring Area No. 1 failed to reach Defendants' land. The Plaintiff acknowledged that he was responsible for the cutting and damming off of the ditches, and asserted to the Defendants that he claimed exclusive right, title and interest in and to all of the water flowing from Spring Areas 1 and 2. This was the first time that Plaintiff had asserted such a claim although he and Defendants had been neighbors for more than five (5) years during which time Defendants had

used on their land all of the water from Spring Areas 1 and 2 except for the piped spring. The dispute culminated with the filing of the Complaint herein on September 19, 1951.

Although the Plaintiff asked only for damages, and not for a Decree quieting title, the Court made and entered Findings of Fact and Conclusions of Law and Decree in Plaintiff's favor quieting Plaintiff's title to all of Spring Area No. 1, including all of the several water sources embraced therein. The Court refused to make any award whatever either to Plaintiff or to Defendants with respect to Spring Area No. 2.

The testimony and evidence concerning the issues raised herein is voluminous and will be reviewed in detail in connection with the arguments hereinafter made.

## STATEMENT OF POINTS

### POINT NO. 1

THAT THE COURT ERRED IN FINDING THAT BRANCH SPRING EMBRACES ALL OF SPRING AREA NO. 1 AND INCLUDES ALL THE WATER SOURCES THEREIN AND IN FINDING THAT BRANCH SPRING IS THE SAME WATER SOURCE AS BIG SPRING.

### POINT NO. 2

THAT THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE COURT THAT THOMAS W. SIMPER, ONE OF THE PLAINTIFF'S PREDECESSORS IN TITLE, ACQUIRED OWNERSHIP OF ALL WATERS ARISING FROM

SAID BRANCH SPRING (ERRONEOUSLY DESCRIBED BY THE COURT AS INCLUDING ALL OF SPRING AREA NO. 1), BY A CERTAIN DEED EXECUTED BY ONE CHARLES A. MOTT.

### POINT NO. 3

THAT THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE COURT THAT THE PLAINTIFF IS THE OWNER AND ENTITLED TO THE POSSESSION AND USE ON HIS LAND OF ALL THE WATERS FROM BRANCH SPRING, WHICH THE COURT ERRONEOUSLY CONCLUDED WAS THE SAME AS AND EMBRACED ALL OF SPRING AREA NO. 1 AND INCLUDED ALL THE WATER SOURCES THEREIN.

### POINT NO. 4

THAT THE LOWER COURT ERRED IN DENYING AND OVERRULING THE OBJECTIONS OF DEFENDANTS TO THE INTRODUCTION IN EVIDENCE OF PLAINTIFF'S EXHIBITS 1 TO 4, BOTH INCLUSIVE, AND THAT THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR NONSUIT.

### POINT NO. 5

THAT THE DISTRICT COURT ERRED IN FAILING AND REFUSING TO FIND, CONCLUDE AND DECREE THAT THE DEFENDANTS ABOVE-NAMED ARE THE OWNERS OF ALL WATERS ARISING FROM SPRING AREA NO. 1, EXCEPT FOR THE ONE WATER SOURCE LOCATED IN THE NORTHWEST CORNER OF SAID AREA AND COMMONLY REFERRED TO AS "BRANCH SPRING", AND REFERRED TO ABOVE AS THE PIPED SPRING.

### POINT NO. 6

THAT THE DISTRICT COURT ERRED IN FAILING AND REFUSING TO FIND, CONCLUDE AND DECREE THAT

THE DEFENDANTS ABOVE NAMED ARE THE OWNERS OF ALL OF THE WATERS ARISING FROM THAT CERTAIN AREA KNOWN AND DESCRIBED AS "SPRING AREA NO. 2" AS DESCRIBED IN THE PLEADINGS AND EVIDENCE IN THIS CAUSE AND AS SHOWN ON DEFENDANTS' EXHIBIT "A".

#### POINT NO. 7

THAT THE DISTRICT COURT ERRED IN OVERRULING DEFENDANTS' MOTION FOR A NEW TRIAL IN THIS CAUSE.

#### POINT NO. 8

THAT THE LOWER COURT ERRED IN REFUSING TO FIND IN DEFENDANTS' FAVOR UPON THE ISSUE OF DEFENDANTS' DAMAGES.

### ARGUMENT

#### POINT NO. 1

THAT THE COURT ERRED IN FINDING THAT BRANCH SPRING EMBRACES ALL OF SPRING AREA NO. 1 AND INCLUDES ALL THE WATER SOURCES THEREIN AND IN FINDING THAT BRANCH SPRING IS THE SAME WATER SOURCE AS BIG SPRING.

It should be stated at the outset that there are involved in this controversy two distinct groups of water sources. The first group is represented by the following water sources, to-wit:

#### GROUP I:

1. The Spring located at the immediate Northwest Corner of Spring Area No. 1, which we refer to as the piped spring.

2. Reservoir No. 2 as specifically described in Exhibit No. "3".

3. The regular Gooseberry Creek water which flows across Defendants' land and on to Plaintiff's land through "C" Ditch as shown on Exhibit "A".

#### GROUP II:

1. The remaining water sources found in Spring Area No. 1.

2. Spring Area No. 2.

Appellants desire to make it clear at the very beginning that, as between the Plaintiff and the Defendants, there is no dispute or contest regarding the waters belonging to Group I above described. Appellants make no claim whatever to any of these water rights, except to their association shares in and to the regular Gooseberry Creek water, which said water rights are not contested herein. It is now and always has been the Defendants' position that these waters are not involved in this litigation. Defendants claim title only to the two water sources included in Group II above referred to and take the position that this action must be limited to a determination of issues involving the second group of water rights only.

Appellants contend that the Findings and Decree of the lower Court, as well as its Decision and Memorandum of August 1, 1953 (R. 10-19), together with its Order

Overruling Motion for a New Trial dated November 19, 1954, (R. 21 - 22) all clearly show that the Court failed and refused to make any distinction whatever in the identity of water rights involved and that the Court has erroneously assumed that all of the waters found within the physical boundaries of Spring Area No. 1 are the Branch Spring and that the Branch Spring is synonymous with the Big Spring. This confusion of the Court and its failure to properly interpret the testimony and Exhibits with reference to the identity of the water rights involved is largely responsible for the award to Plaintiff of all of Spring Area No. 1 upon the unfounded assumption that the entire area covered by Spring Area No. 1 is the same water source as the Big Spring and the Branch Spring referred to in Plaintiff's Exhibits, and that Big Spring and Branch Spring refer to the same water.

As a matter of fact this lawsuit is waged over the rights of the respective parties to Spring Areas No. 1 and 2 as shown in Exhibit "A", but Plaintiff insists that these areas are the same as the waters described in his Exhibits "1 to 4", both inclusive. These Exhibits constitute Plaintiff's purported chain of title upon the said water. Appellants' position with respect to these instruments is simply this, to-wit:

*They are completely incompetent and inadmissible to establish any title to either portion of Spring Areas 1 or 2 involved in this litigation, for the simple reason that they refer to other and describe different sources*

*of water completely separate from and not in any way part of Spring Areas 1 or 2, except for the one Branch or piped spring about which there is no controversy. Moreover, even if they actually did describe the waters involved in this action, which we deny, said Deeds and Memoranda are not sufficient, standing alone, to establish title in the Plaintiff to said waters.*

Appellants concede that “*The Branch Spring of Water*” described in Exhibit “3”, is situated in and is a part of Spring Area No. 1. However, the Court has assumed that because it is located within Spring Area No. 1, Branch Spring must of necessity be all of Spring Area No. 1. The Court also erroneously determined that Branch Spring and Big Spring are identical water sources. On the basis of such an assumption, the Court not only quieted Plaintiff’s title to that water in Spring Area No. 1 which the Plaintiff admittedly owns (the piped spring), but also handed to the Plaintiff the waters in Spring Area No. 1 which belong to the Defendants. The error of this assumption is apparent from a consideration of the following:

1. The testimony of the Defendant Harry Thorsen. (R. 138 - 140) and Frank Casto (R. 164), and John M. Bird (R. 234) that Spring Area No. 1 is composed of several separate, well-defined water sources, all of which have well-marked channels going out of the area in different directions.

2. The testimony concerning the physical topography of Spring Area No. 1 which shows that the water channel from the piped spring goes out of Spring Area No. 1 at a lower elevation than the channels from the other sources in Spring Area No. 1, (R. 140) and that while the other channels convey water directly to the Defendants' land, the water from the piped spring falls off into a pond and then down into the wash at the bottom of the canyon ("C" ditch on Exhibit "A") from which it eventually flows onto Plaintiff's land, through diversion from said wash.

3. The undisputed testimony of Defendant Harry Thorsen, his predecessor in title and possession of his farm, John M. Bird, and Frank Casto and Janie Nielsen, the son and daughter of the original homesteader of the Thorsen Farm, whose cumulative acquaintance with the topography and use of the land and water goes back to the year 1887 (R. 157 and 180), that these physical conditions have existed, except for the construction of the Ernel Peterson Pond, for sixty-four (64) years, and that the various distinct and separate water channels leading out from Spring Area No. 1 have not changed substantially during that period of time.

4. The fact that Plaintiff's own testimony generally confirms these physical facts (R. 44, 45, and 60-74), including Plaintiff's admissions that the only direction the water from the "piped spring" can take is into the main channel ("C" Ditch shown on Exhibit "A") and



then on to Plaintiff's land; that the water from the piped Spring has flowed upon Plaintiff's land ever since Plaintiff has been acquainted with the area (R. 94) and that his use of this water has never been materially interrupted or interfered with (R. 81); and most important, that during the years the Defendants have owned the property immediately North of the Spring Area No. 1, and for at least part of the time the land was owned by John M. Bird prior to Mr. Thorsen, the water from the sources within the Spring Area No. 1 other than the piped spring flowed on to the lands now owned by the Defendants (R. 95 - 98).

5. The significant facts that Plaintiff's Exhibits 2, 3 and 4 upon which they must rely to establish their title to the water of Spring Area No. 1 uses the language of *two separate isolated water sources*.

We quote from Exhibit "3", to-wit:

"The branch *spring* of water lying and being situate at the lower end of Kelsey Bird's field, Gooseberry Prect. Sevier County, Ut. . . ."

"Also, Reservoir No. 2, with ditch *situated near two hundred yards west of what is generally known as Big Spring and near one mile in a southerly direction from the old Taylor Dairy Ranch, said ditch running in a northwesterly direction to and connecting with the head of Gooseberry Creek . . .*"

This wording clearly indicates that the parties to the Mott-Simper Deed were dealing with one water

source (the branch spring) in one area and with another separate water source (Reservoir No. 2) in an entirely different area. This is conclusively established by the fact that Spring Area No. 1 at the lower end of the Kelsey Bird field (and which includes the Branch or piped spring) is located in the Southwest quarter of Section 19, Township 22 *South*, Range 2 East, Salt Lake Base and Meridian. (See Exhibit "A"). However, Big Spring, Taylor Dairy Ranch and the headwaters of Gooseberry Creek, points used in the Mott-Simper Deed to establish the location of Reservoir No. 2, were fixed by John M. Bird, a rangerider in said area for the Brown's Hole Grazing Association, with long experience in the area, as being in Section 23, Township 23 *South*, Range 2 East, Salt Lake Base and Meridian, approximately 8 *miles* South of the area in conflict, (R. 225 - 229).

Also, Lucius Gates, who had herded sheep in the Gooseberry country for many years, estimated Big Spring, Taylor Dairy Ranch and Reservoir No. 2 to be at least 6 miles South of the Thorsen property, (R. 286), and Frank Casto, the son of the original homesteader on the Thorsen property, who had a wide experience in the Gooseberry area, fixed the distance at 8 miles removed (R. 176 - 179). Most important, Exhibit "F", the official map of Sevier County, Utah, clearly shows that the testimony of these witnesses is confirmed as a matter of geographical fact.

The only possible basis for the Court's award of all of the waters of Spring Area No. 1 to the Plaintiff would be Plaintiff's testimony that he has always considered that "the Branch Spring" included all of the waters from Spring Area No. 1 without requiring him to prove any appropriation under the law of any such waters.

Appellants assert that the evidence clearly and unequivocally demonstrates that "the Branch spring of water" in Exhibit "3" refers to and includes only the one piped spring at the Northwest corner of Spring Area No. 1, that the other sources within Spring Area No. 1 are separate and distinct therefrom, and that Reservoir No. 2 is a water source removed some 8 miles from the area in dispute. The Court's failure and refusal to so find, in the face of the undeniable evidence to the contrary, seriously prejudiced Defendants herein, for they have from the beginning disclaimed any title in themselves to the one piped spring and to Reservoir No. 2, and if no distinction is to be recognized between water sources *disputed* and *conceded*, it is a constant temptation to the Court to close its eyes and ears to the testimony and evidence in the erroneous belief that Defendants have conceded that they do not own any of the water rights involved in this action.

## POINT NO. 2

THAT THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE COURT THAT THOMAS W. SIMPER, ONE OF THE PLAINTIFF'S PREDECESSORS IN TITLE, ACQUIRED OWNERSHIP OF ALL WATERS ARISING FROM

SAID BRANCH SPRING (ERRONEOUSLY DESCRIBED BY THE COURT AS INCLUDING ALL OF SPRING AREA NO. 1), BY A CERTAIN DEED EXECUTED BY ONE CHARLES A. MOTT.

### POINT NO. 3

THAT THE EVIDENCE DOES NOT SUPPORT THE FINDING OF THE COURT THAT THE PLAINTIFF IS THE OWNER AND ENTITLED TO THE POSSESSION AND USE ON HIS LAND OF ALL THE WATERS FROM BRANCH SPRING, WHICH THE COURT ERRONEOUSLY CONCLUDED WAS THE SAME AS AND EMBRACED ALL OF SPRING AREA NO. 1 AND INCLUDED ALL THE WATER SOURCES THEREIN.

### POINT NO. 4

THAT THE LOWER COURT ERRED IN DENYING AND OVERRULING THE OBJECTIONS OF DEFENDANTS TO THE INTRODUCTION IN EVIDENCE OF PLAINTIFF'S EXHIBITS "1" TO "4", BOTH INCLUSIVE, AND THAT THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR NONSUIT.

Points 2, 3 and 4 above set forth will be argued jointly herein.

Appellants assert that the Plaintiff, in order to recover upon his Complaint, must establish ownership in the water rights he claims have been interfered with by the Defendants. We acknowledge also that Defendants, on their Counterclaim, must do more than establish the nonexistence or inferiority of Plaintiff's title, and that in order to prevail upon their Counterclaim De-

fendants must establish in themselves title to the waters described therein. *Sowards et al, vs. Meagher et al*, 37 Utah 212, 108 P. 1112.

Ownership of rights in water is now a matter of affirmative statutory law (*Title 73, Water and Irrigation, Utah Code Annotated 1953*). In 1903 the Legislature passed a law providing that in the future the water of all streams and other public sources in this State, whether flowing above or underground, was public property, *subject, however, to all existing rights to the use thereof*. (*Chapter 100, Laws of Utah 1903*.) These statutes provide an exclusive method for establishing rights in water only after the date of their original enactment, to-wit: 1903. The Supreme Court of Utah has on numerous occasions held that all rights in water accruing *prior to 1903* must be established pursuant to governing law prior to 1903. Prior to 1903 the law permitted acquisition of title to water by appropriation and beneficial use thereof. *Patterson vs. Ryan*, 37 Utah 410, 108 P. 1118; *Jensen vs. Birch Creek Ranch Company*, 76 Utah 356, 289 P. 1097; *Wellsville East Valley Irrigation Company vs. Lindsay Land and Livestock Company*, 104 Utah 448, 137 P. 2d 634; *Wrathall vs. Johnson*, 86 Utah 50, 40 P 2d. 755.

In the recent Utah case of *Bishop v. Duck Creek Irrigation Company et al*, 241 P. 2d 162, the Utah Supreme Court has confirmed the foregoing rule and has held as follows:

“Since there are no filings with the State Engineer either by Bishop or his predecessors, *whatever rights he has to the water must necessarily rest upon appropriation by beneficial use before the year 1903*. Prior to that time the law allowed appropriation by such use, and statutes enacted that year preserve such appropriation”.

We take it, therefore, to be the prevailing law in the State of Utah, that whoever first appropriated water by beneficial use thereof prior to 1903 is to be adjudged the owner thereof and entitled to pass title thereto.

Taking Plaintiff's evidence in its most favorable light, it is at once apparent that his claim to ownership of the waters in dispute, is grounded entirely upon written instruments (Exhibits “1” to “4”, both inclusive). The effect of Exhibits “1”, “2” and “4”, insofar as vesting in the Plaintiff the title to any water rights is concerned, hinges upon the question as to whether or not Charles A. Mott, the Grantor in Exhibit “3”, had any title to waters to convey to his Grantee, Thomas W. Simper, the Plaintiff's predecessor in interest. In view of the fact that the record shows that none of Plaintiff's witnesses had any actual acquaintance with either the real property now owned by the Plaintiff or the waters in dispute in this action, prior to the year 1908, as will be discussed in detail hereinafter, Plaintiff must rely upon said instruments to establish his title. We take it as obvious, therefore, that if Plaintiff's Exhibit “3” is not effective as es-

tablishing ownership to water rights and transferring the same, then Plaintiff cannot establish a prima facie case of ownership of water rights prior to 1903, and his Exhibits 1 to 4 are not admissible.

Exhibit "3" is a Deed to certain described water rights. The instrument is dated December 31, 1888. Passing over the matter of the identity of the waters described in the Mott-Simper Deed, which we have heretofore discussed in this Brief, and assuming for the purpose of argument that the instrument described the water sources which are actually in controversy between the Plaintiff and the Defendants, which we expressly deny, nevertheless we most earnestly contend that said "Water Deed", *standing alone*, is absolutely ineffectual as proof of ownership of water rights. Said instrument is entirely a self-serving unsupported declaration and passes no interest in water rights under the Utah Law in the absence of proof of such appropriation and beneficial use thereof by the Grantor therein as would establish ownership of the waters in himself under the laws of Utah prior to 1903.

As above set forth, the Law prior to 1903 was simply one of acquisition of rights in waters by appropriation through beneficial use. The law recognized no certification or recording of such rights; it was all a matter of proof of use, not a chain of paper title. An examination of the historical development of water rights in Utah prior to 1903 and a consideration of the cases herein-

above cited will, we feel, convince the Court that when water rights are contested, the only competent and admissible evidence going to the establishment of such rights prior to 1903 is evidence of actual physical appropriation and beneficial use. Deeds and memoranda of a self-serving nature, which assert ownership but do not prove it, such as the Mott-Simper Deed and Plaintiff's Exhibits "1", "2" and "4", are and ought to be incompetent and inadmissible as proof of ownership of water where the title of the water is in controversy.

Appellants further contend that the provisions of 73-25-13, *Utah Code Annotated*, 1953, providing for the reading into evidence of all instruments affecting real property which are properly acknowledged, without proof of execution, does not avail Plaintiff anything because the crux of the matter is not the execution of the Mott-Simper Deed (Exhibit "3") or its genuineness as an instrument, but rather, proof of appropriation and beneficial use of water upon land. If such were not the case, any person could, prior to 1903, by the act of executing a Water Deed, establish his rights and those of his Grantee to ownership of water without any valid appropriation thereof. Such a device is contrary to public policy and the history of the development of water rights in this State. The title a Grantee secures depends on the title his Grantor had, and such Grantor's title must be established and proved.



Appellant's position is well stated in *Kinney on Irrigation and Water Rights, Second Edition, Volume 3, Section 1554*, page 2803, to-wit:

“Upon the one asserting a claim to the right to the use of water regardless upon what he bases his right, rests the burden of proving his claim as set up in his pleadings by a preponderance of all of the evidence admitted in the case on the point in question. And although a Plaintiff under a claim of general ownership may prove his title to the right by appropriation, adverse possession and user, or purchase, all of the essential elements of the acquisition of his right must be proven according to the nature of the claim which he makes to it. Therefore, if the theory of his claim is that of prior appropriation, he must prove all of the elements which are necessary to make a prior appropriation, including the beneficial use of all of the water claimed . . . If he bases his claim upon a purchase from an appropriator, *he must not only prove a valid appropriation by his Grantor*, but he must also prove his right to his claim by proving the purchase.”

See the cases of *St. George & Washington Canal Co. vs. Hurricane Canal Co.* 93 Utah 262, 72 P. 2d. 642; *Salina Creek Irrigation Co. vs. Salina Stock Co.* 7 Utah 456, 27 P. 578; *Campbell v. Nunn*, 78 Utah 316 2 P. 2d 899, *Bishop v. Duck Creek Irrigation Company*, *supra*, where these rules are applied to differing factual situations.

What then is the nature and extent of Plaintiff's proof of appropriation of the water in controversy?

Plaintiff asserted during his direct examination that he had been using all of the water from Spring Area No. 1 on his farm ever since his purchase in 1930 (R. 42). However, under Cross-Examination Plaintiff changed his story and admitted that while he had used all of the water which had come down to his farm through the main channel ("C" Ditch on Exhibit "A") from out of the Frands Peterson Fish Pond, *and that this has never been interfered with* (R. 81 and 93), the remainder of the water from Spring Area No. 1, (which is the water really involved in this controversy) has gone to the Defendants' land both during Defendants' period of ownership and also during the ownership of John M. Bird, Defendants' predecessor in Title (R. 92 to 97)

George Thomas Simper, Plaintiff's brother, testified that his knowledge of the situation went back to the year 1908 and extended up to the year 1945 (R. 100). Although Simper maintained that the water had always been used on the Mott-Simper property from out of the main channel ("C" Ditch on Exhibit "A"), nevertheless, he conceded that at least part of the water from Spring Area No. 1, during all of the 37-year period from 1908 to 1945, may have been used by Abel M. Casto on his homestead, which is the same property as now owned by the Defendants (R. 104-106).

We quote directly from the record (R. 109):

"Q. (By Mr. Mattsson): Now, isn't it a fact, Mr. Simper, that at all times during the history

of this, as far back as you can remember, that the water from these Branch Springs, with exception of that Pipe Spring, has gone onto Mr. Thorsen's spring (land) or his predecessors', the people before him?

"A. (By George Thomas Simper): It may have been, all but the Pipe system, but the piped system didn't.

Q. The Pipe system went into this channel?

A. That's right.

Q. And all of the other water may have gone into this ditch?

A. That's right.

Q. And that is true back as far as you can remember, back to 1910 or 1908?

A. That's right."

Plaintiff's next witness, Rene Curtis, stated that he worked for Plaintiff's father on the Simper property forty years ago, or in 1912, and that his knowledge of the situation goes back no further than this time (R. 112). As with Plaintiff's other witness, Curtis maintained that the Simper people used all of the water which reached their land through the main channel but Curtis, like the others of Plaintiff's witnesses, acknowledged that except for the regular Gooseberry Creek Water and the water from the one piped spring, all of the other Simper water was in fact waste water from off the Casto-Thorsen farm. Here is another clear-cut admission that as early as 1912

water from Spring Area No. 1 was being used on Defendants' premises. We quote again from the record at Page 113, to-wit:

“Q. (By Mr. Mattsson): Now, does the Gooseberry Creek water come in that same draw?

A. (By Mr. Curtis): It came from the springs, from the waste water is what it was.

Q. It was the waste water you said?

A. Off the Abe Casto farm.

Q. It was the waste water from the Abe Casto farm?

A. Yes, sir.

Q. In other words, Mr. Curtis, this water was used on the Abe Casto farm and then the waste water went into this channel or this draw and it went down to the Simpers' place, is that correct?

A. That is the way it was, yes, sir.”

Harry Miller, also a witness for Plaintiff, testified that he worked on Plaintiff's farm about 23 years ago and that he irrigated the Simper farm from water coming down the main channel (R. 125). On Cross-Examination Miller admitted that this water consisted of Gooseberry Creek flow (not involved in this litigation), and some “Spring Water”, the identity or source of which he did not know (R. 126).

This same witness also testified that after Defendant Thorsen bought his farm he worked for Defendant and

irrigated Defendant's farm with water flowing from out of Spring Area No. 1 (R. 126). The water reached the Thorsen property through two well-established ditches (R. 127).

Frands Peterson testified that his son Ernel Peterson is now the record owner of the "Kelsey Bird field" referred to in the Mott-Simper Deed (Exhibit No. "3") in the Northwest corner of which Spring Area No. 1 is located. Mr. Peterson has lived in a small cabin near Spring Area No. 1 for about 12 years (R. 115). Peterson stated that he had no knowledge whatever concerning the water situation prior to about 1940, but that at the time he moved into the cabin, "there was a big stream of water and it was going right down the main channel", (R. 120). On Cross-Examination he acknowledged that the stream contained high water run-off, Gooseberry Creek water and waste water from off his land. But the following from Mr. Peterson's testimony is so significant that we quote it in full from the Record (R. 121 and 122):

"Q. (By Mr. Mattsson): Now, Mr. Peterson, when you first went in there, there were two ditches, weren't there, extending Northeast-erly from this area that is called the Branch Springs?

A. (By Mr. Peterson): Yes, sir, two ditches.

Q. Ditches leading to Thorsen property that he irrigated from those ditches?

A. Yes, sir.

Q. And they were there when you moved in there?

A. Yes, sir.

Q. And they were used, weren't they?

A. Yes.

Q. Mr. Thorsen used them to take water from those Spring Areas on to his property and irrigate it?

A. Yes, sir.

Q. And he has done it ever since?

A. And he has been doing it off and on ever since.

Q. Well, whenever he needed to irrigate, hadn't he?

A. Well, I couldn't answer that. I don't know.

Q. Now, you moved into this area before Mr. Thorsen bought in here, didn't you?

A. Yes, sir.

Q. Now, Jack Bird used the water the same way, did he not?

A. Yes.

Q. So he used the water out of these Branch Springs to irrigate this property that Mr. Thorsen now owns?

A. Yes, sir."

Peterson also identified the piped spring in Area No. 1 as the one which flows into his fish pond and from there directly into the main channel (R. 123).

Thus the lower Court had before it the testimony of all four of Plaintiff's witnesses, all of whom at various times and for various periods, had experience with and knowledge of the Simper and Thorsen properties and of Spring Area No. 1, covering a period from 1908 to the present time. All four witnesses testified that during the respective periods of time of which they had knowledge, some water was flowing down the main channel to Plaintiff's property, which is not disputed by Appellants, who have always acknowledged that the water from the one piped spring in Spring Area No. 1, from high water runoff, and from his regular Gooseberry Creek rights and flow, rightfully belongs to Plaintiff. *Appellants make no claim whatever to these waters*, nor is there one word of evidence in the record of any act of interference with these water rights.

But the startling fact about Plaintiff's case is that each of said witnesses, and the Plaintiff himself, also testified that during the 44 years covered by their cumulative experience and extending back to the year 1908, *a part of the water from Spring Area No. 1 has always flowed upon the land now owned by the Defendants*. The Court obviously ignored this fact as well as the complete absence of any testimony of actual appropriation and beneficial use of any water by Plaintiff's predecessors in interest prior to the year 1903, as required by law, in order to establish title in the Plaintiff.

Therefore, Appellants most earnestly contend that we are not confronted with the case where the evidence of Defendants' use and appropriation of water preponderates against that of the Plaintiff (Defendants will review their own case for appropriation later in this brief) but we have a situation where Plaintiff's case for appropriation and beneficial use of water is not supported by *any* admissible evidence and where Plaintiff's own case establishes Defendants' use of water from a part of Spring Area No. 1 from 1908 until the trial. There is absolutely *no* evidence in the record, admissible or otherwise, establishing Plaintiff's right to any of the water from Spring Area No. 1. On the other hand, Plaintiff's own witnesses, taking their testimony in the light most favorable to him, establish 44 years of beneficial use by Defendants and their predecessors of the water of Spring Area No. 1 except for the piped spring.

At the conclusion of Plaintiff's case, we assert that the lower Court was required as a matter of law to refuse a Decree to either party, because at that point neither party had yet established a lawful appropriation of water prior to the year 1903. Defendants went forward when the burden of proof shifted to them and established appropriation and beneficial use of water prior to 1903 as will be pointed out hereinafter, but we reiterate that as the record stood at the end of Plaintiff's case, no *prima facie cause of action* had been proved, and the Court's failure and refusal to grant Defendants' Motion for Non-suit, therefore, was palpable error.



Furthermore, the Court in its Decision and Memorandum (R. 10-14) as well as in its Findings of Fact and Conclusions of Law (R. 15-17) obviously based its award to Plaintiff of *all* of the waters from Spring Area No. 1 upon Plaintiff's case in chief. This does not represent a failure by the Court to properly weigh the evidence, but it is an outright instance of the Court ignoring completely entire portions of Plaintiff's case where it applied to the Defendants and accepting it even beyond the limits of remote legal admissibility whenever it applied to the Plaintiff. Appellants assert that this type of decision is not in the interest of accomplishing justice and fair play and that it serves only to deprive one person of a valuable water right which he legally owns, and to award the said water to one whose own testimony and evidence shows him not to be entitled to.

We conclude our attack upon the Plaintiff's case by simply restating our position:

The Findings, Conclusions, and Decree of the lower Court should be reversed and new Findings, Conclusions and Decree should be entered in favor of Defendants as to all of the water from Spring Area No. 1 except for the one piped spring at the Northwest Corner thereof:

1. Because the evidence clearly establishes and proves that "the Branch Spring of water" referred to in the Mott-Simper Deed is in fact the same water source as the piped spring over which there is no contest

as far as Defendants are concerned, and also that Reservoir No. 2 is not part of the water involved in this litigation.

2. Because there is absolutely no competent admissible evidence in the record to support Plaintiff's ownership to any of the other waters of Spring Area No. 1.

3. Because Plaintiff's own evidence establishes Defendants' beneficial use of all the water of Spring Area No. 1, except for the one piped spring, back to the year 1908. As pointed out below, Defendants' case for appropriation and beneficial user of the water at Spring Area No. 1, except for the one piped spring, establishes legal title in them and their predecessors back to the year 1887, against which there is not one iota of conflicting evidence in the record.

#### POINT NO. 5

THAT THE DISTRICT COURT ERRED IN FAILING AND REFUSING TO FIND, CONCLUDE AND DECREE THAT THE DEFENDANTS ABOVE-NAMED ARE THE OWNERS OF ALL WATERS ARISING FROM SPRING AREA NO. 1, EXCEPT FOR THE ONE WATER SOURCE LOCATED IN THE NORTHWEST CORNER OF SAID AREA AND COMMONLY REFERRED TO AS "BRANCH SPRING", AND REFERRED TO ABOVE AS THE PIPED SPRING.

#### POINT NO. 6

THAT THE DISTRICT COURT ERRED IN FAILING AND REFUSING TO FIND, CONCLUDE AND DECREE THAT THE DEFENDANTS ABOVE NAMED ARE THE OWNERS OF ALL OF THE WATERS ARISING FROM THAT CERTAIN AREA KNOWN AND DESCRIBED AS "SPRING AREA NO.

2" AS DESCRIBED IN THE PLEADINGS AND EVIDENCE IN THIS CAUSE AND AS SHOWN ON DEFENDANTS' EXHIBIT "A".

Points 5 and 6 will be argued jointly.

Defendants, by their Counterclaim to quiet title to Spring Areas 1 and 2, except for the piped spring at Area No. 1 (R. 4-8) shouldered the burden of establishing a valid appropriation to said water prior in time to any possible claim of the Plaintiff or his predecessors in interest. This was done without waiver of Defendants' fundamental position herein that the waters described in the Mott-Simper Deed (Exhibit "3") are not in controversy here, but rather as a further protection of Defendant's rights. We take the position that the ultimate proof of the ownership of the water described in Defendants' Counterclaim must be found in actual physical appropriation of said water for a beneficial use at a time prior to that of the Plaintiff's predecessors. See *Sowards et al v. Meagher*, supra. For the reasons already pointed out we assert that the Mott-Simper Deed of 1888 is absolutely ineffective to establish ownership of the water involved in this action, and that the only evidence offered by Plaintiff, admissible or otherwise, extends no farther back than 1908. Under the Utah law, in the absence of any statutory filing upon the water, this is insufficient as a matter of law.

We will now review Defendants' case showing appropriation and beneficial use of the water from Spring Areas 1 and 2 by their predecessors in interest, starting in 1887.

Frank Casto, age 67 at the time of the trial, testified that he moved to the Gooseberry Canyon area with his parents, brothers and sisters in 1887 when he was three years of age (R. 156-157). The family settled on the property now owned by the Defendants. The original Casto cabin was built within the bounds of Spring Area No. 2. The property was taken over from one Henry Russell, a squatter, (R. 160). Casto stated that he could recall events back to his fifth year of life (R. 160) and that he could recall Mr. Russell (R. 161). At this time he observed that the property had been broken up and some crops had been planted. Russell apparently had been on the land for several years prior to the coming of the Castos.

Casto's father, Abel N. Casto, broke up more land, planted crops, irrigated the property and ultimately patented it (Exhibit "C"). Frank Casto's earliest childhood recollections with respect to the use of water on the homestead was that a portion of the water right came from out of Spring Area No. 1 (R. 162-163). Abel Casto used the ditches going out from Area No. 1 which had been constructed by Henry Russell and extended them further onto the land (R. 163). The witness identified the two ditches extending from the Northeast and North center portions of Spring Area No. 1 on Exhibit "A" as being the same ditches he had helped his father extend and clean (R. 164-165). Abel Casto irrigated 5 to 8 acres of alfalfa north of the Spring Area No. 1 with this water, (R. 165), and this continued every summer during Casto's

ownership of the property and until it was sold to John M. Bird (R. 167) after 43 years of ownership. Moreover, the witness stated that he had personally irrigated the Casto farm with water from Area No. 1 (R. 167). Also, during all of this time the water from the one piped spring at the Northwest corner of Area No. 1 had flowed into the main channel of the wash and down to what is now the Simper property (R. 174).

Regarding Spring Area No. 2, Casto's earliest recollection was that there was a small spring used for culinary purposes, but that as irrigation of the property to the north of Area No. 1 increased, the flow from Area No. 2 increased, (R. 170). Thereafter, the water from a number of "seeps" was used to irrigate a meadow and some shade trees east of the main channel of the wash (R. 171). Later a small pond of water was built by the witness and his father to catch some of this water. This pond dried up soon and was not given any name, nor ever referred to as Reservoir No. 2 (R. 176).

Janie Nielsen, Frank Casto's sister, testified that she was five years of age at the time the family moved to Gooseberry and that she could clearly recall events which occurred the day the family arrived in April, 1887 (R. 204). Mrs. Nielsen stated that as far back as she could recall she could remember seeing water flowing through ditches from Spring Area No. 1 onto her father's property (R. 209) and that she as a young girl often took lunches to her father and brothers while they put up hay

in the field. Her acquaintance with the property ended in 1906 when she moved away (R. 210). Mrs. Nielsen's testimony closely corroborates her brother's story as to the use and appropriation of the waters from Spring Areas 1 and 2 and she added that during all of the time she was on the land no objection was ever made to the use of the water nor was it ever interfered with by anyone (R. 215).

John M. Bird, Defendants' next witness, age 55, testified that from the time he was a small child (1898) until 1933, he lived in the cabin now belonging to Ernel Peterson just East of Spring Area No. 1 (R. 231) and that Mr. Bird's father, K. W. Bird or Kelsey W. Bird ultimately patented the Peterson property. At the time of Mr. Bird's earliest recollection Abel Casto was farming the property North of Spring Area No. 1 (R. 233). Mr. Bird recalled that as a young boy he carried water, a quart at a time, from Spring Area No. 1 and that there were then two well marked diversionary ditches running therefrom and onto the Casto property (R. 234) for use in irrigating crops (R. 235). Mr. Bird also worked for Mr. Casto and irrigated the property on several occasions (R. 236). Mr. Casto owned the present Thorsen property from the date of his Patent (1897) to 1933, but used Spring Area No. 1 waters from 1887.

In 1933, Mr. Bird purchased the Casto property (Exhibit "C"). Mr. Bird identified the appurtenant water rights referred to in his Deed from Abel Casto and reading:

“Any other water that may have been used upon said land hertofore is hereby expressly reserved from this grant, *with the exception of a spring which rises on the land of K. W. Bird in the Southwest quarter of the Southwest quarter of Section 19, Township 22 South, Range 2 East, Salt Lake Meridian, the said water of said spring is to go with this land herein deeded to John M. Bird,*”

as being the water flowing from the ditches at the Northeast Corner and from the North center of Spring Area No. 1 (R. 238). This is the identical water which had been used on the property by Abel Casto (R. 239) starting in 1887 and which Mr. Bird continued to use during the time he owned the Casto property. Mr. Bird irrigated a pasture and grain field for 13 years (R. 241).

Mr. Bird also stated that as far back as he could recall the water from the so-called “piped spring” had flowed into the wash (“C” Ditch) and thence North to the property of the plaintiff (R. 246). Also, no adverse claims to the use or ownership of the water at Spring Areas 1 or 2 was ever made by the Plaintiff or third persons during the 23 years Mr. Bird occupied the properties (R. 247).

With reference to Spring Area No. 2, during Mr. Bird’s ownership this water was used for culinary purposes part of the time (R. 253) and it also irrigated a pasture immediately adjacent to the spring (R. 249).

Teddy Bird, the brother of John M. Bird, who lived in the Frands Peterson Cabin just east of Spring Area No. 1 as a boy and who later obtained a lease on the old Kelsey Bird property abutting upon the Thorsen land, corroborated the prior testimony regarding the use made of the water from Spring Area No. 1 by Abel Casto and John M. Bird (R. 271-272). Mr. Bird stated that no adverse claim to the use or ownership of the water had ever been made to his knowledge except that the Plaintiff had, on one occasion, complained about the Frands Peterson fish pond damming off some of his water from the piped spring (R. 274-275).

Evalutella Bird, John M. Bird's wife, and a niece of the Plaintiff (R. 278), corroborated her husband's testimony of the use made of the spring waters from Areas 1 and 2 covering the period from the time she married Mr. Bird in 1923 and moved to the cabin at Spring Area No. 2 until the property was sold to the Defendants in 1946 (R. 279-282).

Defendant Harry Thorsen, age 52 at the time of the trial, purchased the Abel Casto-John M. Bird property in 1946. His testimony was largely concerned with a detailed analysis and description of the area involved in this action with particular regard to Spring Areas 1 and 2, the main channel (Exhibit "A") and the piped spring. He estimated the total flow of water onto this land from the two ditches at Spring Area No. 1 at one-half cubic foot per second (R. 144). Since 1946 he has continuously



used all of the water from Spring Area No. 1, except for the piped spring, for the irrigation of 8 acres of alfalfa and pasture (R. 149-150) and for stock watering. The water from Spring Area No. 2 has been used to irrigate a pasture located largely within the boundaries of the Area itself (R. 153-298) and any excess has been used elsewhere on his property North of said Area. Prior to the summer of 1951 no adverse claim had been made to Mr. Thorsen by the Plaintiff or any third person regarding ownership of the water from either Spring Area No. 1 or Spring Area No. 2 or any part thereof (R. 299). Mr. Thorsen's deed on the former Abel Casto-John M. Bird farm contained a clause conveying to him "any and all waters or water rights thereunto belonging or in any-wise appertaining . . ." (Exhibit "G").

The *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.* case, supra, well states the test to be applied to Defendant's evidence and testimony for appropriation of the waters from Spring Areas 1 and 2, except for the piped spring:

"Until 1903 when an exclusive method for appropriating water was prescribed by statute, water could be appropriated merely by diverting the water from its natural channel and putting it to a beneficial use."

We submit that the Defendant and his witnesses have established an irrefutable history showing diversion of water from Spring Areas 1 and 2 and application of that water to a beneficial use, extending 16 years prior to the

time when the law was changed to eliminate the appropriation of water by diversion and beneficial use. *We emphasize again that there is no evidence anywhere in the record to antedate this title.* If everything in Plaintiff's case were construed in its most favorable light, if the Mott-Simper deed could in some way be construed to be a valid inception of title, said Defendants have shown that they are prior in time to any possible claim of Plaintiff and his predecessors to the lawful ownership of this water. Defendants' case for title to said waters was based upon the oral testimony of witnesses as to diversion and beneficial use prior to 1903, that being the only method by which water could be appropriated in Utah when Defendants' predecessors appropriated these waters. The spirit as well as the context of their words shows that their only interest herein was to relate facts as they occurred. With the exception of Defendant Thorsen himself, they have no personal interest in this matter since none of the water involved here will benefit them in any way. We are impressed with the fact that either all of them told the truth or all of them deliberately fashioned a giant falsehood.

#### POINT NO. 7

THAT THE DISTRICT COURT ERRED IN OVERRULING DEFENDANTS' MOTION FOR A NEW TRIAL IN THIS CAUSE.

Appellants make no separate argument under this point except to state that Rule 59, of the Utah Rules of Civil Procedure, provides that on a Motion for a New

Trial, the Court may grant a new trial, amend Findings of Fact and Conclusions of Law or make new Findings and Conclusions and direct the entry of a new Judgment upon the existence of either or both of the following situations, to-wit:

“ . . .

- (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.
- (7) Error in law.”

Upon the state of the record at the entry of the Decree Quieting Plaintiff's Title, we submit that it ought to have been apparent to the Court that the record was shot through with error and that the Decree was unsupportable from the evidence and testimony. We respectfully assert that to refuse to amend the Findings of Fact and Conclusions of Law or to make new Findings and Conclusions and to enter a new Decree herein upon the state of the record before the trial court was an abuse of judicial discretion.

## POINT NO. 8

**THAT THE LOWER COURT ERRED IN REFUSING TO FIND IN DEFENDANTS' FAVOR UPON THE ISSUE OF DEFENDANTS' DAMAGES.**

If Defendants are the legal owners of the waters of Spring Areas 1 and 2, except for the piped spring, as we are confident we have demonstrated to the Court is the case, then the Defendants are entitled to damages for the

diminution of the value of their crops and animals by reason of the Plaintiff's admitted taking of their water during the 1951 crop and feeding season. *Bigler et al v. Fryer, et al*, 82 Utah 380, 25 P. 2d 598.

The *Bigler v. Fryer* case, *supra*, lays down the rule of assessment of damages for loss of water by wrongful diversion by another, to-wit:

“The proper measure of damages for loss of water through wrongful diversion by another would be the rental value of the 7 hours of water lost or, if that be not obtainable, then the loss to the growing crops as a result of that loss of water. The correct measure of damage for the destruction of growing crops is the difference between the market value of the crops before and after the alleged damage; that in attempting to arrive at that damage it is proper to take into consideration the market value of the crops at maturity if all water had been used and its value in its injured state because of lack of water.”

To the same effect see *Jensen v. Burch Creek Ranch*, *supra*; also *Peterson v. Cache County Drainage District*, 77 Utah 256, 294 P. 289.

In 1950, the year prior to the taking of most of the water from Spring Area No. 1 by the Plaintiff, Mr. Thorsen irrigated from Spring Area No. 1 three acres of alfalfa and also used the water to support a pasture for fifteen buck sheep (R. 307). The 1950 yield from the alfalfa field was a total of approximately 12 tons of first

quality alfalfa (R. 307). In 1950 first grade alfalfa sold at \$30.00 per ton on the market (R. 317). Thus, the market value of the 1950 alfalfa crop would be fixed at \$360.00.

In 1951, after the loss of most of his irrigation water, Mr. Thorsen obtained a partial first cutting only from the alfalfa field for a yield of  $1\frac{1}{2}$  tons (R. 310). The price per ton of hay in 1951 remained at \$30.00 (R. 317). Thus the market value of the 1951 alfalfa crop was \$45.00. By subtraction the difference between the market value of the Defendant's alfalfa crop before and after the damage inflicted thereon by the Plaintiff could have been determined by the Court to be the sum of \$315.00.

In 1950 Mr. Thorsen maintained upon the rest of his land irrigated from Spring Area No. 1 a natural pasture for 15 buck sheep (R. 308). The natural pasturage had always been more than ample to maintain said animals in excellent condition for breeding purposes without any supplemental feeding program (R. 308-309). However, in 1951, because of lack of water available at the pasture, the natural feed dried up (R. 311) and consequently said pasture became unusable for the 15 buck sheep being pastured there that summer and Mr. Thorsen was required to remove the animals to his farm in Salina, Utah, for supplemental feeding a month earlier than usual (R. 312).

Mr. Thorsen, a sheep grazer of wide experience, described the condition of the bucks as being "poor" and

“in bad shape” at the end of the 1951 feeding season and he attributed this fact solely to the lack of sufficient natural feed during the summer of 1951 (R. 313). The animals were in such poor condition that it was necessary for Defendant Thorsen to purchase two additional animals for breeding purposes (R. 315). Moreover, Thorsen’s 1952 lamb crop was of a much poorer quality than usual and fifty of his ewes did not bear any lambs at all (R. 316-318). This was a marked decrease in the fertility of his herd, since Mr. Thorsen had maintained an average lamb yield of 125% in the years prior to 1952 (R. 319). Thorsen estimated his entire loss in this regard, taking into consideration loss of animals, cost of supplemental feed, and poor quality of his herd at \$1,000.00 (R. 318). Such an estimate of necessity had to be based upon a comparative valuation of the herd before and after the infliction of damage by the Plaintiff. The figure arrived at by Mr. Thorsen represented his computation of the difference between the value of his animals before and after the injury.

We submit that the record clearly demonstrates that Defendants’ evidence of damages is neither remote nor uncertain, but that it fulfills the requirements of law in every respect, and entitles Defendants to receive from this Court a Decree awarding to them damages in the sum of \$1,315.00.

## CONCLUSION

Appellants urge upon the Court the necessity of a reversal of the lower trial Court's Decree because it is at once apparent from the record that, in addition to the fact that there is no admissible evidence to support the Decree in Plaintiff's favor herein, the record is replete with fully admissible and creditable evidence and testimony of Defendants' title to the waters in issue. We are frankly unable to understand the matter or motive which impelled the trial Court to cast aside Defendants' entire case and to clothe with the dignity and force of law this unblushing "water grab" by the Plaintiff, especially in view of the complete absence of any proof to support Plaintiff's contended ownership. May we invite consideration of this salient fact: If the Plaintiff or his father seriously entertained belief that the waters of Spring Areas 1 or 2, except for the piped spring, belonged to them, *why did they stand by for 64 years, from 1887 to 1951, years during which they farmed side by side with the Defendant Thorsen and his predecessors in title, and permit the constant and uninterrupted use of these waters by Defendant and his predecessors, without waging a single protest?* There is but one reason; because Plaintiff and his father before him knew in their hearts and their minds that the only water they owned from either Spring Areas 1 or 2 was the one piped spring. And they had always received the full measure of this

water until Frands Peterson dammed it off for his fish pond. *There is not one word in the record to dispute this fact.* In view of Plaintiff's unconscionable delay in asserting his claim there can be no doubt that Plaintiff and his father well knew that the Mott-Simper deed referred to only the piped spring and to one of the several storage reservoirs located at the top of the Gooseberry drainage area, some 8 miles from the farms of the Plaintiff and Defendants.

The plain fact of the matter is that the quantity of irrigation water in Gooseberry Canyon is becoming smaller yearly . . . an unhappy condition which is becoming more and more common in this arid country. Appellants can offer no explanation for the commencement of this action other than that Leland Simper seized upon the desperate opportunity to purloin some of his neighbor's water rights. This is the most onerous of all types of litigation.

Even so, Plaintiff did not have the temerity to seek by his Complaint a Decree quieting title to any alleged water rights, but instead sought to accomplish almost the same result by indirection in suing for damages based on an alleged ownership. The trial Court refused to award Plaintiff damages, but instead "assumed" Plaintiff's title to something he did not own and quieted title in him. This was done despite and in the face of a complete record of evidence requiring the opposite result.



We respectfully urge upon this Honorable Court the necessity of correcting the injustice which has accrued to the Defendants in this action and of reversing the trial Court's Judgment.

Respectfully submitted,

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