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Utah Supreme Court

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Unknown.

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UTAH SUPREME COURT
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DOCKET NO. 4372 "LW"

In the Supreme Court of the State of Utah

UTAH COPPER COMPANY, a Corporation,
Respondent,

vs.

ELIAS A. SMITH and FRANCIS B. CRITCHLOW, Trustees, and MONTANA-BINGHAM CONSOLIDATED MINING COMPANY, a Corporation,
Appellants.

No. 4372

The "Last Word" or Appellants' Reply To Respondent's Second Brief.

PIERCE, CRITCHLOW & MARR,
DEY, HOPPAUGH & MARK,
Attorneys for Appellants.

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The "Last Word" or Appellants' Reply To Respondent's Second Brief.

In replying to "*Respondent's Answer to Appellants' Reply Brief*" we are not merely indulging in our right to the proverbial "last word"—we are further burdening the Court only because we feel it is our duty to call the Court's attention to certain statements made by respondent and for the purpose of correcting confusion. The assertions found between the covers of respondent's last volume of argument sound somewhat as though emanating *a deo et rege*—(from God and the King). When analyzed,

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however, in place of logic or even arbitrary asseveration, respondent is merely artistically indulging in *petitio principii,*—"begging the question."

Counsel assert: "Respondent's dump intercept these waters in the course of such descent, *captures them; retains them.*" But *does* it capture them? *Does* it retain them? Again, respondent says: "That dump and every substance therein is the absolute property of respondent, the right of which is to follow and recover its said property whenever and wherever the same may be found." But is *this* true? According to the theory of respondent advanced in the former brief they do not seek, nor do they claim ,the right to recover the percolating waters even though such right were accorded them by the lower court.

Let's test the question for a moment. My manure lies upon my own property on the hilltop. Therefrom (in the language of the lower court, respondent's last brief page 12), there is "exuded a substance which spreads over the ground" percolating beneath the surface and passing down upon the worthless land of my neighbor below. Could I take my neighbor's enriched soil because I had permitted my manure pile to lie out in the weather? True, I might haughtily say, in the language of respondent, "What can it matter that the valuable abstraction or exudation is mixed with earth or water?" My neighbor might well reply: "Nevertheless, you *left* it there; if you don't want your dung to run off—haul it away!" And that's just the answer here. The dump and contents are the absolute property of the respondent *only if and when it removes it.* Until then, and while the Utah Cop-

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per deliberately permits it to remain upon our land, it is subject to the action of the elements. It is not *lost* property. But, just as the "air we breathe, the air encountered in passing to and fro" (last brief respondent, page 4) goes on to the next land owner who has an equal right to breathe,—so here, deliberately, and with knowledge of all the conditions, subject to the limitations naturally following such conditions, this worthless dump has been placed on our land, and the waters flowing down through the dump come upon the surface and beneath the soil of our ground. We have the same right to breathe on our land and to allow the air to pass, as they have to breathe on their easement "the air encountered in passing to and fro."

The solution of the whole question is found in the application of elementary principles of law. Their assumption of absolute title is *not* correct. The rights of the Utah Copper Company, as the owner of the easement, is, nevertheless, subject to our correlative rights as owner of the fee. We have already discussed this subject in our former brief, and have cited authorities showing the limited rights of the owner of an easement. But let's proceed one step further. If the judgment here stands, the Utah Copper Company MAY DEMAND, as the reward for our enterprise in creating value from their confessedly worthless dump, an accounting and recover from us for all the copper we have reclaimed since 1920. More than this; as we have repeatedly stated hitherto, carrying counsel's argument to its logical conclusion, the Utah Copper Company may recover from us copper rock in

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place within our property, part of our very mining ground, because the same has been enriched from the copper solutions leached from the dump. Why not? According to the case quoted by counsel at page 14 of their brief (Buckley vs. Gross) we are plain ordinary thieves; the title has never passed. We hold what does not belong to us. Of course counsel are mistaken, and in error because *they refuse to recognize the perfectly obvious distinction made in the law between property accidentally lost and this condition designedly created.*

We have quoted from Duvall vs. White, 189 Pac. 324, recognizing the rule as to water, oil and gas and other fugacious substances. All of these cases show clearly that after fugitive minerals pass from the land of the first proprietor his right thereto is gone and he may not reclaim. But counsel ignore all of these cases. The only answer respondent makes is, in effect, to inquire: *"How dare you oppose us?"*

Respondent seemed to be irritated at its last writing. We find in respondent's answer to appellants' reply brief the suggestion that we have indulged in "astonishing dissertation." There is a hint that we have been remarkably audacious. There is even an oblique charge that Mr. Pett is lacking in good morals,—all of which, however, is not argument.

Respondent (referring to its pretended reservoir) asserts that it is merely closing the *"leaks"* in the barrel. LEAKS! ! *"I thank thee for teaching me that word!"* Suppose the water 'leaks" from the gutter of a roof or *"leaks"* exist in a rain barrel. May the owner of the

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roof, or the owner of the barrel dig up his neighbor's garden? Does the owner of the barrel, or of the roof, when the water 'leaks'' upon his neighbor's ground ''continue through such percolation * * the absolute owner thereof, with the untrammeled right to dispose of said water as'' (his) ''advantage might dictate?'' ''LEAKS!'' That is simply another name for percolating or passing through. The so-called ''reservoir'' and a sieve *''leak,''* and *''leak''* in about the same proportions. Counsel say: ''Can it be possible that B would not have the right to calk up and close the ''leaks'' in the ''barrel?'' Yes; by all means you may water-proof every grain of material you place on our ground, or you may take your old barrels and go home. *But,* if the dump remains, it remains subject to the action of the elements, and you have no right to concrete the surface of our ground, nor do you ''continue throughout such percolation the absolute owner of such water.'' *We* retain, by the express terms of the grant, the right to mine *at the surface. We* retain all rights *below the surface.* You merely have a ''limited estate,—limited as to dimensions, height, depth and length.'' (Citizens Telegraph Co. vs. Cincinnatti N. O. & T. P. R. Co., and other cases cited in our former brief).

Counsel have not furnished the court with a single authority which disputes these propositions. On the contrary they have stated again and again that the propositions of law we rely upon are elementary. Indeed, the rule *could not* be denied, though the denial came from ''God and the King.''

''LEAKS'' ! ! Inadvertently our friends let slip

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the real situation. The water leaks down so fast that, as stated by their own witnesses "at certain times the dump is perfectly dry as far as can be seen." Yet, in spite of the admission that the "barrel" or "reservoir" (?) leaks, counsel rather scold the writer of this brief because he made an offer of proof which was *accepted as evidence,* but objected to as immaterial. And respondent, at page 20 of their brief, make the following statement:

> "It appears from the uncontradicted testimony that in order to secure and solely for the purpose of securing, the copper laden water in respondent's dump, the appellants not only were compelled to drive what they call a 'water drift' directly under the fill of the D. & R. G. W. R. R., *but to make a raise in such fill to a heighth of* 15 *to* 20 *feet and thus tap the 'barrels' or reservoir of this respondent and deprive it of its water held in its dump and containing the only value which appellants sought to appropriate, namely, the copper held in solution.*"

There is absolutely no justification in the record for the above statement. The maps and the testimony clearly show that the point where appellants intercept and divert these waters is a considerable distance down the gulch from any ground occupied by respondent, and is from 150 to 200 feet away from the lower end of respondent's dump. If the diverting by us of waters flowing and percolating through the soil and crevices down the bottom of the gulch,—waters which have left plaintiff's dump and passed under the fill of the D. & R. G.,—is "tapping"

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respondent's so-called "reservoir." "Make the most of it!" How could it be? As well say a ditch dug below and down Salt Lake valley where the waters ultimately flow could be considered "tapping" respondent's reservoir!

The assertion made in our reply brief that the Montana Bingham Consolidated Mining Company upraised from the cross-cut tunnel 15 feet, but only to the surface of the natural ground under the fill and not into the fill of the D. & R. G. R. Co., is fully borne out by the record. Mr. Billings had immediate charge of the work and emphatically denied the assertion of respondent's counsel that the upraise extended into the fill at all. (Tr. 206-7). Mr. Pett was cross-examined concerning an inter-office letter of the Montana Bingham Consolidated Mining Company,—a copy of which the respondent had in some mysterious way procured. And without being shown the letter, was questioned rather viciously (it seems to us) in an attempt to confuse the situation. But the testimony of Mr. Pett is not at variance with the evidence of Mr. Billings, nor is the letter which has already been quoted. On the contrary, Mr. Pett's answers are wholly consistent with his idea that the upraise was within the surface limits of the D. & R. G. R. R. Co. fill. He was not asked at all how far, if to any extent, the upraise was *into* the fill. The testimony of Mr. Billings, which we cited, and indeed the whole record, shows clearly that the water coming down the gulch under the D. & R. G. R. R. fill percolates through the natural soils and crevices,—part flowing along the natural surface of the bottom of the gulch at bed rock,

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has been intercepted by the Montana-Bingham Consolidated Mining Company, and the same situation exists further up the gulch under and beneath the soil at the lower end of respondent's dump where respondent seeks the right to dig out the ground for the purpose of taking therefrom the percolating waters. On the other hand, respondent's counsel build up a mighty "reservoir" (?) with an overflow, or spill-way. But to make their case they must, not only by imagination transform the dump into a "reservoir," they must join thereto another imaginary reservoir, (?) viz: the D. & R. G. R. R. fill. They must further contend (although without reason) that this last "reservoir" in some mysterious manner (which Mr. Goodrich in effect says he does not understand) belongs to them. Having thus on a fallacious premise prepared for the conclusion, they then say, (without justification in the record) that the appellants have upraised 15 feet into this fill (the fill of the D. & R. G. R. Co.) and are tapping their reservoir to secure the water. We are content to rest upon the record, and we submit that it justifies our assertion as to what it shows. It further justifies our contention that respondent is given, by the judgment appealed from, the right to deprive appellants of percolating waters and surface waters that have passed out of the dump and into our ground and are already diverted to a public use by appellants.

After all, the theory of the case must be determined from the pleadings, the evidence adduced, and the decree entered, rather than from the briefs filed in the appellate court. Respondent has discarded the theory upon which

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it proceeded to trial and upon which it persuaded the trial court to grant the judgment here for review. We remind the court of the language of the complaint (paragraph 9), —the only excuse offered for this *extraordinary* exercise of the right of eminent domain. There the pleader says that it "does not appear from said agreement" (the grant of easement) "that said plaintiff has the right * * *to enter beneath the surface thereof*" (that is, beneath the surface of the mining claims) "for that purpose and excavate *and construct tunnels or underground works to collect the waters containing the said copper in solution.*"

Mr. Goodrich, plaintiff's chief engineer, testified: (Abs. 37-38).

> "AND BY THAT MEANS *we contemplate securing at this lowest place all the water that comes out of the dump, all the water that percolates below.*"

Mr. Earl testified: (Abs. 56).

> "I don't know how far this water that percolates through the dump goes into the ground. I don't think anyone can say. IT PROBABLY DOES GO DOWN INTO THE GROUND, but it also appears on the surface. IF OUR TUNNEL IS DOWN BELOW WHAT WAS THE SURFACE OF THE GROUND PRIOR TO THE DUMPS BEING PLACED THERE IT WILL, OF COURSE, COLLECT THE WATER THAT IS BELOW THE DUMP, BELOW THE BOTTOM OF THE DUMP, it will, as to the amount that is in that depth of the tunnel."

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And we respectfully ask the court to bear in mind the fact that the "depth of the tunnel" is undefined, and under the condemnation proceedings here the respondent may go with its tunnel to the center of the earth.

The court found (Finding No. 7, Abs. 151):

> "*In order to collect said waters containing said copper in solution,* as aforesaid, and to enable the same to be conducted through such pipe lines to such precipitating vats or tanks, it is necessary to excavate and construct a tunnel and short branches therefrom *beneath the surface of a portion of the mining claims and mining properties of the defendants above named.*"

And the court concludes: (Conclusion of Law No. 3, Abs. 156-7).

> "And although such water and solutions in said dump or deposit *should percolate through the natural surface soil beneath said dump and upon the mining claims of the defendants before the plaintiff should have collected, conserved, or diverted the same,* plaintiff would not be thereby divested of said title, but on the contrary plaintiff would continue throughout such percolation until, upon and subsequent to plaintiff's collection and diversion of said waters and solutions the absolute owner thereof, with the untrammeled right in plaintiff to dispose of said waters and solutions as plaintiff's advantage might dictate."

Upon such a record we cannot understand how able counsel fatuously contend there is not involved here the

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law applicable to surface and percolating waters. Counsel in a rather superior manner brush all aside, by referring to these waters as "meteoric." In the name of common sense! ! where do the waters come from anyway? What is the source of the waters which fall from heaven? When waters reach the surface, flow upon the surface and percolate below, are they any the less surface and percolating waters because the waters accumulate from rain and snow. Respondent alleges in its complaint that the waters are percolating "through their dump and through the surface of our ground." All of their witnesses say that these waters go into our ground. At the trial they frankly conceded that the very thing they desire is to collect the waters underneath the surface of our ground. The court in its findings and conclusions (presumably prepared by counsel for respondent) not only finds that these waters do percolate into our ground, but concludes therefrom that in spite of that fact respondent "remains the absolute owner of these waters with the untrammeled right to dispose of said waters * * as plaintiff's advantage might dictate."

There was one virtue in respondent's theory at the trial. Counsel at the trial were at least consistent. And, being consistent, upon the theory indicated in the complaint and the evidence and findings above outlined, the decree of condemnation, although erroneous in law, is in harmony.

But having obtained a decree for condemnation, counsel now want to uphold it, and in its brief in this court,—in utter disregard of the pleadings and the record,—it

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seeks to argue that there is no law involved in the case. All it asks is a determination of the question of ownership of the waters while *in* (?) the plaintiff's dump. The query of his Honor, Justice Frick, was most pertinent: "If what is really involved here is simply the collection of the waters in the dump while there, and at the surface, why seek to excavate underneath defendants' ground;—why resort to eminent domain proceedings for this purpose at all?"

So, in spite of the impatience of counsel for respondent, we submit that we were and are justified in treating this case as involving fundamentally the question of surface and percolating waters.

But counsel's imaginative genius takes wing heavenward. They compare these waters with the birds of the air,—like the meteor in its flight. These waters they say are the property of any one until captured, and (forsooth!) *they* have *captured* them! For nineteen years these waters apparently have been in captivity. They say: "By what authority does the owner of the fee have any right, title or interest in the rain or snow in the course of their descent upon his surface?" We do not presume that the court is interested in speculating concerning these waters "in the course of their descent." The question here is as to the rights of the parties after these waters have reached the surface. In other words, the law suit here is with respect to the right of the plaintiff to "enter beneath the surface thereof" (that is of our mining claims) * * and excavate and construct tunnels or underground works to collect the waters." LET'S STICK TO THE GROUND!!

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We have already incidentally referred to what counsel in their answer to appellants' reply brief term "are astonishing dissertations concerning barrels stored on another's ground." We thought we had made our position perfectly clear. Counsel's speculations may be interesting, but they lead us far afield.

In our reply brief we stated: (page 7).

> "To the extent that the personal property *may become saturated with the water* so that it is not recoverable by the owner of the land there would necessarily be an incidental burden falling upon the land-owner."

This statement makes unncessary the speculations of counsel with respect to B's barrels upon A's property.

Counsel cite no new authorities for their contention that even meteoric waters may be captured by anyone as against the owner of the land upon which the waters fall. They content themselves with the statement that they cited the authorities in their opening brief with respect to the right to capture these waters; but we have shown that in each of the cases cited the person who claimed the ownership of the water by reason of capture was the owner of the land upon which the water fell, and that it was only while so captured, and not after the barrel "leaks" and the water flows upon the land of another, that there is any such right of ownership.

Counsel at a rather late day, it seems to us, joyously criticise our explanation of the chemical changes which occur in the leaching process and in replacement. True,

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respondent does not seem to attach any particular significance to any of this. The criticism is evidently injected merely to show superior knowledge. We are quite willing to rest this proposition upon the opinions of the geologists and chemists which we have cited in our original brief.

After all, in spite of the great ability shown by our friends in presenting a fallacy, there is but one argument which really goes to the merits of the case. We refer to their contention that even if we assume the water in plaintiff's dump belongs to the plaintiff,—then after it leaves plaintiff's dump and it comes upon defendants' surface and percolates through, the water continues to be the property of the plaintiff. This argument is lucid and to the point. It involves the final position reached by the trial court. It is reflected in the statement of respondent at page 11 of their brief:

> "One does not suffer the loss of title to his property merely because it comes upon the land of another, although without license and even against the will of such other."

And, while the position as stated is somewhat forced and not true to the facts, because the water does not come upon our land *without* license, nor does it percolate *against* the will of the Utah Copper Company, nevertheless, the abstract proposition at first blush, finds some support (though indifferent) in cases of fruit blown upon another's land, straying livestock, and drifting timber. Finally respondent quotes the case of tallow flowing in the river Thames. The difficulty, however, for respondent

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is that *all of the authorities* put water, oil and gas in a classification entirely different from blown fruit, straying livestock, and drifting timber. Water, oil and gas have a fugitive character. They are not the subject of property except while in actual occupancy. (Dark vs. Johnston, 55 Penn. 164). When they escape and go into the lands of another the title of the former owner is gone.

((Brown vs. Spilman, 155 U. S. 665).

We have cited numerous cases and discussed the authorities which, without dissent, support the foregoing proposition. (See pages 46 to 62, inclusive, of our opening brief). We again call attention to the case of Duvall vs. White, 189 Pac. 324, and Humphreys Oil Company vs. Liles, 262 S. W. 1058, involving the question of rights to escaping oil.

Since we cited these two cases, and all of the other cases upon the ''fugacious'' character of water, oil, gas and like substances, and the determination of property rights therein, counsel for respondent has filed two briefs, and strange, but significant, they have failed to either distinguish or comment at all concerning the conclusions reached in these cases. The cases referred to we submit should control the determination of this case.

Respectfully submitted,

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