2007

Arthur R. Lasson v. Justus O. Seely : Brief of Appellant

Utah Supreme Court

In the Supreme Court of the State of Utah

ARTHUR R. LASSON,
Plaintiff and Respondent,

vs.

JUSTUS O. SEELY,
Defendant and Appellant.

NO. 7603

APPELLANT'S BRIEF

Appeal from the District Court of Sanpete County, State of Utah.

Hon. Leland L. Larsen, Judge

DILWORTH WOOLLEY,
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Manti, Utah.

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In the Supreme Court of the State of Utah

ARTHUR R. LASSON,
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vs.

JUSTUS O. SEELY,
Defendant and Appellant.

NO. 7603

I.

STATEMENT OF FACTS

Plaintiff brought this action to recover damages and for an injunction, alleging in his complaint that defendant had placed a dam in Panawats slough, which he threatened to maintain, and thus deprived plaintiff of the use of water for irrigation purposes to which he had a right. (JR 1)

Defendant in his answer and counterclaim, while admitting that he did place the dam in the slough on his own land, denied that he thereby deprived plaintiff of the use of any water or damaged him; and alleged that plaintiff trespassed on defendant's land by entering thereon with-

out the consent of defendant and removing the dam, for which trespass he demanded judgment for damages against plaintiff. (PR 8)

The trial court found the issues in favor of plaintiff (JR 16) and awarded him judgment for damages and costs and enjoined defendant from maintaining the dam. (JR 24)

Defendant made a motion for a new trial (JR 30), which was overruled on September 26, 1950, and defendant appeals from the judgment. (JR 34)

Appellant Seely is the owner of the south half of the south half of Section 5, Township 12 South, Range 4 East, S. L. M., in Sanpete County, Utah; subject to rights of way for railroad, state highway and a county road. His title is in fee simple. Patent therefor was issued by the United States to William H. Seely on his homestead entry on August 6, 1878. The patent contains the usual reservations found in all such instruments since 1866 that the title is subject to vested water rights and ditch and reservoir rights acquired under local laws and customs. (Tr. 4-5). But there are no ditches or canals or reservoirs on this land with which this case is concerned.

Panawats slough is a natural stream of water which flows from south to north across Seely's west forty. Lasson is the owner of the right to the use of the waters of the slough for irrigation purposes at all times material to this case. His point of diversion from the slough is somewhat over three-fourths of a mile north and down stream from Seely's north boundary, and about one mile from the dam which Seely placed in the slough.

The slough has its source in springs which arise on the forty adjoining Seely's west forty on the south. The run-off of irrigation waters applied to Seely's lands lying to

the east of the dam and to lands lying south of his land, and the runoff of the rains and melting snows which fall upon Seely's land, and the percolating waters from all of those lands drain into the slough on Seely's land.

The natural or normal flow of Panawats slough, after the high water season, which usually ends about the 15th of June, is about 0.51 c. f. s., according to a series of measurements made by Lasson over a weir a short distance above his point of diversion. (Tr. 117, 150, 214, 215)

The natural flow of the stream is augmented by the runoff from Seely's lands. (Tr. 301, 309, 136) At times during hot days there is not sufficient water in the stream from the natural flow to reach Lasson's point of diversion. (Tr. 184)

Panawats slough, where it crosses Seely's west forty, used to be a swale with gently sloping banks. At the point where the dam was placed the slough is 80 feet wide from crest to crest and 6.4 feet deep; at a point about midway between the dam and the north boundary it is 55 feet wide from crest to crest and 6 feet deep; and at the north boundary it is 62 feet wide from crest to crest and 4.6 feet deep. (Ex. 1 and Tr. 240) Floods which came down in 1924 and 1941 (Tr. 241) cut a gulch or channel with vertical banks in the bottom of the slough. This gulch at the dam is 15 feet wide and 3.4 feet deep; at the middle point it is 18 feet wide and 4 feet deep; and at the north boundary it is 20 feet wide and 1.6 feet deep. (Ex. 1 and Tr. 188, 233, 240, 273) The cutting of this gulch, which is so deep under the railroad bridge that a man can ride a horse under the bridge (Tr. 18), resulted in damage to Seely's land. The tract in the west forty, which lies west of the railroad track, was bisected. The part east of the slough was made un-

available for pasture because livestock cannot cross the gulch. The tract west of the slough and back to the foothills cannot be irrigated unless water is carried across the slough. The whole tract was drained and the pasture injured. (Tr. 299, 243)

Seely purchased the property in 1947. In the spring of 1948, when he was cleaning up around the place, he instructed his hired men to dump the collected trash in the slough, which they did at a point 224 feet west from the railroad bridge where there had been a dam years before. (Tr. 286) It was his intention to place a series of dams in the slough on his own land, to the height of the perpendicular banks of the gulch which had been caused by the floods. His idea was to restore the slough to its ancient condition. By so doing he hoped to repair the damage which had been done to his land by the floods and to prevent further damage from additional erosion, to be able to make use of the pasture between the slough and the railroad right of way by filling in the slough up to the top of the steep banks so that cattle can cross over, to retard the drainage of his pastures adjacent to the slough so that the grass will not dry out, and be enabled to carry some of his irrigation water across the slough to sub-irrigate the tract of about two acres of meadow on the west of the slough.

FINDINGS OF FACTS

The findings of fact, omitting the captions and recitals, are as follows:

> "1. That the Panawats Slough is a natural water course with well defined bed and banks in and through which water has flowed for more than 50 years last past and for a time to which memory of men runneth

not to the contrary; and all waters gathered therein from all sources has been appropriated by the plaintiff and his predecessors in interest and applied on lands for irrigation thereof and stockwatering purposes from June 15 each and every year until December 31, each and every year, and by the plaintiff and others called canyon users from March 1 each and every year, until June 15 next, each and every year, for irrigation of lands and have been applied to a beneficial use. Said Panawats Slough extends through the immediate west part of defendant's land in a westerly and northwesterly course which lands of the defendant is described as follows: (Description omitted.)

And said land of the defendant is also known as the South half of the South half of Section 5, Township 12 South, Range 4 East, Salt Lake Base and Meridian, in Sanpete County, Utah, and across said lands at all times herein mentioned has flowed and now flows the appropriated waters of the plaintiff and others aforesaid and the center line of the said Panawats Slough is approximately 6 feet East of the following described course of said Slough through the said defendant's land to-wit: (Description omitted.)

"2. That plaintiff's land to which the water of said "Panawats Slough" at all times herein mentioned has flowed, and been appropriated, and now flows, is described as follows: (Description omitted.)

"3. That at all times herein mentioned and for more than 50 years last past, plaintiff and his predecessors in interest have been, and plaintiff now is, the sole owner and user of all the waters which gather into and flow in said Panawats Slough from all sources from June 15 to December 31, each and every year; and from June 25 at 6 o'clock a. m. to June 30 at 6 o'clock a. m. and from July 10 at 6 o'clock a. m. to July 15 at 6 o'clock a. m. called 5 turns of each and

every year, the said plaintiff with others called canyon users are the owners of the right to use all the waters of Panawats Slough and one-fourth of Rock Creek and one-fourth of Clear Creek and all of Thistle Creek. And during said two 5 day turns and from March 1 to June 15 of each and every year, plaintiff is the owner with lower canyon users in Utah County, Utah of the right to use all of the waters of said Panawats Slough.

"That during the period of March 1, to June 15 of each year, the plaintiff and the said lower canyon users have been and now are the owners of the right to the use of all of the waters of said Panawats Slough plus sufficient flow of the waters of Thistle Creek, Rock Creek, and Clear Creek during said period to be measured across two weirs, one at the lower end of Panawats Slough located in the Southeast quarter of the Southeast quarter of Section 31, Township 11 South, Range 4 East, Salt Lake Base and Meridian, Utah County, Utah, and one weir located about 1300 feet East thereof in the West one-half of the Southwest quarter of Section 32, Township 11 South, Range 4 East, Salt Lake Meridian, Utah County, Utah, to equal one-half the quantity of the waters of said Thistle Creek, and one-fourth of Rock Creek, and one-fourth of Clear Creek, which flows across a weir, near their junction in Section 3 Township 12 South, Range 4 East, Salt Lake Meridian, Sanpete County, Utah.

"4. That the plaintiff and his predecessors in interest since 1894 have been the owners and plaintiff is now the owner of the right to the use of said waters of Panawats Slough as hereinbefore set out upon approximately 75 acres of his above described tracts of land in Utah County, Utah.

"5. That the water flow in said Panawats Slough is fed from living springs of water of which so many are located at and near said water course and by seep-

age water also called percolating water that accumulates in said Slough from lands lying at a higher altitude to the East and West and South thereof and within Sections 5, 6, 7, 8, 9, 16, and 17 in Township 12 South, Range 4 East, Salt Lake Base and Meridian, Sanpete County, Utah.

"That said seepage water also called percolating water and living spring water and all run-off water upon lands lying to the South and West and East thereof collect and gather into said water course called Panawats Slough and make the flow thereof,

"That said flow is not constant and depends in some degree upon the amount of water applied on higher lands for irrigation and the spring waters and the annual rainfall on the surrounding catchment area therof.

"6. That the plaintiff and his predecessors at times and as above set out have been for more than 50 years last past, the appropriators of the right to use all the waters of said Panawats Slough and have at all times applied said water therefrom to a beneficial use for irrigation of lands and stock watering purposes; provided, however, that the Indianola Irrigation Company, a corporation, has the duty of delivering said water of said Panawats Slough together with a fractional part of the waters of Clear Creek, Rock Creek, and Thistle Creek, to said plaintiff and other users called canyon users from March 1, each and every year to June 15 next, each and every year as is more particularly described in the decree of the First Judicial District Court of the Territory of Utah, entitled Edward Simons, et al, vs. Williams Seely et al., dated September 28, 1894, Case No. 3217, in the Clerk's Office of Utah County, Utah; but on and after June 15 each and every year up to and including December 13 of each and every year the plaintiff and his predeces-

sors in interest during all of said 50 years last past and more have been and plaintiff now is the sole owner and complete owner of the right to use all of the waters of said Panawats Slough on and after June 15 to December 31 following, each and every year; except for said two 5 day turns hereinbefore set out and has at all times applied said water from said Panawats Slough upon his lands hereinbefore described and also used same for stockwatering purposes.

"7. (Omitted).

"8. (Omitted).

"9. That the defendant Justus O. Seely, on and between the 16th and 18 days of June, A. D. 1949, went upon said natural water course of the Panawats Slough at a point about 451 feet North and 258 feet East of the Southwest corner of Section 5, Township 12 South, Range 4 East, Salt Lake Base and Meridian, Sanpete County, Utah and then and there constructed a dam across said water course, Panawats Slough, about 35 feet long at the top and_____diameter consisting of shaft of trees, rubbish, old stoves, cast iron, wood, decayed hay, manure, and rocks and thereby obstructed the flow of water in the said so called Panawats Slough and backed the water up stream at said dam and from said dam in one fork thereof for about 1100 feet and in another fork thereof for about 1700 feet and during the period from June 18 to June 29, 1949, inclusive, defendant detained and impounded upon his land and on the land of others lying immediately South of his land the said waters of said Panawats Slough and prevented said waters owned by said plaintiff and appropriated by plaintiff and his predecessors in interest from flowing down said water course, Panawats Slough, to plaintiff's land hereinbefore described.

"10. That on the 29th day of June, 1949, the plaintiff in order to recover his said appropriated water,

backed up stream and impounded on land as aforesaid by said defendant's wrongful and unlawful construction of said dam was compelled to, and did, go upon said stream in the Southwest quarter of the Southwest quarter of Section 5, Township 2 South, Range 4 East, Salt Lake Base and Meridian, Sanpete County, Utah, at the point of location of said dam hereinbefore described and then and there removed a portion of said dam necessary to permit water to flow to the lands of the plaintiff in said Pannawats Slough.

"11. That some time during the spring of 1950, said defendant, by his servants and agents, caused a substantial part of said dam to be restored and replaced in said channel and said Panawats Slough; that he now threatens, and will, unless enjoined, maintains said dam and place other dams in said channed of said Pannawats Slough on his land and without any devices therein to permit the waters of the plaintiff to flow to plaintiff's said lands as said waters have heretofore substantially flowed in undiminished quantity.

"12. That said acts of the defendant, his servants, and agents on and between the 16th to the 18th and the 29th day of June, 1949 deprived the plaintiff of his water right of said Pannawats Slough and during said period, the hay crop of the plaintiff was thereby diminished upon plaintiff's land in the quantity of seven tons and his grain crop on said land was thereby diminished in the quantity of 25 bushels; that the reasonable value of the hay per ton, after the expense of harvesting same were deducted was $9.00 per ton of a total of $63.00. That a fair market value of the wheat lost as aforesaid to plaintiff was $1.75 per bushel on a total of $43.75. That the reasonable value of the costs of labor that was expended by the plaintiff to remove portions of said dam as aforesaid was $20.00, making a total damages in the sum of $126.75. That if the defendant be permitted to reconstruct the said

dam and to construct other dams in said Pannawats Slough on his lands, as he threatens to do, he will thereby continue to trespass upon the water rights of the plaintiff for which plaintiff has no plain speedy or adequate remedy at law.

"13. That plaintiff did not trespass upon the lands of the defendant above described on the 29th day of June 1949 when he went upon said lands and removed part of the dams placed in said channel by the defendant as aforesaid and defendant suffered no damage thereby."

THE CONCLUSIONS OF LAW

"1. That the defendant Justus O. Seely, on and between June 15 and June 29, 1949, unlawfully and wrongfully interfered with the water right of the plaintiff in Pannawats Slough by obstructing and detaining the flow of the water in the natural channel of said Pannawats Slough upon the lands of the defendant and upon lands of other owners immediately joining defendant's land on the South thereof.

"2. That the defendant had no right to place said dam in said channel upon his own land and thereby obstruct and diminish the flow of the waters of said Pannawats Slough and prevent said water from reaching the lands of the plaintiff during said time.

"3. That plaintiff is entitled to have issued herein an injunction restraining and enjoining the defendant from reconstructing and maintaining the aforesaid dam in said Pannawats Slough and from constructing other dams in said slough on his land on the Southwest quarter of the Southwest quarter of Section 5, Township 2 South, Range 4 East, Salt Lake Base and Meridian, in Sanpete County, Utah and which will appreciably obstruct the natural flow of water in said channel; except where and when dams will not sub-

stantially obstruct said flow, he may construct check dams in said natural channel where necessary to arrest the speed of the water flow and protect existing perpendicular banks from caving if necessary, but such practice must not destroy the existing bed and banks of the natural channel so as to destroy said bed and banks and form a new channel through which said water will flow.

"4. That the plaintiff is entitled to have and recover of the defendant Justus O. Seely, the sum of $126.75 damages and his costs herein incurred."

THE JUDGMENT AND DECREE

The judgment and decree is in two parts, the first part incorporating substantially all of the findings of facts, which the writer deems it unnecessary to incorporate in this brief, and the latter part being as follows:

"Therefore, IT IS ORDERED, ADJUDGED AND DECREED:

"That the said defendant, Justus O. Seely, his agents, servants, and employees be and they are hereby perpetually restrained and enjoined from in any manner obstructing, impounding, or diverting the waters of said Pannawats Slough, so as to interfere with the rights of the plaintiff as heretofore found and decreed, except said defendant may construct check dams in said natural channel if necessary to arrest the speed of the water flow therein and protect the existing bed and perpendicular banks from caving. However, if said defendant should construct check dams in said channel, they must be so placed therein as not to destroy the present perpendicular banks or alter the bed of said stream, or appreciably interfere with or obstruct the usual, ordinary and continuous flow of the water therein to the plaintiff's land aforesaid.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

"That the plaintiff had the right to go upon the defendant's land at the place where the defendant had built the dam in said slough to remove the same so that plaintiff could obtain his water and the defendant was not damaged in any manner or at all by plaintiff by reason thereof, and defendant's counterclaim is denied and dismissed.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

"That the plaintiff do have and recover of the defendant, Justus O. Seely, the sum of $126.75 damages and his costs incurred herein, taxed in the sum of $94.50."

II.

ARGUMENT

By way of introduction and before coming to the points upon which appellant will rely for a reversal, we desire to call the Court's attention to the waters which are involved, the nature of Lasson's right therein, and to some of the rights of the land owner; bearing in mind that Seely does not deny Lasson's right to the use of the waters of Panawats slough. But we believe it is important to understand what are the waters of Panawats slough. So let us consider the natural flow of the stream, the rains and snows, the Canyon waters, the irrigation waters, and the percolating waters in Seely's land in their relation to the rights of Seely to use and to do with his land as he may please.

(a) The natural flow of the stream, measured at the weir on Lasson's land during the period of the year with which we are concerned in this case, is about .51 c. f. s.

The following table is prepared from measurements made by the plaintiff and testified to by him. He gave his measurements in inches over a six-foot weir and the conversions to cubic fee per second were made by him. (Tr. 24, 215)

(Tr. 150)

May 10	3½	inches
May 11	2¼	"
May 13	6½	"
May 16 (Rained)	12.86	c. f. s.
May 17 (Rained)	37.98	c. f. s.
May 18 (Rained)	13	inches
May 19	9	"
May 20	11	"
May 21	11	"
May 22	8	"
May 25	6¼	"
May 28	6½	"
May 29	6	"
May 30	4	"
May 31	4	"
June 1	4	"
June 2	4	"
June 3	3	"
June 4	6	"
June 5	5½	"
June 6	5	"
June 8	5	"
June 9	9	"
June 11	4	"
June 12	4	"
June 13	3.75	"
June 14	3.25	"
June 15	2.50	"

(Tr. 117)

June 17	1.34 c. f. s.
June 21 (Minimum)	.34 c. f. s.
June 23 (Rain)	1.12 c. f. s.
June 27	.51 c. f. s.
June 28	.51 c. f. s.
June 30	.72 c. f. s.
July 1	.51 c. f. s.
July 2	.51 c. f. s.
July 8	.51 c. f. s.
July 10	.51 c. f. s.
July 16	.51 c. f. s.

Let it be remembered that the basis of the plaintiff's complaint is that he was deprived of the use of water by reason of the dam from June 6 to June 29, 1949; and that the dam was removed on the 29th. Bear in mind also that the water users in Thistle Valley were put on turns on the 15th of June and the Canyon waters which had been flowing over Seely's meadows and the meadows of the other owners to the south of his lands had been turned down the creek or were being taken in turns, so that the streams which had been running over the meadows and into the slough up to that date were now no longer contributing their waters to the flow of the slough. These conditions and not the presence of the dam were what caused the drop in the stream from 2.50 inches on June 15th to 1.34 c. f. s. on June 17 and to .34 c. f. s. on the 21st of June. The increase to 1.12 c. f. s. on June 23rd is attributable to the rain. When these factors are taken into account it is quite apparent that the natural, steady flow of the stream is rather constant at .51; and that if there was any dimunition at all on account of the dam, it was only the difference between the constant flow of 0.51 c. f. s. and the .34 c. f. s. on June

21, which is .17 c. f. s., which is the most that was lost to Lasson on account of the dam and so far as the evidence shows he lost that for only the one day.

(b) The Canyon waters are the water rights which are decreed to the plaintiffs in the action in Utah County in which the Smith Decree was entered in 1894. Plaintiff is successor in interest to some of these parties plaintiff and defendant is successor in interest to some of the defendants in that action. It has been the immemorial custom for the Canyon waters to be diverted from Thistle Creek and permitted to flow over the Seely meadows and the meadows south of his until it becomes necessary for them to be turned down the main channel of Thistle creek in order to make up the flow that the Canyon users are entitled to receive. After flowing over the meadows, these waters empty into the slough and go on down to Lasson and the other Canyon users. Seely claims no right to impede or diminish the flow of these waters or to use them in any way except as they have always been used. They have no importance in the situation after the waters of Thistle creek are put on turns. No complaint is made as to them, as the complaint is in relation to a time when they are no longer contributing to the flow of the slough. These are not the waters which Seely proposes to carry across the slough to the two acres of meadow on the west thereof.

(c) The irrigation waters are waters which Seely brings to his land out of Thistle creek and which are distributed to him by the Indianola Irrigation Company because of his ownership of stock in that company. Any run-off from Seely's lands from the application of these waters necessarily flows into the slough. These waters are Seely's personal property so long as he keeps them on his land and

under his control and does not abandon them. As Kinney says (Vol. 2, page 1153, Kinney on Irrigation and Water Rights in the Western States): "After water has been appropriated and diverted from a natural stream into ditches, canals, or other artificial works. it becomes personal property and cannot be appropriated from such works."

Not only does the runoff from the irrigation of the land by these waters contribute to the flow of Panawats slough but also there is a contribution to the slough through the percolation of these waters through the land and into the slough. During the summer months, after the Canyon waters are no longer being applied to the meadows, these are the only waters which contribute to the flow of the stream through percolation.

Seely has the right to control the use of the irrigation waters on his own land. Lasson's right to the use of the waters of the slough gives him no vested right in these waters so long as Seely is making use of them. Seely is under no duty to Lasson to permit them to flow into the slough. He has the right to direct them into the slough and take them out on the other side to sub-irrigate his meadow and keep the grass green. Section 100-3-20, Utah Code Annotated, 1943, is sufficient authority for this statement.

This is what Seely proposes to do. It will not be a difficult operation. All that is necessary is for him to place a box or some measuring device in the dam so that he can measure the amount of water going over the dam and down the stream at the time he empties his irrigation water into the slough and see to it that the flow down stream is not diminished while the irrigation water is being applied to the little meadow on the west side. The flow of the stream will still go on down to Lasson. See Smithfield West Bench Irri-

gation Co. v. Union Central Life Ins. Co., ____Utah____, 195 P2d 249, prior appeal in 105 Utah 468, 142 P2d 866; also Tanner v. Bacon, 103 Utah 419, 136 Pac. 957.

(d) The surface waters, meaning the rains and snow which fall upon Seely's land, regardless of the law of riparian rights and the doctrine of apropriation, are nature's gift to the land owner when they are beneficient.

At 67 C. J. 868, Sec. 287, it is said:

> ". . . . a land owner has the right to collect and appropriate to his own use all the surface waters upon his property without liability to other owners upon whose property it would flow if not appropriated."

Wiel, (3rd Ed.) Vol. I, page 379, says:

> "Diffused surface water cannot be appropriated against the land owner on whose land it lies. Its presence and movements are too capricious to found any right upon distinct from the land where it is gathered, and such water is owned by the owner of the land where it happens to lie."

See also Wiel at page 379, Sec. 349.

Also the following from I Wiel, page 38, quoting from Baron Alderson in Broadbent v. Ramsbothem:

> "No doubt, all water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, if the water has arrived at and is following in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel."

See also Kinney, Vol. 2, page 1146:

> "Surface water, however, may be captured and impounded in any method advisable by a land owner over whose lands such waters have flowed, and, when so captured, it becomes the absolute property of such land owner and is not subject to appropriation by others."

It is submitted that the legislature did not intend by the amendment of 1935 to bring surface waters within the orbit of waters which may not be used by a land owner without a license from the state engineer. It will come as a surprise to all of us if it should turn out that a man may not plow his land on the contour, or seed it to grass and other vegetation to retard the runoff of the surface water, and take any and all measures he may please to take in order to conserve the water in his soil, without getting an application to appropriate such waters through the office of the state engineer or else being able to prove a diligence right acquired before 1903.

There must be some limits beyond which the doctrine of appropriation of waters may not be extended either by legislation or by judicial holdings without its coming in conflict with the vested rights of land owners and hence in conflict with the provisions of the state constitution (Art. I, Sec. 7) and the federal constitution fifth amendment and Art. I, Sec. 22 of the state constitution.

It is incredible that the legislature intended by its declaration that all waters on and under the ground are public waters and that the only way in which any person can acquire the right to use any of them for any purpose is to make an application to the state engineer, publish notice, and go through the whole procedure required by the stat-

utes, to apply to the rights which the owners of land have always exercised with respect to the surface waters.

(e) Percolating waters in Seely's land. Since the decision of this Court in Riorden v. Westwood, et al., on March 11, 1949, _____Utah_____, 203 P2d 922, a consideration of the various classifications of percolating waters which text writers and the courts have mentioned is unnecessary and will not be attempted.

That case is authority for the proposition that percolating waters in private lands, when they are not being put to some beneficial use by the land owner and do not contribute to any useful purpose connected with the occupation and use of the land, are public waters; hence they may be appropriated by strangers to the title to the land as are other public waters of the state, providing the would-be appropriator obtains a grant from the land owner or condemns the right to enter upon the property to make his diversion and use.

But it is submitted that the case does not destroy the law which has been followed by this Court in many cases, which is that a land owner is the owner of waters which are percolating through his ground so long as they are contributing to some useful purpose connected with his ownership and occupancy of the land; or at least, that they are not public waters until it be shown that they are not being put to some beneficial use on the land and do not contribute to some useful purpose connected with the ownership and occupancy.

Mr. Justice Wade, in the prevailing opinion in the Riorden case, says:

> "This court throughout its history has recognized that percolating waters are not public waters but be-

> long to the soil through which they pass and are the property of the owner thereof, and are not the subject of appropriation."

The Utah cases on that proposition are all cited in the prevailing opinion, so will not be listed here. But we do respectfully call the Court's attention to one case therein cited, which is not a case which was decided by this Court. It went to the Supreme Court of the United States through the federal courts. The case is Midway Irrig. Co. v. Snake Creek Mining & Tunnel Co., 8 Cir., 271 Fed. 157, affirmed 260 U. S. 596, 43 S. Ct. 215, 67 L. Ed. 4423.

A concise statement of the Utah law upon the subject of the right of the land owner to the use of the water percolating therein is contained in the brief submitted by the late A. B. Irvine and Samuel R. Thurman in the Midway case. They write:

> "The right of the owner of the land to the water percolating therein is limited to a reasonable and beneficial use of the water upon the land itself, or to some useful purpose connected with its occupation and enjoyment. This doctrine is now so prevalent in this country as to be designated "The American doctrine."

So while it cannot be said, in the light of the cases in this state, that the owner of the land is the owner of the water therein which is percolating through the soil, in the full meaning of that term, as he is of the silica or clay or other constituents, he nevertheless is the owner of the right to make any reasonable and beneficial use of the percolating waters upon his lands, or he may, as land owner, aside from all considerations of the law of appropriation, make

any reasonable use of them for any useful purpose connected with the use and occupation of the land.

This right is certainly a valuable property right.

It is suggested in the opinions filed by Mr. Justice Latimer and Mr. Justice Wolfe in the Riorden case that all waters in the state, whether on the surface or under the ground, are and always have been public waters; and that the only way in which the land owner may maintain any right to use them on the land is for him to show a diligence right under the law of appropriation of former times or an approved application in the state engineer's office since 1903; and, by Justice Wolfe, that the only purpose of the amendment in 1935 of Section 100-1-1, Code, was to bring such waters under the jurisdiction of the state engineer so as to require his approval of an application before anyone, even including the land owner, can acquire a right to their use.

Point 1

THE DECREE IS CONTRARY TO LAW BECAUSE IT DEPRIVES SEELY OF HIS PROPERTY RIGHTS IN HIS LAND AND CASTS BURDENS UPON THE LAND FOR LASSON'S BENEFIT WHICH ARE NOT SANCTIONED BY THE LAWS OF THIS STATE.

Seely has the right as land owner to fill in the slough so as to restore it to the condition in which it existed when Lasson's appropriation became a vested right. His only duty or obligation in this respect is that he permit the flow of the stream to go on down to Lasson without appreciable dimunition or contamination. To restore the stream to its former condition will not lessen the flow to Lasson's point of diversion; it will not even change the course of the stream. But the decree restrains him from filling in the

gulch to the bottom of the old bed. Seely has the right to restore the bed to its former condition to prevent additional damage to his land by erosion of the banks. The decree says he must not do this. He may only place check dams in the bottom of the eroded channel to prevent its being gouged out deeper; but it emphatically declares that he must not fill in between the steep banks. Seely has the right to prevent the drainage of his land into the slough to the damage of the meadows and pastures which border upon the slough. One purpose for filling in between the perpendicular banks is to prevent this rapid drainage which is now going on. The decree enjoins him from doing this. Seely has the right to direct the irrigation waters which he brings to his lands across the slough for the benefit of the pasture on the west side, and to dam the slough for that purpose, providing he permits Lasson's water to go on down the stream. But the decree enjoins him from doing this because any dam which did not raise the water in the slough to the height of the old ditch would be ineffective. He could and would use the dam for this purpose, if not enjoined, and there would be no interference whatever with Lasson's water rights.

The trouble is that Lasson claims more rights over Seely's land than he is lawfully entitled to claim just because he is an appropriator from the stream after it has passed out of the Seely property. He in effect claims that Seely is obligated to permit all of the rain water and melting snow water, all of the irrigation water runoff, and all of the percolating water in his land to go on down the slough for Lasson's benefit. The decree in effect sanctions these claims. In this respect the decree is contrary to law because, as it has been made to appear above, Seely has the right to make

any reasonable and beneficial use of such waters that he may desire while they are upon his own land

The appropriator cannot lawfully require the land owner to permit such waters to flow down stream unobstructed by any use which the land owner may make of his own property. Lasson's rights to the use of those waters do not begin until Seely's rights to their use end. Seely's rights are not based upon the doctrine of riparian rights in waters nor upon the doctrine of the appropriation of waters in the arid land states. They are based upon his ownership of the title to the land. Therefore Lasson's right to the use of such waters does not begin until the waters are abandoned by Seely and flow into the slough and pass out of his control and cease to be useful to him in the use and occupancy of his land. So any interference with such waters in the slough by the construction of the dam is something about which Lasson had no legal right to complain; is something which caused him no damage, because they are not his waters until Seely is through with them; and the decree is wrong because it deprives Seely of his rights to make use of such waters on his land in the manner stated in his testimony.

If Section 100-1-1, Code, as amended in 1935, be so construed by the Court as to require the Court to hold that Seely does not have any of the rights herein discussed in the rain water and melting snows on his land, in the irrigation water which he brings to his land, and the waters which are percolating through his land, then the statute as so construed is void, because is deprives Seely of his property rights without due process of law. Art. I, Sec. 7, state constitution; Fifth Amendment to the federal constitution.

Since the decree effectively destroys the property rights of the land owner and requires him to hold his property in its present condition for the benefit of Lasson, and imposes burdens upon the land which are not lawfully attached to the title, it takes Seely's property for a public use without compensation; hence it is in violation of the rights guaranteed to Seely by the Fifth Amendment to the federal constitution and Section 22 of Article I of the state constitution; the use of water for irrigation purposes being a public use. Section 100-1-5, Code.

The decree goes too far even if it be admitted for the sake of the argument, which we do not admit, that Seely ought to be enjoined from retarding the flow of the stream to the extent that it does flow without the contributions which are made from the waters which Seely has the right to use on his own land. It goes too far because it restrains him from using the waters on his land which he has a perfect right to use but in effect requires that he permit them without interference to flow into the slough and on down to Lasson's point of diversion. So it in effect takes his property for a public use without any compensation; takes it from Seely and bestows it upon Lasson; and deprives him of his property without due process of law.

In Bountiful City v. De Luca, 77 Utah 107, 292 Pac. 194, 72 A.L.R. 657, this Court held that an injunction which restrained a land owner from grazing his goats on his own land within 300 feet of a stream deprived him of his property without due process of law.

Point 2

THE DECREE IS CONTRARY TO LAW BECAUSE IT RESTRAINS SEELY FROM DOING SOMETHING WHICH HE HAS NEVER THREATENED TO DO AND HAS NO INTENTION OF DOING.

We will show under another point that Lasson has not lost any appreciable amount of water and will not lose any by reason of the dam constructed as proposed. What we claim under this point is that Seely has not threatened and does not intend to do anything which will be injurious to Lasson in his right to the use of the waters of the slough; hence there is no warrant at all for any injunction.

Seely testified that he intends to fill the slough between the railroad bridge and his north boundary, between the perpendicular banks, leaving the slough large enough for the water to run through. (Tr. 295-295). He wants to do this to stop soil erosion and so that his stock can cross over, to fill in what has already been eroded out. (Tr. 296). He proposes to put in a series of dams to check the floods and the spring runoff. (Tr. 297). He claims no interest in Lasson's water rights. He has no intention of interfering with them. After June 15 he wants to put some of his own water in the slough and take it out on the west side to sub-irrigate a little meadow, measuring the water out. If there should be any loss to Lasson while the pond is filling or from seepage or evaporation, he would expect to make up that loss. He intends to use the dam in such a way that the flow to Lasson will not be diminished to any appreciable extent. (Tr. 298-299).

We submit that this testimony is not sufficient evidence upon which to base finding of fact No. 11; that said finding is not supported by the evidence; and that the decree is con-

trary to law because there is no need whatever for the injunction. The water always went on down to Lasson before the deep gulch was cut in Seely's land by the floods; it will continue to go down to him in the same channel when the deep gulch is filled in all the way through Seely's pasture, because the slough will still be there just as it was before those floods. The flow of the stream to which Lasson is entitled is the flow which passed over the land when his appropriation was initiated. This flow he can demand as of right. This flow he will always receive when the deep gulch is filled in and the slough restored to its ancient condition. The proposed dam will benefit Seely and will not damage Lasson.

Aside from the question of the relative rights of the parties, considered as matter of law, the equities are not with the plaintiff. Seely only wants to do what any prudent and intelligent land owner would do to make the best use of his property, believing he has a perfect right to do it. He realizes that Lasson has a right to the use of the water in the slough and respects that right. He proposes to construct the dam so that the slough waters will always flow over it, as may easily be done, and to measure out any water which he puts in and takes out on the other side, allowing credit to Lasson for any loss thereby caused to the natural flow of the stream. This is fairness and equity. Lasson, on the other hand, wants Seely to let nature take its course with the Seely meadow even if nature should cause the utter destruction of the meadow by the drainage of the land. This is not equity.

Point 3

THAT PART OF FINDING NO. 9, WHICH IS TO THE EFFECT THAT DEFENDANT IMPOUNDED THE WATERS OF THE SLOUGH AND THEREBY PREVENTED PLAINTIFF FROM RECEIVING WATERS TO THE USE OF WHICH HE WAS ENTITLED IS NOT SUPPORTED BY BUT IS CONTRARY TO THE EVIDENCE.

The evidence regarding the loss of water is summarized as follows:

The dam was placed in the slough in the spring of 1948. But it was not until June 21, 1949, that Lasson discovered or noticed any shortage of water or made any complaint about the dam. On that day he had only .34 c. f. s. of water at the weir, which was too small a stream to irrigate with. (Tr. 117). So he followed up the stream to see what was the matter. The dam was tight in the bottom and no water was going through. (Tr. 118). His next measurement, which he made on June 23, showed that he had 1.12 c. f. s. He went back to the dam on June 28 and 29; the water was then backed up higher behind the dam than it was on the 21st, being 3 feet and 5 inches deep, and there was water seeping through the dam. (Tr. 118). On June 27 and 28 he had .51 c. f. s. at the weir; on June 20 he had .72 c. f. s., which was the day after he had removed the dam. Thereafter through July he had .51 c. f. s. at the weir. So that his only possible loss was .17 c. f. s. on the day of June 21, if he lost any by reason of the dam; this being the difference between the .51 c. f. s. which he might expect to receive from the natural flow of the stream and the .34 c. f. s. which he actually did receive that day. (Tr. 115, 117, 150, 214, 215, 183, 184). On May 18 his land was soaked. (Tr. 151). At all times, according to the table

of measurements, right down to June 21, he had plenty of water. On May 17, 1949, there was a flow of 37.98 c. f. s. going over the weir, when it was raining. (Tr. 150).

Now, let it be remembered that the dam was placed in the slough in the spring of 1948. The pond behind the dam had been filled that year with the spring run-off and with the irrigation water applied to the lands above the dam. It had also been replenished with the run-off in the spring of 1949 and with the waste water from the irrigation. So the ground was saturated and there was no loss from seepage because of the dam. The natural flow of the stream was going through or over the dam. Only on one day was the quantity of water at the weir less than the .51 c. f. s. which Lasson's own measurements show is the flow of living water in the stream. That was on June 21. This might well have been one of those hot days when the stream was lowered by evaporation. But be that as it may, this was not such a substantial loss as to justify the judgment for damages and for the injunction and the justify the finding and the judgment based thereon that Seely has substantially interfered with the natural flow of the stream. A dimunition of the flow of the stream for one day to the extent of .17 c. f. s., under the conditions existing in this locality, cannot be said to be a substantial interference with the rights of the plaintiff.

The fluctuations in the flow of the stream which are exhibited by the table of measurements are accounted for by two factors: (1) The rains. Lasson had plenty of water on the days when it rained that summer. There was more water in the slough than he could use. (2) The application of irrigation water to the Seely lands and other lands which lie east and south of the slough. The waste

water from those lands flows into the slough above the dam. When the lands are being irrigated Lasson gets the waste water, his stream is increased in flow. As the water is changed about on these lands, the waste water fluctuates because there is a lapse between the time when water is turned on to a tract of land and the time when it runs off at the end of the tract into the slough. Lasson gets the benefit of all the waste water from all the lands above the slough, and, so far as Seely is concerned, he is entitled to it when it gets into the slough and out of Seely's control. But Seely is under no duty to permit the waste water to flow into the slough. If he can intercept it before it gets into the slough and direct it to other tracts, or keep it within his control by emptying it into the slough and then taking it out on the west side, as he proposed to do, he has a perfect right to do these things. Lasson cannot complain if he does either of them. It is evident from a reading of the entire record that any difference in the flow of the stream between the maximum measurement of 37.98 c. f. s., on May 17, when it rained, and the .51 c. f. s., which his own measurements show to be the natural flow of the stream, is due to rain fall and to the changing of the irrigation waters on the lands which drain into the slough. These fluctuations were not caused by the dam. Lasson did not lose any water on account of the dam. If the hot sun of summer drew toward himself .17 c. f. s of the flow of the stream on June 21, which is likely what happened, Seely is not to be held liable for that act of God. If Seely and the other land owners above the slough changed the waters on their lands and so diminished for a time the flow of waste water into the slough, which is unquestionably

what happened, this is something about which the plaintiff has no right to complain.

Appellant therefore claims that the evidence does not support the finding that Seely deprived Lasson of water to which he was entitled.

Point 4

FINDING OF FACT NO. 12 IS NOT SUPPORTED BY THE EVIDENCE.

The court found that plaintiff had been damaged on account of loss of water and consequent loss of crops to the extent of $126.75, and awarded him judgment for that sum and for his costs.

The evidence regarding the damages is as follows:

Andrew Lasson, brother of plaintiff, testified:

He noticed a shortage of hay crop on his brother's land in 1949. (Tr. 71). Wild hay was worth $13.00 per ton in the stack. (Tr. 72). It cost in the neighborhood of $4.00 to put it up. (Tr. 73). He estimated there was a shortage of about 6 tons of hay on Lasson's 15 acres. (Tr. 73-74). The pasture was not as good as it would have been if the land had been watered during the latter part of June. (Tr. 74). In his judgment there was a loss of $10.00 in the pasturage. The land was irrigated last around June 15, but he did not know when. (Tr. 76-77). Lasson put the water on the meadow when he took the dam out on June 29. (Tr. 77).

Arthur Lasson, plaintiff, testified:

It took him and his hired man the better part of a day to take out the dam. His services and the use of his car were worth $12.00. (Tr. 121). He was watering his land between June 15 and 17, 20 acres of wild hay and lu-

cerne and 4½ acres of wheat. Ie needed water. (Tr. 122, 123). From June 21 to June 29 there was just a mere drizzle of water and he could not irrigate his crops with it. Some of the hay dried up, didn't dry clear up but suffered from lack of water and the grain needed water. (Tr. 124).

(Note:—See his table of measurements, showing that between June 21 and June 29 he had not less than .51 c. f. s. on any day except June 21, when he had .34 c. f. s.; and that on the 17th he had 1.34 c. f. s., and on the 23rd 1.12, when it rained).

He cuts his hay once a year, generally gets 2 tons to the acre over the 20 acres. (Tr. 125). The hay was worth $13.00 per ton in 1949. After the dam was removed and the flush of water was over on June 30 the water in Panawats slough was enough to water the land. (Note:—He then had .51 c. f. s. See table.) During the period of June 21 to June 29, with the exception of one day when the flush came, he could not irrigate those lands with the water flowing in the slough. (Tr. 128). In his judgment he lost about 7 tons of hay and about 25 bushels of wheat because he did not water his land the latter part of June, 1949. The value of the wheat was $1.75 per bushel. (Tr. 132).

On cross examination: (Tr. 182) He put all the water of Panawats slough on that land between the 1st and the 10th of June; after June 10th he put none of it on that land; he turned it off so that the ground could dry out a little so that he could cut the hay. The hay was cut around July 4th. (Tr. 182). He raised 110 bushels of grain on the 4½ acres last year. (Tr. 180). He watered it once before June 15, the biggest part of it was headed out on June 15. It needed water after that date. He raised 1½

tons of hay to the acre on that hay land last year. He cut it right after July 4. He got a good pasture but not as good as it would have been if it had been watered more. But he did not put all the slough water on that land. (Tr. 181).

The foregoing is all the evidence in the case relative to the damages. It is clear that he lost no crops because Seely shut off his water. According to his own testimony he had water to use but did not use it on that land. According to his own testimony his hay land did not need water, for he testified that he had to turn the water off so that he could cut the hay. He had plenty of water for the 4½ acres of wheat but did not use it. In the first place, we seriously question the sufficiency of the evidence to sustain a conclusion that he lost any crops at all because of lack of water. In the second place, we say the evidence shows that if he did lose any hay or grain crop because of the lack of water during the latter part of June, it was his own doing and not because Seely deprived him of any water; for he had plenty of water for the purpose and did not use it on those crops. And in the third place we say that the amount of damages is wholly speculative. There is no foundation in the evidence from which a rational judgment can be adduced as to the extent of his damages.

The judgment for damages should therefore not be permitted to stand. Likewise the judgment for costs.

POINT 5

THE CONCLUSIONS AND JUDGMENT ARE CONTRARY TO LAW BECAUSE LASSON WAS A TRESPASSER ON SEELY'S LAND AND THE CONCLUSIONS AND JUDGMENT SHOULD HAVE BEEN IN FAVOR OF SEELY.

Lasson has no right in Seely's land. Seely has the fee simple title thereto. Lasson trespassed when he went up there and removed the dam which Seely was in the process of building on his own property for his own purposes. Lasson had no right to remove that dam. It was not within his rights as an appropriator on the stream to regulate Seely in the use of his land and to tell him whether or not he may direct the flow of the waters over his property or to go upon the land and remove any of the improvements which Seely may place thereon, just because he may have the idea that Seely may be interfering with his water rights. His right of self-help does not go that far. He may not lawfully take matters into his own hands, and, over Seely's objections, remove the dam. If he thought the dam interfered with the flow of the water, he had his remedy by action in the courts. It is true that Lasson has a vested right in the stream to its source. Chandler v. Utah Copper Co., 43 Utah 479. But this interest is merely the right to have the water flow down to him in quantity and quality to satisfy his appropriation. Larson, J., in Adams v. Portage Irrig. & Res. Co., _____Utah_____, 72 P2d 653. Lasson might just as logically claim the right to tell Seely how to irrigate his lands because if he runs the water over the land in one way there will be a greater run-off into the slough to Lasson's benefit than if the furrows

follow the contour. In fact, he does claim such right, as appears from the cross examination of Seely.

See I Wiel, 48, 244, 247, 249;

Jones, et ux. v. McIntire, 60 Idaho, 228, 91 P 2d 373;

67 C. J. 1003;

Butte Canal & D. Co. v Vaughe, 11 Cal. 143, 70 Am. Dec. 769;

Naches v. Weikel, 87 Wash. 224, 151 Pac. 494.

It will be argued that Lasson has an easement over Seely's land for the benefit of plaintiff's land which is irrigated from the stream. But he has no easement. There is no appropriation or diversion from the stream on Seely's land, there is no ditch, canal or reservoir thereon which has ever been used by Lasson or any of his predecessors. If he has such an easement, how did he get it? Easements lie in grant or prescription, which presumes a grant, or from reservations in conveyances. There is nothing like any of these things here. Lasson has never conveyed any water over Seely's land through Panawats slough. The water has passed over the land in a natural stream, directed by the forces of nature without any help from Lasson. Lasson's point of diversion is down stream from Seely's land, at a point where the stream flows over Lasson's land. It is true that there are loose statements in some text books and in some cases to the effect that an appropriator has an easement over the land across which flows a natural stream of water; just as there are statements declaring that the appropriator has an interest in the stream to its source. But all that is meant by such statements is that the approp-

riator has a right to have the stream flow down to him undiminished and unobstructed as it was when his right became vested to the use of the water. To hold that Lasson has an easement over Seely's land will establish a principle which will cloud the titles to all the lands in this state which are traversed by natural streams. If Lasson has an easement, then all the appropriators down the stream, even to the Great Salt Lake, have easements over Seely's land for the benefit of their several lands. If such a principle of law should be established, then how in the world can anyone know or determine the condition of his title?

But even if Lasson has some sort of easement over the land, this fact does not excuse or justify his trespass; for he did not follow the course of the stream when he went up there and took out the dam. He went around and entered the land on the west side and crossed down to the dam, following a course at right angles to the course of the stream. This was a trespass under any view of the law. We do not claim for it anything more than nominal damages. But it was sufficient in importance to entitle Seely to prevail on his counterclaim and to his costs.

For the reasons stated it is respectfully submitted that the judgment and decree should be reversed and the lower court directed to enter judgment in favor of defendant on his counterclaim and for costs.

Respectfully submitted,

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were the enactment of
Session Laws 1935 - p. 619.
the only waters which were declared
by statute to be public
waters were flowing waters,
waters in defined channels,
either above or underground -
The amendment in 1935 was
a radical departure from the
water laws of the United States.