

1955

# Leland W. Simper v. Harry Thorsen and Mildred Thorsen : Brief of Plaintiff and Respondent

Utah Supreme Court

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Olsen and Chamberlain; Attorneys for Plaintiff and Respondent;

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In the  
**Supreme Court of the State of Utah**

AUG 26 1955

LELAND W. SIMPER,  
*Plaintiff and Respondent,*

vs.

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

Clerk, Supreme Court, Utah

Civil No.  
8305

**BRIEF OF PLAINTIFF  
AND RESPONDENT**

Appeal from the District Court of the Sixth Judicial  
District in and for the County of Sevier  
Honorable John L. Sevy, Jr., Judge

OLSEN AND CHAMBERLAIN,  
*Attorneys for Plaintiff  
and Respondent.*

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**STATEMENT OF FACTS**

Throughout this brief we will refer to the parties as they are designated in the lower court in the manner adopted by the Appellant.

The statement of facts prepared by the Defendants is substantially accurate, but in order fully to apprise the Court of the Plaintiff's position we believe it to be necessary to set out the following:

The Plaintiff has owned and operated a ranch located in Gooseberry, Salina Canyon, Utah since the 10th day of February, 1930 (R. 28, 29). He received the title to the property by Warranty Deed from his father, Thomas W. Simper (Plaintiff's Exhibit No. 1).

He grazed cattle on his property and also raised crops of grain, hay and occasionally raised potatoes (R. 29). The land, in order to produce crops, required irrigation and the Plaintiff obtained water from a right in Gooseberry Creek, which water is not involved in this action, and from a spring area known as Branch Springs "located in the lower end of Kelsy Bird's field", (R. 49, 64, and 65, Plaintiff's Exhibit No. 2), land now owned by Ernell Peterson (R. 64, 115). Branch Spings is designated on Defendants' Exhibit "A" as Spring Area No. 1. Also, Plaintiff received water from Reservoir No. 2 located on property now owned by the Defendants designated on Defendants' Exhibit "A" as Spring Area No. 2.

The Plaintiff would take water from these spring areas through a well defined natural channel which runs in a northerly direction to his land (R. 46 & 116). The water, if unobstructed, would run from Branch Springs, or Spring Area No. 1, into a small pond known as Ernell Peterson's Pond, then into its natural channel known as "C" Ditch (R. 69, 110). The channel continued into an area which

gathered water from Spring Area No. 2 on the way to Plaintiff's land (R. 45, 72 & 94).

The Plaintiff derived his right and title involved in this action through an assignment from his father, Thomas W. Simper, by an instrument dated September 19th, 1932 (R. 33, Plaintiff's Exhibit No. 2). His father in turn acquired the rights from one Charles A. Mott under a certain deed executed December 31st, 1888 and recorded January 11th, 1889 in the records of Sevier County (Plaintiff's Exhibit No. 3). These instruments of conveyance are more fully discussed in Plaintiff's Argument herein. Plaintiff and Plaintiff's witnesses testified that he had use of the water from the described spring areas during the time he has owned his land at Gooseberry with the exception of some interruptions (R. 39, 83, 96, 105). Witnesses of the Plaintiff also testified that water from the described spring areas was used on the land by the Plaintiff and his predecessors in title so long as they could recall and back to the year of 1908 or 1910 (R. 100, 101, 102, & 112). During the course of the trial there is no testimony from either witnesses of the Plaintiff or the Defendants that all of the water from these sources was ever denied the Plaintiff. It was affirmatively shown that the Plaintiff has had a continuous use of water from the spring areas and that the flow was never completely stopped (R. 81, 102, 110, 138).

During the month of May, 1951, the Plaintiff had trouble with the Defendant, Harry Thorsen, regarding the water. The Plaintiff after that date dammed off ditches leading to Defendants' property on several occasions. Thereafter on September 19th, 1951, the Plaintiff filed a com-

plaint and commenced this action against the Defendants seeking damages and a determination of his rights to the waters involved in this controversy.

The Court after hearing the evidence and having viewed the spring areas, made a finding that the Branch Springs were one and the same springs as those designated by the Defendants' Exhibit "A" as Spring Area No. 1, and entered the Decree quieting Plaintiff's title to all waters arising therefrom (R. 15, 18). The Court reserved any finding or award on Spring Area No. 2 and stated that there was insufficient evidence to justify a finding of appropriation and use of waters by either the Plaintiff or Defendants (R. 11). From this decision of the Court, the Defendant has appealed.

## STATEMENT OF POINTS

### POINT I.

THAT THE COURT DID NOT ERR IN FINDING THAT BRANCH SPRING EMBRACES ALL OF SPRING AREA NO. 1 AND INCLUDES ALL THE WATER SOURCES THEREIN.

### POINT II.

THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT THOMAS W. SIMPER, PLAINTIFF'S PREDECESSOR IN TITLE, ACQUIRED OWNERSHIP OF ALL WATERS FROM BRANCH SPRING WHICH INCLUDES THE WATERS OF SPRING AREA NO. 1, BY A DEED EXECUTED BY CHARLES A. MOTT.



## POINT III.

THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT THE PLAINTIFF IS ENTITLED TO THE USE OF ALL THE WATERS FROM BRANCH SPRING WHICH INCLUDES THE WATERS OF SPRING AREA NO. 1.

## POINT IV.

THE LOWER COURT DID NOT ERR IN ADMITTING PLAINTIFF'S EXHIBITS "1" THROUGH "4" AND PROPERLY DENIED DEFENDANTS' MOTION FOR NONSUIT.

## POINT V.

THE TRIAL COURT PROPERLY REJECTED DEFENDANTS' COUNTERCLAIM FOR A DECREE QUIETING TITLE IN THEM TO BRANCH SPRING WHICH THE COURT PROPERLY FOUND TO INCLUDE ALL THE WATERS OF SPRING AREA NO. 1.

## POINT VI.

THAT THE DISTRICT COURT DID NOT ERR IN OVERRULING DEFENDANTS' MOTION FOR A NEW TRIAL IN THIS CAUSE.

## POINT VII.

THAT THE LOWER COURT DID NOT ERR IN REFUSING TO FIND IN DEFENDANTS' FAVOR UPON THE ISSUE OF DEFENDANTS' DAMAGES.

## ARGUMENT

## POINT I.

THAT THE COURT DID NOT ERR IN FINDING THAT BRANCH SPRING EMBRACES ALL OF SPRING AREA NO. 1 AND INCLUDES ALL THE WATER SOURCES THEREIN.

The waters not involved in this controversy which should be distinguished are those from Gooseberry Creek. The other waters described in Defendants' brief as the spring located in the immediate northwest corner of Spring Area No. 1 which they have termed the pipe spring, is a part of Spring Area No. 1 or Branch Springs. The water described as Spring Area No. 2 includes what is described as Reservoir No. 2 in Plaintiff's Exhibit 3. The Appellants' contend that the findings and decree of the lower court, as well as its decision and memorandum of August 1, 1953 (R. 10 through 19), together with its order overruling motion for new trial (R. 21, 22) show that the court failed to make any distinction whatever in the identity of water rights involved. It is clearly apparent from the record that the court understood and identified the water involved in this action and that the record fully supports the decision of the court.

The witness, George Simper, testified that this water was *all* of the water designated by Defendants in their exhibits and testimony as the Spring Area No. 1.

*R. p. 101:*

"Q. (Mr. Beal) And those waters, and all of them, derived in this area were used by your father, and with your assistance, on this farm?

"A. Yes Sir.

"Q. Was your right ever interrupted or disturbed?

"A. No sir; not in the early days; there was nobody there to interrupt or take it.

"Q. And this property here that is now claimed by Mr. Thorsen or the property that was owned by Mr. Bird, was public domain at that time you were there, was it?

"A. That's right."

*R. p. 100:*

"Q. But you were there when your father owned it?

"A. Yes, a long time ago.

"Q. Calling your attention to—What years would that have been, George?

"A. Well, that would date back to probably about 1908 or 10, up until forty or forty five.

"Q. And so during that period of time you have had rather intimate operations of this area, have you?

"A. Yes Sir.

"Q. Now, where is the source of water derived from that was used during those years for irrigation of this land that is now operated and owned by your brother?

"A. Well, the deeded water came out of the creek, the Gooseberry Creek, and they had acquisition to those springs you have been referring to."

This testimony clearly shows the water covered by the deeds, Plaintiff's Exhibits 2 & 3, to have been all the waters of Branch Spring, and all the waters of Branch Spring to have been all that water arising in Spring Area No. 1 as designated by Defendants. The testimony of Leland Simper,

plaintiff in this action, also identifies Branch Springs and Spring Area No. 1 as one and the same water sources from which his water came (R. 81, 82).

As we have argued in Point I hereinabove, while the trial court may have erroneously designated the Branch Spring to be synonymous with the Big Spring, nevertheless there is ample evidence to support the fact that the court was clear in its identification of the water sources, as shown by its Decision and Memorandum (R. 10, 13) and to support the court's finding that *Branch Spring* included all of the *Spring Area No. 1*.

The court viewed the premises and used the following language in its memorandum (R. 13) in identifying Branch Springs as one and the same as that spring area and the water sources designated as Spring Area No. 1:

“\* \* \* the physical evidence discloses that all of the several channels or branches of said spring, if unobstructed and uninterfered with, naturally flow to the area of what is described in Defendants' Exhibit A as the Ernel Peterson pond from whence they flow into the natural channel or “C” ditch, described in the last-named exhibit, and thence to Plaintiff's lands, and Plaintiff's evidence shows that he and his predecessor father have always used beneficially all waters that came through said natural channel or “C” ditch to his farm, and this appears to be the only course these waters, if uninterfered with, could have taken since their deeding by Mott to Simper.”

The decision of the court and the position of the Plaintiff is further substantiated by the showing that the Defendants expressly admit that the Plaintiff is entitled to all those

waters flowing from the pipe spring which was one of the springs designated in Spring Area No. 1 or Branch Springs. It is shown by testimony that the spring flowed from a two inch pipe and that it flowed a very small stream (R. 184). This amount of water would not be sufficient to flow any distance, let alone the distance to the Plaintiff's land, and in a force sufficient to be used for irrigation purposes. It is clearly apparent that more water was available to Plaintiff and was used by the Plaintiff.

#### POINT II.

THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT THOMAS W. SIMPER, PLAINTIFF'S PREDECESSOR IN TITLE, ACQUIRED OWNERSHIP OF ALL WATERS FROM BRANCH SPRING WHICH INCLUDES THE WATERS OF SPRING AREA NO. 1, BY A DEED EXECUTED BY CHARLES A. MOTT.

#### POINT III.

THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT THE PLAINTIFF IS ENTITLED TO THE USE OF ALL THE WATERS FROM BRANCH SPRING WHICH INCLUDES THE WATERS OF SPRING AREA NO. 1.

#### POINT IV.

THE LOWER COURT DID NOT ERR IN ADMITTING PLAINTIFF'S EXHIBITS "1"

## THROUGH "4" AND PROPERLY DENIED DEFENDANTS' MOTION FOR NONSUIT.

Since the Defendants and Appellants have consolidated their argument upon these points, and Plaintiff and Respondent will respond similarly.

We agree with Appellants that whoever first appropriated water by beneficial use prior to 1903 is the owner thereof and entitled to pass title thereto. We likewise agree that the law prior to 1903 required no certification or recording of such rights; that title was and must continue to be based on proof of use.

We cannot agree, however, that deeds and memoranda are incompetent and inadmissible as proof of ownership of water where title is in controversy.

While we concede that ordinarily self-serving documents and memoranda, including deeds, are not competent evidence against third parties, we nevertheless contend that the Plaintiff's Exhibit "3" falls within a well defined exception to that rule, that of recitals in Ancient Deeds. It is well settled that recitals in ancient deeds are competent evidence of facts recited therein even as against strangers to the title, when accompanied by possession under the deed or other corroborating circumstances. 20 Am. Jur. 794, Evidence, Sec. 941. Exhibit "3" of Plaintiff is such a deed.

Exhibit "3" is a deed executed December 31, 1888, recorded January 11, 1889, from Charles A. Mott to Thomas W. Simper, Plaintiff's grantor, in which it is recited that for the consideration of \$200.00, [which the trial court found to be "substantial" (R. 10)] the grantor conveyed

“the Branch Spring of water, lying and being situate at the lower end of Kelsey Bird’s field, Gooseberry Precinct, Sevier County, Utah; said spring located October 1884 and duly recorded to the party of the first part December 21, 1888 in Book G-1, page 47, Sevier County Records.”

As has been argued in our Point No. I hereinabove, we contend that the court properly found, after hearing the evidence and viewing the physical properties involved, that the “Branch Spring” referred to in that deed embraces the entire water source within “Spring Area No. 1.”

If the Branch Spring includes all those waters, then the remaining question is whether or not there is sufficient evidence upon which to base the court’s finding of a diligence right, acquired by beneficial use prior to 1903, by Charles A. Mott.

In the recent case of *Edmunds v. Plianos*, 74 S. D. 260, 51 N. W. 2d 701, it was held that a recital in an ancient deed as to the existence of an alley at the rear of property conveyed is competent evidence of the fact of dedication of the alley. The dearth of satisfactory evidence there made it proper to admit the ancient deeds even as against strangers to the title.

In *Fulkerson v. Holmes*, 117 U. S. 389, 29 L. Ed. 915, 6 S. Ct. 780, the United States Supreme Court has held that a deed more than 60 years old may be admitted in evidence against third parties to prove contained recitals even in the absence of proof of possession by the parties offering it.

No case closer to the facts involved here could be found than the reported decision preceding the note in 6 A. L. R.

found at page 1433, *Gabarino v. Noce*, 183 P. 532, where it is said that:

“Having been executed for more than 50 years before the present controversy arose [the deed] comes within the rules of evidence applicable to ancient deeds and hence the recitals therein relating to the property conveyed are competent evidence of the facts recited even against strangers to the deed  
\* \* \* The recitals tend to show that the ditch was originally conducted by the owner of the lot for the purpose of conveying water from the creek to that lot. The fact that the title deeds of the Garbarino lot show this particular ditch as an appurtenance while the title deeds of the other lots make no mention thereof, is some evidence, at least, that the right thereto was not claimed by the owner of the other lots at the time of making the conveyances thereof.”

In *Condit v. Galveston City Co.*, 186 S. W. 395, where title to shares of corporate stock were in controversy, a deed recited that the certificate in question was sold at public auction pursuant to an order of the probate court. The Plaintiffs contended that such evidence was inadmissible, in the absence of any evidence showing that the transferee or any person claiming under him had enjoyed possession or shown acts of ownership. In that case, it was held that the ancient deed was properly admitted to prove the recitals.

In the instant case, there is ample testimony of “corroborating circumstances” as indicated in the note from American Jurisprudence, in the evidence of consistent use in the years 1908 or 10 to 1945 (R. 100-102). In the Texas case, even this requirement was not present. Certainly the



trial courts view of the premises established a consistent use (R. 13).

Recitals in ancient instruments have been held admissible to prove extent of title, source of title, and existence of other supporting instruments. Annotation, 6 A. L. R. 1437.

The reported case to that annotation holds that "it [the ancient deed] is also competent as a declaration of the grantor while in possession, as evidence that he then claimed full ownership of the ditch and water right."

Ancient deeds are admitted as proof of their recitals as an exception to the hearsay rule upon the theory that time and possession have raised the presumption of their truth, which is admissible even as against strangers.

The rule admitting ancient deeds to prove recitals therein contained pertaining to water rights appurtenant to the lands conveyed should reach great eminence in the state of Utah under its peculiar statutory and case law relating to diligence rights to the use of water.

The time is rapidly approaching when direct testimony of use prior to 1903 will be absolutely unobtainable. Even today one, in order to have a recollection of occurrences antedating 1903, must be of an age in the early seventies.

To adopt a rule urged by the Appellants that a predecessor in title's use must be established and proved by direct testimony would be to establish a rule making multitudes of anciently established water rights unaffirmable by judicial proof.

In the trial court's memorandum (R. 12-14) it is clearly shown that the deeds were not given controlling weight, and possibly not even the weight to which, under the foregoing decisions, they were entitled. The Court says: (R. 11, last sentence, and 12).

"Charles A. Mott has assertedly located said spring in 1884 and recorded it in 1888, and while there is no competent evidence (a statement which apparently is refuted in the cited cases) in the record that Charles A. Mott ever himself put these waters to a beneficial use or that he owned land in that vicinity, the *physical evidence* [coming on through the court's view of the premises] (R. 10) discloses that all the several channels or branches of said spring, if unobstructed and uninterfered with, naturally flow to the area which is described in Defendants' Exhibit A as the Ernel Peterson pond from whence they flow into the natural channel or "C" ditch, described in the last named exhibit, and thence to Plaintiff's lands, and Plaintiff's evidence shows that he and his predecessor father have always used beneficially all waters that came through said natural channel or "C" ditch to his farm and this appears to be the only course these waters, if uninterfered with, could have taken since their deed by Mott to Simper.

"The Defendant, as far as beneficial use prior to 1903 is concerned, which is the only basis on which he could rest his claim, is compelled to base his case solely upon the testimony of witnesses, \* \* \* [who] were 3 and 5 years old when they settled with their parents  $\frac{3}{4}$  miles north of Branch Spring, and who were 8 and 10 years old in 1903, \* \* \* more than 50 years after they left the scene of action.

\* \* \* \* \*

“However, taking the evidence as a whole, including the physical conditions disclosed by a view of the premises, I am of the opinion that the evidence of ownership of said waters, based on purchase, appropriation and beneficial use prior to and including the year 1903, preponderates in favor of the Plaintiff.”

These are the findings which the Appellants must overcome by a showing that the trial court, having heard the witnesses, and viewed the premises, has misapplied proven facts or found against the clear preponderance of the evidence. (*Cranford et al. v. Gibbs*, . . . Utah, 1st Series, . . ., 260 P. 2d 870.

As to the evidence referenced in pages 21 to 25 of Appellants' brief, we agree with the trial court that this is no more than recurring interruptions by Defendants and their predecessors, and as to this we agree with Appellants when they say that they must do more than establish nonexistence or inferiority of Plaintiff's title in order to prevail themselves.

## POINT V.

THE TRIAL COURT PROPERLY REJECTED DEFENDANTS' COUNTERCLAIM FOR A DECREE QUIETING TITLE IN THEM TO BRANCH SPRING WHICH THE COURT PROPERLY FOUND TO INCLUDE ALL THE WATERS OF SPRING AREA NO. 1.

In our Point No. V we shall address ourselves to the errors assigned by Defendants (here Appellants) in both their Points Numbered V and VI.

The trial court, close to the scene of events, hearing the witnesses, and viewing the premises, properly appraised the testimony of Casto (R. 156) and Nielsen (R. 204) in his memorandum decision (R. 13) where he says:

“The Defendant, as far as beneficial use prior to 1903 is concerned, which is the only basis upon which he could rest his claim, is compelled to base his case solely upon the testimony of witnesses, a brother and a sister, children of Able N. Casto, one of Defendants’ predecessors, which children were three and five years old, respectively, when they settled with their parents, not at, but some  $\frac{3}{4}$  of a mile north of Branch Spring, and who were eight and ten years old, respectively, in 1903, at and prior to which time the rights of the respective parties herein were fixed and which said brother and sister testified in the case, more than fifty years after they left the scene of action involved in the case.

“It is true, there is abundant evidence of almost constant interference with Plaintiff’s use of said water, especially since John M. Bird’s purchase in 1933, from Able N. Casto, of the property now owned by the Defendant and also evidence in the wording of the deed from Able N. Casto to John M. Bird that Casto claimed ownership, in which might appear to be some of said waters.

“[The court later amended the memorandum to show that Casto and Nielsen were there until 1900, at which time they reached the ages of 16 and 18 respectively, but did not consider this sufficient to justify any change in his original decision (R. 21-22)].”

The specific reference of the court to this testimony discounts the Defendants’ contention that the court “ignored portions of the Plaintiff’s case” (Br. App., p. 28).

We disagree with Defendants-Appellants in their italicized statement on page 37 of their brief where they declare that “there is no evidence in the record to antedate the title of plaintiff’s predecessors” which fact they attempted to prove by the testimony of Casto and Nielsen, who came to the area in 1887 (R. 156). We doubt seriously that those witnesses at the ages of 3 and 5 would have any recollection whatsoever as to evidence in 1887 but, on the contrary, urge that the deed admitted into evidence (entirely properly, as argued in Points II, III, and IV herein) establishes a use of the Branch Springs—which the trial court found to include all the waters in Spring Area No. 1—in October 1884, the location of which date was recorded December 21, 1888 in Book G-1, page 47 of the Sevier County records.

Perhaps previous counsel for Plaintiff should have introduced a certified copy of the instrument referred to which has been since 1888 a matter of public record. However, the ancient document found at page 359 of the record proves the prior instrument. *Fulkerson v. Holmes*, supra. In any event, there are documents in existence and entered upon the public records since 1888 showing Plaintiff’s appropriation of Branch Spring which the trial court found to be the equivalent of Spring Area No. 1.

With this factual premise we then agree entirely with Defendants that the controlling legal principle is that which they cite on page 36 of their brief, that “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.”

Subsequent uses by Defendants' predecessors in interest, and at a time when the witnesses Casto and Nielsen had attained an age of 14 or 16 years of age, the earliest possible age at which evidence as to their recollection could be at all creditable, could not initiate any right but were only interferences with an established right if such uses were in fact made.

Certainly this was the rationale of the court's finding on page 13 of the record.

#### POINT VI.

THAT THE DISTRICT COURT DID NOT ERR  
IN OVERRULING DEFENDANTS' MOTION  
FOR A NEW TRIAL IN THIS CAUSE.

The trial court at page 21 and 22 of the record considered the exceptions to the court's findings and rejected them. The attack was solely upon his findings of fact which we believe to be fully and adequately supported by the record and which, in any event, as a matter of law cannot be upset except by a clear and convincing showing that the court has misapplied proven facts or made findings clearly against the weight of evidence. *Cranford v. Gibbs*, . . . Utah . . . , 260 P. 2d 870.

#### POINT VII.

THAT THE LOWER COURT DID NOT ERR  
IN REFUSING TO FIND IN DEFENDANTS'  
FAVOR UPON THE ISSUE OF DEFENDANTS'  
DAMAGES.

Upon the issue of damages, no case could have clearer application than *Cranford v. Gibbs*, *supra*. The testimony of

the defendants as to their own damages is based solely upon speculation and is not bottomed on logic or analogy. We first contend that the defendants were never entitled to any of the waters and therefore entitled to no damages for expropriation by the Plaintiff. Assuming, *arguendo* only, this not to be the case, then we see no sufficient basis upon which the trial court could find other than he did that damages were based upon theories too speculative for an award.

As to Defendants' claimed loss of alfalfa hay, this could be attributable to any number of causes: Poor husbandry, extreme drought, an unusually short growing season, or inclement weather.

The same would apply to natural feed and other crops.

The major portion of Defendants' claimed damages were in deficiencies in livestock production which the Defendants themselves tie directly to inferior and limited hay supplies. Besides being subject to the great margin for error in assuming that lack of water contributed to this condition, then speculation as to what their livestock would have produced becomes much more broadly speculative and even more remote and uncertain.

It appears that nothing was done by the Defendants to mitigate this loss or to prevent this damage.

## CONCLUSION

It is respectfully contended that the trial court has fairly and adequately determined all the facts before him in this trial. We believe that there is no manifest showing

of a misapplication of proven facts or a finding of fact clearly against the weight of evidence.

We believe the trial court ought to be affirmed.

Respectfully submitted,

OLSEN AND CHAMBERLAIN,

*Attorneys for Plaintiff*

*and Respondent.*