

1956

Rebecca McKell v. Spanish Fork City et al : Brief of Plaintiff and Appellant

Utah Supreme Court

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Civil No. 8494

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

REBECCA McKELL,

Plaintiff and Appellant,

vs.

SPANISH FORK CITY, a Municipal
Corporation, MARCELLUS NIEL-
SON, J. W. ANDERSON, ED M.
BECK, ARTHUR GROTEGUT,
BERT D. ISAAC, J. ROWE LEWIS,
and LINDSEY B. SNELL, et al,

Defendants and Respondents.

Appealed from Fourth District Court of Utah County,
Honorable Maurice Harding, Judge

BRIEF OF PLAINTIFF AND APPELLANT

ELIAS HANSEN

721 Continental Bank Building
Salt Lake City, Utah

*Attorney for Plaintiff and
Appellant*

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IN THE SUPREME COURT of the STATE OF UTAH

REBECCA McKELL,

Plaintiff and Appellant,

vs.

SPANISH FORK CITY, a Municipal
Corporation, MARCELLUS NIEL-
SON, J. W. ANDERSON, ED M.
BECK, ARTHUR GROTEGUT,
BERT D. ISAAC, J. ROWE LEWIS,
and LINDSEY B. SNELL, et al,

Defendants and Respondents.

Civil No. 8494

STATEMENT OF CASE

This action was commenced by A. T. McKell, now deceased, against Spanish Fork City, Its Mayor, City Councilmen, and Lindsey B. Snell, Its Water Superintendent, Utah County, and Its County Commissioners, and some of its employees, and also some of the employees of the State Road Commission of the State of Utah.

After the action was commenced and before the same came on for trial, Rebecca McKell, the wife of A. T. McKell, was substituted as plaintiff in lieu of her deceased husband, A. T. McKell. The basis for making the substitution was that Rebecca McKell was a joint

tenant with her husband, A. T. McKell, prior to his death, and was such joint tenant at the time complained of in the Complaint. (R. 56-57). The action is for damages done to plaintiff's lands, the improvements and personal property thereon by reason of the defendants having constructed a dyke along a road, the title to which was in Utah County, Utah. Such road extends east for about one-third of a mile from the northeast corner of plaintiff's land. As a result of the construction of the dyke along the road, large quantities of water which had overflowed the banks of Spanish Fork River, were concentrated along the southern side of the dyke so constructed and forced over plaintiff's lands. The water so forced over plaintiff's land cut large gulleys through the same and carried away improvements, together with some farming equipment located thereon. It is so alleged in the complaint (R. 20) and the amendment thereto (R. 50 and 54).

Numerous motions were filed by the defendants whereby they sought the dismissal of the action on various grounds. We shall not undertake a discussion of such motion because before the cause came on for trial, such motions were all disposed of and the case was tried on the issues raised by plaintiff's Amended Complaint (R. 20) and the amendment thereto, and the answers of the defendant Spanish Fork City and Its officers. Before the case came on for trial the action was dismissed as to all of the defendants except Spanish Fork City and its officers. The dismissal was had pursuant to a motion of plaintiff, A. T. McKell. (R. 63). It

will be seen from the motion that the same was made and granted pursuant to a stipulation and the payment of the sum of \$2000.00 by Utah County and \$2000.00 with an appropriation made by the Legislature of the State of Utah. It will be noted that the motion and the order granting the same were with prejudice as to the parties against whom the same was dismissed, but without prejudice as to those against whom it was not dismissed; that is, without prejudice as to Spanish Fork City, its Mayor, City Councilmen and Superintendent of its Water Works. (R. 63 to 65). In its original answer Spanish Fork City and its officers alleged that they did not participate in the construction of the dyke except to permit some of the trucks belonging to the City to haul some of the gravel (under the direction of Utah County) onto the road extending east from the northeast corner of plaintiff's land. The City and its officers also alleged that plaintiff consented to the acts complained of and that the damage done was caused by an act of God, and by reason of the construction of a new channel resulting in draining off the water that had escaped from Spanish Fork River. (R. 41 to 44 and 49 to 52, both inclusive).

After the plaintiff had rested, the defendants over the objection of plaintiff, moved for leave to amend its pleading "to strike from the answer to the Amended Answer — it is paragraph — I don't know how they number it, but it says paragraph three on the third page. It starts there, "That at the time and times herein mentioned, the Spanish Fork River after it went under

the bridge or the State Highway 91, and so forth. The evidence certainly shows otherwise." The defendants further asked leave to add to their pleading as an affirmative defense, to put in here the words "That at the time the elevation of the road to the Northeast of plaintiff's property was raised a great flood emergency existed resulting from the flood from Spanish Fork River, and in order to protect themselves from a common enemy, the City of Spanish Fork furnished trucks to Utah County in an effort to raise the elevation of the county road" and allege as a further affirmative matter that they did what they had a right to do and that they had a right to do so." (Tr. 202-203) The motions were granted. (Tr. 203-204) and later on January 26, 1956 an amendment was filed. (R. 140-141)

A trial was had with a jury on the issues raised by the amended complaint with the amendment thereto and the answer of the defendant, Spanish Fork City and its officers. The Jury on November 19, 1955 found for the plaintiff and assessed her damage against Spanish Fork City in the sum of \$2072.00 (R. 123). Thereafter the court set aside the verdict and granted judgment in favor of the defendants and against the plaintiff, no cause of action. (R. 135-136)

The plaintiff by this appeal seeks a reversal of the judgment of the court below in vacating the verdict of the jury and granting defendant city judgment of no cause of action notwithstanding the verdict, and to have

re-instated the verdict and the judgment pursuant thereto.

While there is some conflict in the evidence as to the amount of damage sustained by the plaintiff on account of the forcing of the water complained of across plaintiff's land and some other minor matters, there is no substantial conflict in the evidence as to the facts which form the basis of plaintiff's complaint.

These facts are established without any conflict in the evidence :

During the winter of 1951 and 1952, there was more than the usual amount of snow fall on the water shed which drains into Spanish Fork River. In the late winter of 1952 it became apparent that there was grave danger of high water as soon as there was warm weather. It was anticipated that there would be flood waters about six weeks before the high waters actually come down. (Tr. 121-122). On April 2, 1952, the following appears in the minutes of the meeting of the City Council on that day:

“Mr. Parley Neeley, Ray Bradford, Wm. R. Jex, Orson Brown, Richard Taylor, S. A. Bradford, Dean Ludlow, Andrew Nelson and Garland Swenson met with the council to discuss the flood problem of our community. Mr. Wm. R. Jex was spokesman and Parley Neeley explained very thoroughly the problem we are faced with by means of a map, picturing the river district. Mayor reports that county would help if property holders would sign a waiver so that they can go in and work on any and all property.”

“Councilman Grotegut moved that the following be selected as flood control committee: Mr. L. B. Snell, Councilman Beck representing City, Wm. R. Jex, Garland Swenson, Bishop Harold Swenson, Ray Bradford and Dean Ludlow. They are to go ahead and meet with county and work out plans to do what is necessary for the flood control agreeable to all property owners concerned. They are to select their own chairman. Seconded by Councilman Isaac. Vote unanimous.” (Trs. 92-93)

On April 11, 1952, the following appears in the Minutes of the City Council of Spanish Fork City:

“Councilman Anderson moved that we go along with County and State in \$2000.00 each on dyke road and do all we can to cooperate with County and State in construction of road dyke and to authorize Mayor and Recorder to sign county agreement. Seconded by councilman Isaac. Vote Unanimous.” (Tr. 93)

An agreement was signed along in June and July 1952, see defendants' Exhibit 1.

By an instrument dated April 2, 1952, some of the property owners along Spanish Fork River signed what is designated as a Release. The original plaintiff in this action, Arthur T. McKell, was among the signers. The instrument is marked Exhibit D. 39. Such instrument in part provides:

“That we, property owners, along Spanish Fork River in Sections (naming them) and also property owners along the canals and tributaries, of the Spanish Fork River in the above sections,

do hereby release the State of Utah, Utah County, the United States of America through the U.S. Engineers and the City of Spanish Fork from all liability for damages to any real or personal property owned by the signers hereto in the above described sections along the Spanish Fork River, or along its canals and tributaries, by reason of work done or by or at the instance of any of the above described bodies politic, in dredging, cleaning, sand-bagging, doing revertment work and bank protection, removing debris, removing other obstructions, or doing any other work to alleviate flood conditions or present flooding from the Spanish Fork River or any of its canals or tributaries or drainage system fed by the Spanish Fork River."

In his deposition which was read to the jury (Tr. 97-99) because Mr. A. T. McKell was dead at the time of the trial, he testified concerning what was said when the so called above mentioned Release was signed as follows:

That he did sign permission to take heavy equipment across his land to the river to clean out the river; that he was asked if he would sign this slip; that Mr. McKell said "Bishop, this is in case of wanting to get to the river with heavy equipment" (which was on the west of his land) . . . " is just permission to cross your ground. "That he read the agreement before he signed it (Deposition of A. T. McKell, pages 18 and 19) Mrs. McKell testified that she was present when the so-called release was signed by her husband and that at that time Mr. McKell was told by Mr. Swenson, who brought the so-called release to the home of the plaintiff, that the

purpose of signing the instrument was to get consent to take heavy equipment over plaintiff's land that they were going to clean out the river. (Tr. 195) Mr. Swenson was questioned about the circumstances surrounding the signing of the so-called release, but his testimony does not shed much light on what was said at the time Mr. McKell signed the same. His testimony is not in conflict with that of the McKells. (Tr. 302-304)

Spanish Fork River began flooding over the adjoining lands to the north and west of its channel in April 1952 and continued into the month of May 1952. It is so alleged in the Amended Complaint, (R. 22) and so admitted in defendants' Answer thereto. (R. 41) The evidence shows that the flood water that caused the damage complained of occurred during the latter part of April and the early part of May. (See testimony of Frances Lundell (Tr. 105): deposition of A. T. McKell, page 4 & 5; testimony of Arthur M. McKell, Tr. 188)

At and before the time involved in this controversy there was a canal extending along the east boundary of the McKell property, along the east banks of which was a growth of willows and briars. (Tr. 6-7 and also Trs. 101). The slope of the land to the east of the plaintiff's property was towards the east and north. (Tr. 106; Tr. 79; Tr. 54 to 59) Spanish Fork City is and at all times complained of was the owner of a tract of land and improvements thereon to the south and just outside of the city which the city leased for \$150.00 a year for a stock sale and sheds (Tr. 289) Such property is about

2900 feet northwest of the McKell property (Tr. 61) and is about 15 feet 4 inches lower than the northeast corner of the plaintiff's property. (Tr. 58)

There is a slight conflict in the evidence as to whether or not the plaintiff consented to the blasting of holes through the banks of the canal which marked the east boundary line of plaintiff's property. Plaintiff A. T. McKell said he did not so consent. (Deposition of Mr. McKell, page 38) Mr. Wm. Jex testified that Mr. McKell asked him if something could not be done to contain the water in one channel. (Tr. 255 to 256) Sometime after April 2, 1952 (Tr. 17) the exact date does not appear, some of the officers of Spanish Fork City, Utah County, and the State Road Commission entered into an oral arrangement whereby the road extending east from the northeast corner of plaintiff's land should be raised and the expense therefor was to be paid in equal amounts by Utah County, Spanish Fork City and the State Road Commission, for the purpose of raising the road which extended to a hill about 1/3 of a mile east from the northeast corner of plaintiff's land. The estimated cost of this work was about \$6000.00. Each of the parties were to furnish some equipment. (Tr. 13 to 17). Pursuant to such agreement the road was raised about 2 feet on the east end thereof and about 4 feet on the west end. (Tr. 26) As a result of raising the road, the water was forced over plaintiff's property. The water which escaped from the Spanish Fork River had spread over a large area of land to the east of plaintiff's property before it reached the dyke

road, that is to say, the road was a little over $1/3$ of a mile long. (Tr. 191) There were 3 culverts under the road. They were 12 inch culverts, one of which was covered up. (Tr. 192) The water that escaped from Spanish Fork River had flowed some distance from the river before it reached the road which was raised. Mayor Nielson estimated the distance at from 40 to 80 rods. (Tr. 282)

Soon after the road was raised it became apparent that great damage was being done to the plaintiff's property by the large quantity of water that was being forced over the same.

Wm. R. Jex who had been active in a plan whereby his property would be saved from flooding secured some powder to enable Frances Lundell to do some blasting on plaintiff's property. (Tr. 101) Mr. Lundell put in a number of blasts whereby a channel was cut through the banks of the canal which formed the east boundary of plaintiff's land and also through plaintiff's land to the river. (Tr. 103) By that means a channel was cut through plaintiff's land in which the water was concentrated (Tr. 104) That blasting was done about May 5th or 6th. (Tr. 105). Arthur McKell expressed it as his opinion that if it had not been for the dyking of the road his property would not have been damaged and that he could have saved the washing away of the land next to the river if it had not been because the large amount of water that was accumulated next to the dyked road and forced over his land prevented him from getting

onto his land with equipment and cutting down trees that were growing along the banks of the river. We quote a portion of his testimony touching that matter:

“If I could have gotten across (the water flowing over the northern part of plaintiff’s land) why I think there is some land on the west, the northwest corner, I could have saved, by dropping those trees along the bank, there were trees available for that purpose.”

That he had lived on a ranch where he had a lot of flood water to contend with. That he had a fraction over 25 acres of land in the premises involved in this action. Deposition of Arthur T. McKell, Trs. 8-9. He thus described the damage done to his land:

The land was worth \$600.00 per acre, some land just north of his land sold for that amount per acre. (Dep. 9-10) That the following improvements and personal property was washed away. A manure spreader of the value of \$60.00, a hay rake of the value of \$50.00, a spring tooth of the value of \$25.00, a harrow of the value of \$25.00. The corral and yard of the value of \$1,412.26. That he had been engaged in the lumber business for 36 years and knew the value of lumber; that the material in the feed manger had a value of \$408.75 (Tr. 11) That the fence which was washed away had a value of \$240.00 of which he should get 80% from the government (Tr. 12) That he had not received anything from the government; that the government charged \$1300.00 for leveling the land for which he was to pay \$330.00. (Tr. 13) That in addition to the \$240.00 for fences, there was

\$560.15, making a total of \$800.15, (Tr. 14) That the flowing well was broken off by the flood and to drill a new well would cost about \$500.00. (at the time of the trial the well had been repaired at a cost of \$125.00 (Tr. 197)). The witness was not certain as to the number of acres of land that was washed away. He gave it as his opinion that about one-half of his land was washed away and that not washed away was depreciated in value 25%. (Tr. 16) That the value of the land, the top of which was washed away was of little value, probably not over \$100.00 (Depos. 17)

Other evidence offered by plaintiff at the trial came from Lawrence M. Atwood, a real estate broker, who was sent over by Utah County to appraise the damage done to the McKell property. He placed the value of the land at \$600.00 per acre. (Tr. 37). He further testified that between 3 and 4 acres of land were washed away by reason of the water being forced over plaintiff's land. (Tr. 37). Other testimony touching the damage done to the plaintiff's property was given by Mark McKell who testified that no crops could be grown on the property here involved in either 1952 or 1953 except about 3 acres. (Tr. 144) That only about 15 acres of land was saved from the 25 acres. (Tr. 145) Evidence was also offered and received as to the productivity of the land before it was damaged by having the top soil removed. See testimony of Arthur T. McKell (Tr. 185-186 and testimony of S. R. Boswell (Tr. 124-129.) Numerous photographs of the McKelly property were received in evidence from which the damage done can

be seen. There is other evidence touching the amount of damage sustained by reason of the water having been forced over plaintiff's land, but at this time we refrain from discussing the same in greater detail because we do not know the basis for the court granting defendant city a judgment notwithstanding the verdict. Suffice it to say that the evidence shows that plaintiff was damaged in the following amounts: About \$2000.00 for the machinery and improvements washed away, in excess of \$2000.00 for the land washed away, about \$3000.00 in damage to the land not washed away, and another \$2000.00 or more due to the fact that the land not washed away did not produce any crops because of its being leveled.

As we understood the situation at the time the matter was argued in the lower court, the judgment rendered by the court was not because the evidence did not establish the amount of damage found by the jury. That being so, probably no useful purpose will be served at this time, by a further discussion of that phase of the case. Should defendant city make the claim that the evidence as to the matter of damages is not sufficient to support the verdict of the jury, we can probably meet such contention in a reply brief.

ARGUMENT

An examination of the various pleadings and motions filed in this case will reveal that the defendant city has advanced a number of theories upon which it has based its defense to the action brought against it and

then has apparently abandoned such defense and shifted to other and at time inconsistent defenses. Thus under date of March 23, 1953 the defendant city moved to dismiss the action because the acts complained of were committed beyond the city and therefore ultra vires. (R. 59).

The next motion filed by defendant city was to dismiss the action set out in the amended complaint because the facts therein alleged were ultra vires and were done as a governmental function. (R. 60) By its next motion, the defendant city sought summary judgment. (Tr. 68) In its original answer to plaintiff's amended complaint, the defendant city sets up as an affirmative defense that it did not participate in the performance of the acts complained of except that some of the trucks belonging to Spanish Fork City were used by Utah County to haul the gravel to raise the road extending easterly from plaintiff's land; that the plaintiff consented to the doing of that which was done by the defendants who were released from any damage that may have been done by the acts complained of; that the damage done to plaintiff's land was an Act of God; that the damage complained of was caused by the straightening of the river channel below the McKell property; that the officers were too busy trying to save its spring water to devote any time with respect to the handling of the water that flowed across plaintiff's land; that the water which was forced over the plaintiff's land was brought about by a wire fence along the south side of the road which was raised against which fence

weeds, paper and debris lodged causing the water to be diverted across plaintiff's land. (R. 41-44) After the plaintiff had offered its evidence and rested, the defendant city asked and was granted leave to strike its allegation to the effect that plaintiff's damage was caused by the straightening of the river below the McKell land, and to amend the pleading by alleging that "at the time the elevation of the county road was raised, a great flood emergency existed resulting from the threatened flood of the Spanish Fork River and in order to protect itself and others from a common enemy and disaster, the city of Spanish Fork participated with Utah County in raising the elevation of the county road and further allege that it had a right under the law so to do in order to save itself from a common enemy." (R. 140) It will be noted that the amendment was made long after the action was concluded. We, of course, are mindful that a defendant may assert and rely upon as many defenses as he or it may desire, but we do contend that the court abused its discretion in permitting the amendment that was allowed after the plaintiff had concluded its evidence and rested.

We are at a loss to know the exact basis of the judgment appealed from. That is the judgment awarding the defendant city a judgment of no cause of action notwithstanding the verdict of the jury. However, we shall discuss those matters which apparently the court below had in mind in rendering the judgment appealed from under the following points.

STATEMENT OF POINTS

POINT ONE

THE TRIAL COURT ERRED IN PERMITTING THE DEFENDANTS TO AMEND THEIR PLEADING BY STRIKING FROM THE COMPLAINT THE ALLEGATIONS TO THE EFFECT THAT THE DAMAGE SUSTAINED BY THE PLAINTIFF WAS CAUSED BY A CHANGE IN THE COURSE OF THE RIVER AND SUBSTITUTING THEREFOR THE ALLEGATION THAT THE DEFENDANT CITY HAD A RIGHT TO DO WHAT WAS DONE BECAUSE OF THE EXISTENCE OF AN EMERGENCY TO PROTECT ITS PROPERTY FROM A COMMON ENEMY (Tr. 140).

POINT TWO

THE EVIDENCE DOES NOT SHOW THAT THE PLAINTIFF RELEASED THE DEFENDANT CITY FROM LIABILITY ON ACCOUNT OF THE DAMAGE COMPLAINED OF.

POINT THREE

UNDER THE EVIDENCE IN THIS CASE, THE DOCTRINE OF GOVERNMENTAL FUNCTIONS IS NOT INVOLVED.

POINT FOUR

THE EVIDENCE IN THIS CASE DOES NOT, AS A MATTER OF LAW OR AT ALL, JUSTIFY THE VACATING OF THE VERDICT OF THE JURY AND THE GRANTING OF A JUDGMENT FOR THE DEFENDANT CITY NOTWITHSTANDING THE VERDICT BY REASON OF AN EMERGENCY.

POINT FIVE

THE EVIDENCE IN THIS CASE DOES NOT, AS A MATTER OF LAW OR AT ALL, JUSTIFY THE VACATING OF THE VERDICT OF THE JURY AND THE GRANTING OF A JUDGMENT NOTWITHSTANDING THE VERDICT

UNDER THE DOCTRINE THAT FLOOD WATER IS A COMMON ENEMY AGAINST WHICH A LAND OWNER MAY DO WHAT WAS HERE DONE TO PROTECT ITS PROPERTY.

POINT SIX

THE PLAINTIFF IS ENTITLED TO THE AMOUNT AWARDED TO HER BY THE JURY BY REASON OF ARTICLE ONE, SECTION 22 OF THE CONSTITUTION OF UTAH WHEREIN IT IS PROVIDED THAT "PRIVATE PROPERTY SHALL NOT BE TAKEN OR DAMAGED FOR PUBLIC USE WITHOUT JUST COMPENSATION."

In light of the amendment to the answer of the defendant city to the effect that it assisted in raising the road in question to protect itself and others (R. 140), we assume that no reliance is had on the allegation of its answer before the amendment was allowed and made, that in the original allegation to the effect that the city did not participate in the raising of the road (R. 41-44).

POINT ONE

THE TRIAL COURT ERRED IN PERMITTING THE DEFENDANTS TO AMEND THEIR PLEADING BY STRIKING FROM THE COMPLAINT THE ALLEGATIONS TO THE EFFECT THAT THE DAMAGE SUSTAINED BY THE PLAINTIFF WAS CAUSED BY A CHANGE IN THE COURSE OF THE RIVER AND SUBSTITUTING THEREFOR THE ALLEGATION THAT THE DEFENDANT CITY HAD A RIGHT TO DO WHAT WAS DONE BECAUSE OF THE EXISTENCE OF AN EMERGENCY TO PROTECT ITS PROPERTY FROM A COMMON ENEMY (Tr. 140).

We are mindful that a trial court has a discretion to allow amendment of pleadings, and that under Rule 15b of the Utah Rules of Civil Procedure an amend-

ment may be made at any time, even after judgment, to cause the pleadings to conform to the evidence. However, in this case the defendant city in its answer (R. 43) alleged that by reason of changing the course of the river and lowering the same "10 or 12 feet this made a heavy draw and washed out the plaintiff's land and other lands above the highway 91; had this not been lowered, the plaintiff would not have suffered very much damage and said river would have drained off slowly and the cutting of the banks and the land would not have occurred."

Even in those states such as California where the doctrine of the right of a property owner to take measures to protect his property against flood waters, such right must be exercised reasonably and without negligence. *House vs. Los Angeles County Flood Control District*, 153 Pac. (2d) 950. In this case, the sudden lowering of the channel of the river some ten or twelve feet below plaintiff's land resulting in the damage, complained of, might well have constituted negligence. While the evidence does not show just what part, if any, the officers or employees of the City took in the work of lowering the channel of the river, the evidence does show that the City entered into an arrangement with Utah County and the State Road Commission to take over the control of the flood water. See testimony of Mr. Elmer, Tr. 9. By granting the motion of defendant City to strike such allegations, especially after plaintiff rested, deprived her of a right to rely upon such allegations as an admission of the defendant City that might

well have constituted negligence. The mere fact that the City may not have directly participated in the sudden lowering of the channel of the river, to plaintiff's damage, does not relieve it from liability. 52 Am. Jur. 454 and 455, Sections 114, 115 and 116, and cases cited in footnotes.

POINT TWO

THE EVIDENCE DOES NOT SHOW THAT THE PLAINTIFF RELEASED THE DEFENDANT CITY FROM LIABILITY ON ACCOUNT OF THE DAMAGE COMPLAINED OF.

Defendant City claims that it was released from the damages complained of by reason of the language contained in Exhibit D. 40 which reads thus: "That we . . . hereby release . . . the City of Spanish Fork from all liability for damage to any real or personal property owned by the signers hereto in the above described sections along Spanish Fork River or along its canals and tributaries, by reason of work done by or at the instance of the above described bodies politic in dredging, cleaning, sandbagging, doing revertment work and bank protection, removing debris, removing other obstructions, or in doing any other work to alleviate flood conditions or prevent flooding from Spanish Fork River, or any of its canals or tributaries, or drainage system fed by the Spanish Fork River."

The plaintiff is not here complaining because of the doing of any of the acts specified in the above mentioned document. The only language that even remotely may be said to release the City from the acts complained of

are the general provisions contained in the latter portion of the language above quoted. The well recognized rule of "ejusden generis" prevents the defendants from making any such a claim. *W. S. Hatch Co. vs. Public Service Commission*, 3 Utah (2d) 7; 277 2nd Pac. 809. That rule is especially applicable here. It is obvious that Mr. McKell signed the instrument so that his property might be protected from the high waters of the river and was never intended as a permission to destroy his farm, the improvements thereon and farming equipment. The language used is clear as to the purpose sought by the permission granted. Moreover, if it should be claimed that the language is uncertain, the testimony heretofore referred to of Mr. McKell at the time he signed the instrument shows what was intended.

POINT THREE

UNDER THE EVIDENCE IN THIS CASE, THE DOCTRINE OF GOVERNMENTAL FUNCTIONS IS NOT INVOLVED.

During the early stages of this action the defendant City seemed to rely upon two propositions, namely, that even if the officers of the City were liable, the City could not be held to respond in damages because under the facts alleged, the acts complained of were done in the performance of a governmental function and in any event the acts were done outside of the corporate limits of the city.

There are two reasons why the acts complained of do not come within the doctrine which precludes a re-

covery from a City for acts performed in furtherance of a governmental function. They are: When a City takes or damages property for a public purpose, it is no defense to say that the same was done in furtherance of a governmental function. The provisions of Section 22 of Article one of the State Constitution makes no such distinction. The maintenance and protection of property which is leased for a stock sale is not the performance of a governmental function. McQuillin on Municipal Corporations, 2nd Ed. Vol. 6, Sec. 2793, where it is said that: "A distinction must be drawn, however, between injuries to property rights and other injuries, since if the officers of a municipality in the discharge of its governmental functions and police power invade property rights, the doctrine of respondeat superior applies and the corporation is liable for their acts." Numerous cases are cited in a footnote to the text above quoted which support the doctrine therein announced. We have found no case holding that if property is taken or damaged for a public purpose, no recovery may be had if such taking or damaging is for a governmental purpose. We doubt that any such case can be found where there is a constitutional provision such as Article One, Section 22 of our State Constitution. The fact that the acts complained of were performed outside of the City would seem to be immaterial. The City may take such measures as are necessary to protect its property outside of the City as well as that which is within the City. It is so provided in U.C.A. 1953—10-8-2.

POINT FOUR

THE EVIDENCE IN THIS CASE DOES NOT, AS A MATTER OF LAW OR AT ALL, JUSTIFY THE VACATING OF THE VERDICT OF THE JURY AND THE GRANTING OF A JUDGMENT FOR THE DEFENDANT CITY NOTWITHSTANDING THE VERDICT BY REASON OF AN EMERGENCY.

An emergency as that word is generally understood and as defined by the adjudicated cases is a sudden unexpected occurrence which calls for immediate action to avoid an imminent peril. 29 C.J.S. 760-762 and cases there cited. The evidence in this case falls far short of measuring up to the elements necessary to constitute an emergency. It was generally known in March, 1952 at least six weeks before the high water came down Spanish Fork River that high water would occur. See testimony of Francis Lundell (Tr. 121-122). The testimony of Mayor Nielson is to the same effect (Tr. 294). Moreover on April 2, 1952, William R. Jex and Parley Neeley very thoroughly explained the flood problem (Tr. 92). Nothing was done, however, towards protecting the McKell property, but on the contrary when action was taken, it was calculated to and did cause very substantial damage to plaintiff's property. Moreover, if the testimony given by Mayor Nielson is to be believed, no substantial damage would have been done if the water had been permitted to take its natural course. Mayor Nielson testified:

“If there hadn't been any work done on the road at all, it would have changed the flood situation by very little. Some water, maybe, would have gone over the road, but not enough to have

hurt anybody else. There was a woven wire fence on the south side of the road that the county raised and debris of all sorts piled up against that and, of course, coursed the water back towards the river" (Tr. 299).

The evidence shows that Mr. Wm. R. Jex was the principal person who was concerned about raising the road because he was afraid of some construction work he was doing would be flooded. He was fearful that his property might be flooded as early as March 1, 1952. Mr. Neeley was also apparently interested because he owned property near that of Mr. Jex which was in the southwest corner of Spanish Fork City (Tr. 258-259). We do not contend that some water would not have found its way into portions of Spanish Fork City and across the land owned by Spanish Fork City which it leases for the purpose of conducting stock sales thereon, but we do contend that the plaintiff may not be required to bear the whole burden, without being compensated therefor, of the damage done to her property in order to save from damage the property of others that might have been damaged if the water had been allowed to take its natural course.

POINT FIVE

THE EVIDENCE IN THIS CASE DOES NOT, AS A MATTER OF LAW OR AT ALL, JUSTIFY THE VACATING OF THE VERDICT OF THE JURY AND THE GRANTING OF A JUDGMENT NOTWITHSTANDING THE VERDICT UNDER THE DOCTRINE THAT FLOOD WATER IS A COMMON ENEMY AGAINST WHICH A LAND OWNER MAY DO WHAT WAS HERE DONE TO PROTECT ITS PROPERTY.

There is well established conflict in the adjudicated cases dealing with what may and what may not be done by a land owner to protect his property from flood waters. Indeed the authorities are not in accord as to when waters escaping from a natural channel cease to be regarded as flood waters. The question as to what may and what may not be done to control waters escaping from a natural channel has been before the courts on numerous occasions, both in the United States and in England. California seems to have more than its share of such cases. It is apparently the well settled law in the State of California that the flow of surface water may not be interfered with. That is to say, the owner of the higher lands has an easement over the lower land to have the water from the upper land flow over the lower lands without interference that will injure the upper lands, and so also, the upper land owner may not change the manner in which the water is wont to flow off his land to the injury of the lower land owner. It also seems to be the settled law in California that one whose lands abut a river may protect himself against flood waters notwithstanding barriers erected may cause flood waters to rise higher or flow with greater force on a neighbor's land. Among the cases from California so holding are *LeBrun vs. Richards*, 210 Cal. 308, 291 Pac. 825, 72 A.L.R. 336; *Archer vs. City of Los Angeles*, 119 Pac. (2d) 1, in which numerous California cases are reviewed and in which there is a long dissenting opinion of two of the justices of the Supreme Court of California. The case of *O'Hara vs. Los Angeles County Flood*

Control District is to the same effect. 119 Pac. (2d) 23, in which the justices divide as they did in the Archer case.

It will be seen from those cases and other cases cited therein that surface waters are those resulting from rain and snow falling upon the land, while flood waters are those which overflow the banks of a river or lake. It will also be noted that in California one may not lawfully impend the flow of a natural stream if to do so results in an injury to other land owners.

The law as announced by the California courts and some others is in direct conflict with the law in other jurisdictions. Thus, while in California, one may not interfere with the natural flow of surface water, in Washington surface waters are held to be a common enemy from which a land owner may do what is reasonably necessary to protect his property against the same. It is also held in some jurisdiction that waters which escape from a river at time of a flood are surface waters and not waters of a stream, and a property owner may defend himself against the same, although to do so may cause injury to others who have done nothing to protect themselves. *Harvey vs. Northern Pac. Ry. Co.*, 116 Pac. 464. In the case of *Keck et al v. Venghause, et al*, 127 Iowa 529; 103 N.W. 773, it is held that a riparian owner may not embank against the natural overflow from an inland stream where the effect is to cause an increased volume of water on the lands of another. To the same effect are *Mouvaisterre Drainage and Levee Dist. vs. Wabash Ry. Co.*, 299 Ill. 298, 132 N.E. 559;

O'Connell vs. East Tennessee G. R. Co., 87 Ga. 246; 13 N.E. 489. In the case of *Sullivan vs. Dooly*, 31 Tex. Civ. App. 589; 73 S.W. 82, it is held that no distinction may be made between surface and flood waters and that the rights of the parties is to be determined by the contour of the territory, and that no change may be made to the damage of another. That under the common law one must so use his own property as not to damage the property of another.

In the case of *Fordham vs. Northern P. R. Co.*, 50 Mont. 729; 76 Pac. 1040, it is held that water which overflows the banks of a river is still a part of the stream and may not be interfered with. Cases dealing with the question here presented will be found collected in 16 A.L.R. 629; 22 A.L.R. 944 and 81 A.L.R. 262. See also 40 A.L.R. 848.

We have not attempted to review the numerous cases dealing with the questions here presented. To do that would extend this brief far beyond the length that this court has indicated should be the limit of a brief. So also the court will doubtless discover from a reading of the cases cited that the same are in hopeless conflict as between different jurisdictions and at times in the same jurisdiction. Moreover, the facts in this case are such that it becomes unnecessary to follow any of the various conflicting doctrines announced by the adjudicated cases. Thus, it is the established law in states which adhere to the doctrine that flood waters are a common enemy and as such a property owner may take such reasonable measures as are necessary to protect

his property against such waters that he becomes liable if he is negligent in performing such work. *House vs. Los Angeles County Flood Control District*, 153 Pac. (2d) 950.

While in this case there may well be an absence of negligence in the manner in which the road running east from the northeast corner of plaintiff's land was raised, there could not well be any question about the defendants being negligent in failing, for a period of six weeks after they knew the danger of flood waters, to do anything to prevent damage from the flood. The defendants sought and was granted a license to go upon the river and do the necessary work to prevent damage to itself and the owners of the land abutting on the river about three weeks before the situation became serious. Aside from that the defendants wilfully raised the road to intercept the water escaping from the river and cast it onto the McKell property at the northeast corner thereof.

Some of the witnesses, particularly Mayor Nielson of defendant city who testified that he knew that the road was being raised to divert the water across McKell's land back into the river. I don't think it was to divert it across McKell's land (Tr. 282). To the same effect is the testimony of Mr. Lewis (Tr. 314), of Ed M. Beck (Tr. 317) Bert D. Isaac (Tr. 320). He stated that at the council meeting it was discussed that they should be careful not to trespass on private property (Tr. 320) and of Mr. Anderson (Tr. 316). The minutes of the city council of the defendant city show that the city undertook

to aid in raising the road (Tr. 92-93), and finally after plaintiff's evidence was all in, the defendants asked for and were granted leave to amend their pleadings and allege that the city did aid in doing the work of raising the road (Tr. 202-204). It is thus apparent that the defendant city was a party to the infliction of the damage complained of. There was some controversy as to whether or not the plaintiff authorized the dynamiting on plaintiff's land. In light of the fact that it is made to appear that the dynamiting was made necessary to minimize the damage to the McKell property, it would seem that it is not material as to whether McKell did or did not authorize something to be done to reduce the amount of damage.

Returning to the law applicable to a state of facts such as are here presented, we direct the attention of the court to the case of *Roosevelt Irr. Dist. v. Beardsley Land and Investment Co., et al.*, 282 Pac. 937, 36 Ariz. 65, and cases there cited. In that case an irrigation canal had been constructed and in order to protect the same against water that came from the higher ground adjacent thereto, an embankment was constructed parallel to the canal to intercept water that might flow against and destroy the canal. The water so intercepted was carried some distance by the embankment and cast upon the lands at or near the end of the embankment. While Arizona adheres to the same doctrine as California as to flood waters, the Supreme Court of Arizona in disposing of the case said that there is a manifest distinction between casting waters upon anothers land and preventing the flow of water upon your own land. The

evidence in this case conclusively shows that the raising of the road was intended to and of necessity did cast the water onto the McKell land. There was no where else that it could go. The defendant city may not be heard to say that it did not intend the results that were brought about by the raising of the road.

The defendants seem to place some importance as to the matter of whether or not they actually entered upon plaintiff's premises. If an actual entry had been made on the McKell premises and a canal excavated to the river, doubtless less damage would have been done than was done by turning the large quantity of water thereon and then let the water cut its way to the river and wash away much more land that it would have done if a channel had been excavated. Needless to say to thus turn water onto the land of another constitutes a trespass. 87 C.J.S. 966 and cases there cited.

Before leaving this phase of the case, we again direct the attention of the court to the evidence which shows that the land was higher along the east boundary of plaintiff's land than was the land farther east. That there was a canal extending along the east boundary of plaintiff's land so that the road had to be raised about four feet to force the water across plaintiff's land. If the doctrine of the right to ward off flood waters is applicable to the facts in this case, it follows that McKell had such right, as well as the city. We wonder what would have happened if McKell had not been confined to his home because ill and had gone out with trucks to

compete with the city to see which could build the higher embankment.

POINT SIX

THE PLAINTIFF IS ENTITLED TO THE AMOUNT AWARDED TO HER BY THE JURY BY REASON OF ARTICLE ONE, SECTION 22 OF THE CONSTITUTION OF UTAH WHEREIN IT IS PROVIDED THAT "PRIVATE PROPERTY SHALL NOT BE TAKEN OR DAMAGED FOR PUBLIC USE WITHOUT JUST COMPENSATION."

Since the amendment of the City; pleading was made to the effect that the road was raised to protect the property of the defendant from the flood waters of Spanish Fork River and the evidence shows such to be the fact, it would seem that this case resolves itself into two issues, namely the question of law: Do the facts bring this case within the protection of Article One, Section 22 of the Utah Constitution, or does it as a matter of law fall within the Police Power of the defendants, and the question of fact as to the damage sustained by the plaintiff?

We have heretofore in this brief directed the attention of the Court to the evidence of the damage sustained by the plaintiff. The amount of damages awarded to the plaintiff is much less than the evidence would sustain, but the plaintiff does not raise any question of its being inadequate. It is plaintiff's position that the facts in this case falls far short of bringing it within the doctrine of the police power.

If we accept the testimony of Mayor Nielson viewed

in the light of what would have happened if the road had not been raised, it would lead one to the conclusion that the raising of the road was not even necessary (Tr. 299). To the same effect is the testimony of the members of the City Council (Tr. 314, 316, 317 and 320). It would be stretching the police power far beyond the breaking point to say because some water would flood over part of Spanish Fork City, that a calamity or catastrophe would flow therefrom. Had it not been that the water which was forced over the McKell property was concentrated in a large stream with a precipitable slope toward the river, it is doubtful if any substantial damage would have been done to the McKell property. Nor does the evidence support the claim that there was an emergency when viewed in the light of the fact that it was known for at least six weeks before high water came that it would come. If an emergency existed at the time the flood came, it was in part at least the product of the defendant City in that it failed to take steps to prepare for the flood until long after the same became apparent, and even then without any reason being made apparent, they devoted their time and energy in building up the road instead of doing what was necessary and what they were authorized to do by making the channel of the river able to carry the additional water.

It is of course the law that the primary function of the exercise of the police power is to regulate the use of property not to damage or confiscate the same except in case of dire necessity. Lewis, on Eminent Domain, 3 Ed., Vol. 1, Sec. 6, pages 13. See also discussion in the case

of *Archer v. City of Los Angeles*, 119 Pac. (2d) 20 and the case of *O'Hara v. Los Angeles County*, 119 Pac. (2d), 23.

In this case it would appear that the duly constituted County Commissioners of Utah County and the State Legislature of Utah thought that this was a case where the McKells were entitled to be paid for the damage sustained. Otherwise they would not have paid them what they thought was their just proportion of such damages. It was Spanish Fork City, through its officers, that originally urged that action be taken which resulted in the damages to plaintiff's property. There is every reason why the defendant City should not be permitted to escape paying its just share of the damages. That the defendant City may be required to respond in damages by an action against it under the Doctrine of Eminent Domain, even if it does not formally bring an action in condemnation, seems to be well and universally settled. *O'Hara vs. Los Angeles City*, supra.

It is submitted that the judgment vacating the verdict of the jury and rendering judgment in favor of the defendant City should be reversed and the Court then should be directed to reinstate the verdict of the jury and to render judgment in conformity therewith and that appellant should be awarded her costs herein expended. Appellant prays that this court so direct.

Respectfully submitted,

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