

1958

# Russell Kano and Tommy Seo v. Arcon Corp. et al. : Brief of Appellants

Utah Supreme Court

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Edward W. Clyde; Harold R. Boyer; Attorneys for Defendants and Appellants;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL KANO and  
TOMMY SEO,

*Plaintiffs and Respondents,*

— vs. —

ARCON CORPORATION and  
BARCON CORPORATION,

Utah corporations,

and MAE L. BAGLEY, LEO L.  
CAPSON, GLEN L. PECK and  
MANFORD A. SHAW,

*Defendants and Appellants.*

FILED

MAR 5 - 1958

Clerk, Supreme Court, Utah

Case  
No. 8739

UNIVERSITY UTAH

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## BRIEF OF APPELLANTS

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Defendants and Appellants*

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MANFORD A. SHAW,  
*Defendants and Appellants.*

Case  
No. 8739

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## BRIEF OF APPELLANTS

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### NATURE OF THE CASE

Respondents brought suit to recover money damages for crop loss, to restrain appellants from interfering with respondents' water and water rights, and to require appellants to restore the flow of water from underground wells and springs. The appellants are two separate corporations and four individuals.

The trial court entered a money judgment against all of the appellants in the amount of \$8,217.36 and ordered them to install an electric pumping system and to perpetually pump three cubic feet of water per second for the plaintiffs during the irrigation season. From this judgment all of the defendants have appealed.

## STATEMENT OF FACTS

Respondents are the owners of approximately twenty-five acres of land situated near 5600 South and 20th East in Salt Lake County, Utah. (R. 146) The appellant Arcon Corporation purchased a 56-acre tract of land from Henry Moyle. (R. 354.) In total, the Moyle farm had a water right approximately two and one-half times greater than it needed. (R. 319-20) The land having been purchased for subdivision purposes, the irrigation water was taken off the land and the stock sold to Salt Lake City Corporation. (R. 355) Considerable other land on the east toward the foothills had also been subdivided over the past years, and taken out of irrigation. (R. 298-99)

Appellant Arcon Corporation also purchased some land from Salt Lake City Corporation. This land abutted the east boundary of respondents' land, separating it from the Moyle farm, and, prior to its acquisition by the City, had been owned by a man named Ferguson. (R. 354-55). Ferguson utilized runoff water from upper irrigation and waters naturally accumulating in a source known as Spring Run Creek to develop some fish ponds. Spring Run Creek was a surface stream and was covered,

though generally, by a court decree. (R. 295-97) The area embraced in the Ferguson and Moyle farms was marshy and swampy, as shown on official topographical maps. (Exhibits 3-D and 3-D[a]) Moyle had a large pond on his place which was upstream both from Ferguson and respondents. Historically, this pond had filled with water from Spring Run Creek, but at the time appellant Arcon Corporation purchased the Moyle farm, this pond had gone dry. (R. 349)

There was not sufficient water from Spring Run Creek for the fish ponds constructed by Ferguson and, to augment this flow, he drilled approximately 25 wells, all of which flowed under artesian pressure. (R. 279) The combined waters flowing to the Spring Run channel from the Moyle farm and the farms above it, from natural sources, and from the 25 wells, were sufficient to maintain these fish ponds. The fish ponds were operated until just prior to the time they were filled in for subdivision purposes. (R. 358-60)

In about 1894 one of respondents' predecessors in interest, a man named Boyce, learned that Ferguson was constructing a fish pond in the middle of his acreage (R. 258). Boyce went to Ferguson and said "Why can't I use some of that water?" Ferguson said it would be all right, and a ditch was built jointly by Ferguson and Boyce from what is referred to in the record as the middle pond. (R. 257-59) This ditch took water from a pond by gravity to respondents' land and was used for irrigation purposes.

In about 1904 Ferguson constructed a lower pond near the westerly or downstream edge of his property. (R. 275) This pond was built entirely by Ferguson to serve fish culture purposes, and respondents' predecessors did not participate in any way in the construction of this lower pond. (R. 275)

Sometime between 1912 and 1920, the exact date could not be fixed by the witnesses, respondents' predecessor abandoned the ditch from the middle pond and started diverting water from the lower pond. (R. 275-76) The lower pond raised the elevation of the water several feet, so that water could be diverted from it by gravity to the lands now owned by respondents. From about 1912 until the times complained of here, respondents' land received water from the lower pond by gravity flow. The acreage irrigated during this time was substantially less than that now irrigated by respondents, since the testimony reveals that the quantity of water historically used was very small. Bagley, who sold the land to respondents, testified that he didn't irrigate his alfalfa at all. (R. 359) The acreage that was irrigated by Bagley was no more than four acres. (R. 341)

When respondents changed the use of the land to row crops (subsequent to 1944), they began using considerably more water. There was no testimony fixing the exact amount of water used, but respondent Seo said they never used more than between one and two cubic feet per second. (R. 155)

During 1955, Salt Lake City bought the Ferguson tract. (R. 355) It shut off the 25 flowing wells and drilled a 20-inch replacement well to greater depth. The water from the 20-inch well was taken into the City culinary system. Respondents brought suit against Salt Lake City Corporation, claiming that it wrongfully shut off the 25 wells and wrongfully took from the plaintiffs the water yielded by the wells. In that suit, the District Court of Salt Lake County decided the issues in favor of Salt Lake City and respondents did not appeal. In this suit they complain against Salt Lake City for shutting off those wells and for drilling and pumping the large 20-inch well. At the trial these matters were considered to be res judicata, and the suit was dismissed against Salt Lake City. (R. 140)

The evidence at the instant trial showed that capping the 25 wells and drilling the 20-inch well plus removing the Moyle farm and other farm land on the east bench from irrigation, served substantially to reduce the surface flow at respondents' point of diversion. This was clearly demonstrated by testimony that wells on the Moyle farm, which formerly flowed, and the pond had gone dry. (R. 367-68) All of this occurred before the appellants installed the drains and covered the ponds which are the acts here complained of.

In the spring of 1955 Arcon Corporation started to subdivide the Ferguson lands and the westerly side of the Moyle property. (R. 356) The 25 City wells had been capped in April, and, prior to appellants' commence-

ment of work, there was no surface stream whatsoever. The lower pond was dry at this time and there was no difficulty in working the area and filling the pond. (R. 359) In order to develop the land for subdivision purposes, a tile drain was installed running east and west on the south side of the marshy area known as Spring Run Creek. A tile drain, which also ran generally east and west, was installed on the North side of Spring Run Creek. These drains had the effect of further drawing the water table down. (R. 314-15) They were necessary to the use of the land for subdivision purposes. (R. 216) None of the drains were located within the stream, but were located more than 100 feet away from the Spring Run Creek channel to dry up the marshy area. The tile drain discharged into Spring Run Creek channel at a point within 8 feet of the base of the impounding dam for the lower pond. (R. 220) The quantity of water placed in the channel at this point is more than enough to meet the water needs of respondents. (R. 166, 338) Respondent Seo testified unequivocally that their complaint was not concerned with the quantity of water. Their complaint is that at the point of discharge into the channel the water was approximately six to eight feet lower than the elevation of the easterly side of respondents' ground. (R. 220). In order to get their water on to the easterly side of the land, it was necessary to pump, but there was plenty of water. (R. 338)

The evidence was uncontradicted to the effect that respondents built an impounding dam across the channel inside their own field. (R. 445) The impounding dam was

not so high as to cause the water to inundate the outlet of the drain. This dirt-filled dam cost respondents from \$50 to \$100.00. (R. 445, 452) They had a ditch from it by which it would be possible to convey water by gravity to all but five acres of their land. (R. 429-30) Thus, all of their land but five acres can be irrigated by gravity flow from Spring Run Creek by using an existing dam located on respondents' own property. To irrigate the other five acres, it will be necessary to pump. (R. 430) The court ordered appellants to pump water for all the lands.

The court also awarded respondents damages for loss of expected profits from crops, including a celery crop which was not planted due to unavailability of early spring water. The court also awarded respondents the full cost of a pump, aluminum pipe, a trailer to haul it on, and depreciation on a tractor used to operate the pump, and, in addition, ordered appellants to install and maintain a new pump.

The judgment of the court was entered against all of the appellants, although there was no evidence to show that Arcon Corporation or any of the individual defendants had anything to do with the activity that allegedly interfered with respondents' water. All of the defendants have appealed.

## STATEMENT OF POINTS

### POINT No. 1

THE COURT ERRED IN HOLDING THAT APPELLANTS COULD DRAIN THEIR LANDS TO MAKE A REASONABLE USE THEREOF ONLY IF THE SAME COULD BE DONE WITHOUT INTERFERING WITH THE RESPONDENTS' USE OF THE WATER.

### POINT No. 2

THE COURT ERRED IN HOLDING THAT RESPONDENTS HAVE AN EASEMENT OR RIGHT TO REQUIRE THE MAINTENANCE OF THE PONDS ON APPELLANT ARCON CORPORATION'S LAND.

### POINT No. 3

THE COURT ERRED IN FINDING THAT RESPONDENTS ARE ENTITLED TO RECEIVE THREE CUBIC FEET OF WATER PER SECOND FOR THE IRRIGATION OF TWENTY ACRES OF LAND.

### POINT No. 4

THE COURT ERRED IN ASSESSING DAMAGES.

### POINT No. 5

THE COURT ERRED IN ENTERING JUDGMENT AGAINST ALL OF THE APPELLANTS.

## ARGUMENT

### POINT No. 1

THE COURT ERRED IN HOLDING THAT APPELLANTS COULD DRAIN THEIR LANDS TO MAKE A REASONABLE USE THEREOF ONLY IF THE SAME COULD BE DONE WITHOUT INTERFERING WITH THE RESPONDENTS' USE OF THE WATER.

Appellant had the right to make a reasonable use of their land, even though it interfered with respondents' historic manner of using the water. This point is of crucial public interest, for if a land owner has a vested right to maintain the water table in adjacent land at or near the surface level, then the adjoining land owners can be effectively prevented from making reasonable use of their land.

This is not a problem of water law. Appellants claim no interest in the water, and respondents freely admit that the quantity of water has not been diminished and that there has always been more than ample water. (R. 338) The drains which respondents installed return the water to the channel within eight feet of the impounding dam which previously existed on the lower pond, or at the point which historically would have been respondents' diversion point. (R. 22) Engineer Ward stated positively that the pond could not have been filled after the installation of the drains as they presently are (R. 314), even though he testified that the pond, through the years, had become impervious and watertight (R. 300-01). An

impervious pond can only be filled if water is introduced above the impervious layer. (R. 325) The drains and the taking of lands out of irrigation and the capping of 25 wells, however, have pulled the water table down to such a point that water will not flow on the surface into the pond. At the outset, therefore, we are confronted with the question as to whether appellants had a right to lower the water table in their lands by installing drains which would enable them to make a reasonable use of their lands.

The trial court totally failed to note a basic distinction between the case at bar and a water law suit. The distinction is an essential one and is noted by all of the cases. Where the parties *are in competition for the water and the right to use it*, one set of rules applies. Where, as in this case, there is no competition for the water, but, rather, a claim by one landowner that he has a right to make reasonable use of his own land, an entirely different set of rules applies. This distinction is universally recognized.

(a) THE AMERICAN LAW INSTITUTE RECOGNIZES THE DISTINCTION:

The American Law Institute's Restatement of the Law on Torts, Section 849, states:

“Interferences with one person's use of water by another's use of water involve a conflict over the same physical substance, and raise problems of proprietary competition over that substance. These interferences are dealt with in Sections 850-864. Interferences with a person's use of water

by another's use of land or other activity which affects water only incidentally, do not directly raise problems of proprietary competition over the water itself, and therefore, in substance, involve the same questions as other types of interference with the use and enjoyment of land. Consequently, the rules stated in Sections 822-840, governing invasions of interest in the use and enjoyment of land, are equally applicable to such interferences with a use of water."

The Restatement then notes examples demonstrating the difference, as follows:

"5. The A Mining Co. buys land and starts to mine for coal therein. In the process of excavation, the flow of subterranean water is interfered with, and a spring on near-by land in the possession of B dries up as a result. A's operations do not involve a use of subterranean water, and its liability to B is governed by the rules stated in Sections 822-840.

"6. A and B are severally in possession of adjoining parcels of land. There is a well on B's land from which he obtains water for domestic and other purposes. A digs a large well on his land and starts to take a considerable quantity of water therefrom. This substantially reduces the amount of water that B can obtain from his well. A is using subterranean water, and his liability to B is governed by the rules stated in Sections 858-863."

It must be concluded from Sec. 822 that where there is no competition for the use of the water, but the landowner seeks merely to make reasonable use of his own land, he is liable only on the following concepts:

(a) If the injury to the neighboring landowner is *intentional*, then there is liability only if

the activity on one's own land is done with malice or is unreasonable.

(b) If the injury is not intentional, then there is liability only if the acts on one's own lands were negligently done, or were reckless or ultra-hazardous.

(b) CASES FROM OTHER JURISDICTIONS AND  
LEGAL AUTHORITIES RECOGNIZE THE  
DISTINCTION:

The subject under discussion is elaborately annotated in 29 ALR 2d 1354 and, once again, the same distinction is emphasized. The Article is entitled "Liability for Obstruction or Diversion of Subterranean Water in Use of Land." The annotation deals with the intentional or unintentional diversion of water,

*"as an incident of the use of the land or the conduct of some activity thereon, such as ditching, excavating, mining, or the like, as distinguished from an obstruction or diversion primarily for the purpose of extracting or using the water. In other words, the annotation is not concerned with rights and liabilities in respect of a competitive use of the water itself."* (emphasis added)

The annotation is supplemental to the previous annotations in 55 ALR 1386, and 109 ALR 395, dealing with subterranean waters, springs and wells generally.

Recognizing the position of the Restatement, the annotator notes that:

"Under the rules adopted by the American Law Institute, liability for the interference with

waters of this type in the use of one's own property, to the injury of another, is determined by the rules governing liability for non-trespassory invasions of interest in the private use and enjoyment of land generally. Thus, such liability depends upon whether the causative activity or conduct, (1) if intentional, was unreasonable, or (2) if unintentional, was negligent, reckless or ultrahazardous."

In explaining the history of this distinction, the annotation proceeds to note that the common law permitted the landowner to make reasonable use of his own land. Even though there was an injury to the neighbor as an incident to that use, there was no liability in the absence of negligence or malice (page 1358). A number of early cases are cited from jurisdiction following the early English common law rule. It is noted at page 1361 that several jurisdictions have repudiated the common law rule, but at page 1364 it is noted:

"Under the rule or doctrine of correlative rights, as applied in most jurisdictions, the owner or occupant of the containing land is not precluded from utilizing it for any lawful and proper purpose to which it is adapted, without liability for incidental interferences with the waters, and he is required only to so exercise his proprietary rights as not unreasonably or unnecessarily to obstruct or divert such waters to the injury of neighboring proprietors. *To state the proposition more concisely, immunity depends upon whether the interference was reasonably necessary in connection with the use or improvement of the land.*" (emphasis added)

The above quotation reflects the conclusion of the annotator. The precise question in issue is further discussed at page 1368 where it is stated:

“The rules governing liability for the obstruction or diversion of percolating waters in the use of one’s own premises have been applied or invoked most frequently *where the effect of the interference was to cut such waters off to drain them away from an adjoining or neighboring tract, so as to deprive the owner or occupant of the benefit thereof.* In the following cases, it was held that the interference complained of was not actionable under the rule prevailing in the particular jurisdiction.” (emphasis added)

Cases from fifteen jurisdictions are then cited. On page 1369 it is noted that aside from reasons previously noted, the right to uninterrupted passage of percolating water “cannot be acquired by prescription.” Cases which did hold the landowner liable are noted on page 1371, but only five states are there noted, to-wit: California, Indiana, Kansas, Pennsylvania and Washington. The Washington case, there cited, *Patrick v. Smith*, 75 Wash. 407, 134 P. 1076, was expressly overruled by *Evans v. City of Seattle*, noted below. On examination of the decisions from the other four states, it would appear that only California would uphold respondents’ position. The Indiana case cited permitted damages only where “*negligence or malice was shown.*” The Kansas case cited permitted recovery where defendant *negligently* left “unfilled a core hole which it had bored in prospecting for gas and oil, in consequence of which wells on adjoining premises were drained and destroyed.” The Pennsylvania case

also was based on *negligence*. Thus, in the absence of negligence or malice, all twenty of the jurisdictions cited, with the lone exception of California, denied liability for damages where the waters were interfered with by a landowner in making reasonable use of his own land. The annotator concluded:

“To state the proposition more concisely, immunity depends upon whether the interference was reasonable necessary in connection with the use or improvement of the land.”

The ALR Blue Book, current to the year 1957, cites three additional cases. In each of the three, the courts held that there was no liability for interfering with water in making reasonable use of one's land. They are *McCormick Coal Company v. Shubert*, 379 Pa. 309, 108 A. 2d 723; *Trillingham v. Alaska Housing Authority*, 109 Fed. Supp. 924; *United Fuel Gas Company v. Sawyer*, (Ky.) 259 SW 2d 466.

The distinction under discussion is noted by Hutchins, “Selected Problems in the Law of Water Rights in the West.” To illustrate, he cites and discusses the Washington cases at pages 263-64. Of greatest significance is the case of *Evans v. City of Seattle*, 182 Wash. 450, 457 P. 2d 984, wherein the City of Seattle was operating a gravel pit. The water table in the city's land was so high as to make it difficult to recover the sand and gravel, and so the city dug a drain. The plaintiffs were located on lands of lower elevation and they had developed water systems for the irrigation of their lands. The court observed that “These water systems have been fed and supplied with

amply sufficient water from springs and small streams which appear on the surface at points some distance from and below the level of the city's gravel pit." After the city drained its pit it was admitted that, almost immediately "all of the water, or practically all, was diverted from springs and streams upon which respondents relied for the water supply, and that as a direct and proximate result of the opening of the ditch by the City, the respondents suffered a total loss of their theretofore sufficient water supply." In concluding that the City had the right to make a reasonable use of its own property, the court stated:

"The fact is well established that the appellant city was making a reasonable use of its own property, and that the draining of the gravel pit was for the reasonable and proper purpose of extracting the gravel for use. Apparently, the gravel pit property was valuable for no other purpose than that of producing gravel, and the city, being the owner, had we think, under the reasonable use and correlative rights doctrine, a legal right to so drain the gravel pit as to make the product thereof available *for use without thereby incurring any liability to others.*" (emphasis added)

Hutchins, after noting this case, at page 263, says:

"Of course, the City was making a reasonable use of land which may have been the only practical use, and of which an incident was the removal of water from the gravel pit, \* \* \*. It should be noted that no other limitations upon use are stated in this most recent case, *but it should also be borne in mind that in this case the city was making a drainage use, rather than a use of water on the*

*overlying land for irrigation, domestic or manufacturing purposes.”* (emphasis added)

Another helpful case comes from Oklahoma. In *Canada v. City of Shawnee*, 179 Oklahoma 153, 64 P. 2d 694, the court summarized the rule relating to the distinction under discussion:

“\* \* \* the rule of reasonable use as applied percolating waters does not prevent the proper use by any land-owner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted; \* \* \*”

See also *Bristor v. Cheatham* (Ariz.), 255 P. 2d 173.

#### (c) THE UTAH CASES FOLLOW THIS SAME DOCTRINE

The Utah cases are in harmony with the general rule. The primary and latest case in point is *Peterson v. Cache County Drainage*, 77 Utah 256, 294 P. 289, where a drainage district constructed a drain near and running parallel with the east boundary of plaintiff's land. There was no competition for the use of the water, but the drain drew the water table down, rendering it impossible for the plaintiff to secure sufficient water to irrigate his premises. The lower court granted judgment against the defendant. On appeal, the drainage district relied, to some extent, on the English common law rule which holds that water percolating through the soil without any definite

channel is a part of the soil, and that *in the absence of malice* the owner of the soil may intercept the water. The plaintiff contended that the common law rule had been modified in Utah and cited a great number of cases, including the Washington case of *Patrick v. Smith*, 75 Wash. 407, 134 P. 1076 (which has, as noted above, been overruled).

The Utah Supreme Court, in reversing the trial court's judgment for the plaintiff, noted that the *modern tendency* is away from the doctrine that a proprietor has an absolute right to use the percolating water in his land without regard to the rights of adjoining landowners. There was some argument as to the source of the water, but the Supreme Court, for the purposes of its decision, assumed that the water reaching the plaintiff's land has its origin in *natural sources*, and then *squarely held* that a neighboring landowner may drain his land without liability for lowering the water table in the lands of his neighbor. The court said:

“Assuming, however, that the percolating water which found its way into plaintiff's premises before the drainage canal was constructed came from natural sources, *still the defendant is not liable, in the absence of malice or negligence, merely because the water table in plaintiff's land was lowered because of the construction* by the defendant of its drainage canal. Neither the doctrine of reasonable use, nor the doctrine of correlative rights can aid the plaintiff in such a case. *The proprietors of the land within the drainage district had a right to improve their lands by draining the same.* The plaintiff had no right to have the

water table within his premises maintained at a high level at the expense of rendering adjoining land unfit for use. The plaintiff does not here complain because he has an insufficient supply of percolating water to supply his needs, but his complaint is founded upon the claims that the water table in his land was so lowered by the construction of the defendant's drainage canal that he can not now irrigate his premises by the *method of subirrigation* as he was wont to do before the drainage canal was constructed." (emphasis added)

The court went on to note that the doctrines of reasonable use and correlative rights have not been and should not be:

*"extended so as to prevent an adjoining landowner from improving his land by draining the same, even though such drainage may result in a lowering of the water table in the adjoining lands, nor should either of such doctrines be extended to make a landowner liable for damages to an adjoining landowner, so long as the drainage is effected without negligence and without malice."* (emphasis added)

In *Roberts v. Gribble*, 43 Utah 411, 134 P. 1014, the court even applied this doctrine to a situation where the parties were competing for the water. In that case plaintiffs sought an injunction to prevent defendant from interfering with certain underflow, or subterranean waters, which passed beneath the surface of and through the defendant's lands. Plaintiffs also sought to quiet title to the waters. In about 1905, because of irrigation of surrounding lands, a quantity of water began to seep and

percolate, and at the time of the trial was percolating into a natural channel. When not interfered with, these waters which found their way into the channel flowed down the natural channel to plaintiff's point of diversion as a surface stream. The waters historically had been diverted from the channel and used by the plaintiffs to irrigate their land.

In the month of June, 1910, the defendant constructed a number of wells by driving perforated pipe into the earth a short distance south and away from this natural channel, and in a natural depression upon the land. These pipes collected a quantity of water, and the defendant used it. This dried up the channel and deprived plaintiffs of all water. The Utah Supreme Court held that the defendant *had the right to intercept the water before it reached the river channel*. The evidence clearly established that immediately after the defendant installed the various pipes to intercept the water, the surface seeps in the channel disappeared. The court said:

*“The respondent undoubtedly had a right to drain his land of the water and put it in a condition for raising crops. Whether he did this by sinking wells or by digging drain ditches was of no concern to appellants.”* (emphasis added)

Thus, the Utah position is firmly established in harmony with the general rule that an owner of land has every right to reasonably drain his land to make a beneficial use thereof.

The court is thus squarely confronted with the question whether an owner of land has a right to drain it,

even though such drainage causes incidental damage to his neighbor. Every state in the union that has passed upon this subject, with the lone exception of California, has said that an owner of land has such a right. The Restatement of the Law of Torts is in complete accord. The ALR Annotations are in complete accord. Hutchins, an eminent water authority, recognizes the soundness of the doctrine. And, of greatest importance, the only two Utah cases on the subject clearly establish such a right. The *Gribble* case held that the defendant “*undoubtedly had a right to drain his lands of the water and put it in a condition for the raising of crops.*” The more recent *Petersen* case squarely held that the water law doctrines of reasonable use and correlative rights did not apply because it was not really a water problem, and said that the neighboring landowner had no right to have the water table maintained at a high level “at the expense of rendering adjoining land unfit for use.”

Under the very clear, convincing, and nearly unanimous authority, appellants cannot be held liable unless it can be shown that they acted with malice and in an unreasonable manner or else were negligent. Respondents made no effort to prove negligence nor to prove that the draining of appellants' land was unnecessary or unreasonable or done with malice. The trial court made no findings on any of these matters. The appellants acted with prudence and reason, and were free from malice. Their drain intercepts percolating waters before they reach and become a part of any surface stream, and it delivers such water to the Spring Run channel at almost the exact point of the

previous impounding and diverting dam. The sole affect on the respondents (as in the *Peterssn* case, supra) is that the water table in appellants' lands has been reduced or drawn down, so that the waters will no longer flow on the surface, and thus they will not run into or fill a storage pond, nor reach some five acres of plaintiffs' land by gravity. It is not the sufficiency of the water with which we are concerned. The flow is not diminished in quantity or quality. Appellants are not using any part of it. There is no evidence in the record to suggest that appellants acted in any manner which could subject them to liability to the respondents.

Despite the clarity and persuasiveness of the law on this issue, it seems advisable at this point to insert a question of fact. It is possible, even probable, that appellants' conduct was not the cause in fact of respondents' inability to get water at a sufficient elevation for gravity flow irrigation on all of their land.

It must be stressed that there was no evidence at the trial to prove that Spring Run Creek would have flowed at all in 1955, even if appellants had not constructed their drains. This is so because much irrigation on lands of higher elevation has been discontinued (Moyle farm and much of the east bench which had been subdivided for residential purposes) (R. 354-55), the City had capped twenty-five flowing wells in April of the same year (R. 356), and the City drilled a new twenty-inch well to pipe water into the City system. It is sheer speculation, therefore, to assume that the water table would have been at

surface level to provide a flow in Spring Run Creek in any event. In fact, in view of the diminished water supply, it is extremely doubtful. One point is clear: Appellants' drains intercepted these percolating waters, including some waters at lower levels than Spring Run Creek, and discharged them near plaintiffs' historical point of diversion. Coupled with this fact is engineer Ward's testimony that the drains also save water which otherwise would have been lost by evaporation and transportation seepage (R. 322-23). It is true that the drains now discharge the water at a lower elevation and thereby require pumping operations to irrigate five acres of respondents' land which were previously irrigated by gravity flow. But, if the drains hadn't discharged the water at the lower elevation, *it is distinctly possible that respondents would not have been able to irrigate any of their land by gavity flow*. They can now so irrigate fifteen acres.

No one has questioned that we had the right to stop irrigating our land and the court has already held in a previous case that the city had the right to cap the 25 wells and drill a new 20-inch well. Respondents have failed to prove that respondents were negligent and cannot recover because of work done on our own land.

#### POINT No. 2

THE COURT ERRED IN HOLDING THAT RESPONDENTS HAVE AN EASEMENT OR RIGHT TO REQUIRE THE MAINTENANCE OF THE PONDS ON APPELLANT ARCON CORPORATION'S LAND.

If the court determines that appellants had a right to drain their land, then no other question need be here determined. The question of the extent of the respondents' vested rights to use the pond would clearly be moot, because the testimony stands uncontroverted that the pond would never have filled from the available waters with the drains installed. (R. 314) The drains destroyed the usefulness of the pond, and if appellants had the right to construct the drains, there can be no liability, even though the court were to conclude that respondents owned vested rights in appellants' fish ponds.

Point I should dispose of the case. If, however, the Court should disagree, then the Court must determine what the respondents' vested rights were in the use of the lower pond.

The evidence is not in controversy, so that the problem for decision is purely one of law. Ferguson testified that his father built the middle pond near the house, with some help from Mr. Boyce. (R. 258) Mr. Boyce asked, in effect, why he couldn't have some water out of this pond, and Mr. Ferguson's father said, in effect, that he saw no reason why Mr. Boyce couldn't use the pond. (R. 258-59) So prior to 1903 Mr. Boyce constructed a ditch from the middle pond to irrigate part of the lands now owned by respondents. (R. 259) Later on, and probably by the early 1900's, as Mr. Ferguson testified, his father built the lower pond. (R. 275) Mr. Ferguson was very clear in his testimony that Mr. Boyce did not help in any way with the construction of the lower pond. (R.

275) *It was constructed by defendants' predecessor in interest for his own use for fish culture.* Later on, after the pond was completed, defendants' predecessor in interest drilled approximately 25 wells to increase the flow of the water, and right up until the time that appellants acquired the land the wells flowed into the lower pond and it was used for fish culture. (R. 359-60) The wells were permitted to run to keep the ponds full. (R. 358) Also, the Moyle farm to the east was irrigated with a water right approximately two and one-half times greater than the needs of the land. (R. 319-20)

Until the plaintiffs bought the land, the total contribution of respondents' predecessors to the lower pond was a \$6.00 contribution (six bags of cement) to repair a part of the dam. (R. 342-43) Respondents bought the land several years ago, and once or twice they claim to have furnished a few flash boards for the headgate and repaired some muskrat holes. (R. 223-25) There is no indication that they were requested to furnish the headgates or to fix the muskrat holes. There was no evidence that the pond was used for overnight storage for irrigation, or that the irrigators raised the pond, and then drained it down in irrigation. The evidence was to the contrary. The pond was a fish pond; its elevation was held constant by appellants' predecessor, and he built the pond on his own land for his own use and convenience. The ditch from the middle pond may have been used both by Ferguson and Boyce, but it was abandoned sometime between 1912 and 1920, and Mr. Boyce moved to the lower pond. (R. 266)

He did not help build, nor did he help maintain the lower pond. (R. 275)

The uncontroverted evidence demonstrates that the pond was built and maintained by the landowner solely for his own use. The cases are uniformly to the effect that the use of incidental benefits from a pond by people in the position of respondents is neither hostile nor adverse, and does not permit the creation of prescriptive rights to have the landowner continue to maintain his land in that condition for his neighbors' benefit. In fact, Bagley testified that during his period of use he acquiesced in the assertion of a superior right by appellants' predecessor. In the 1934 drought there was not sufficient water to keep the pond full, even with the wells flowing into them, and Bagley was told not to use any water. And so he went without water that entire year. R. 340-41)

The principle applicable to this situation is stated in "Farnham on Water Rights," page 2685, in a footnote, in which it is stated:

"The fact that a ditch was dug upon one of two adjacent lots for its occupant's convenience, but which incidentally drained the surface water of the other, does not prevent a subsequent owner thereof from filling up such ditch and raising the grade of his lot above its natural level so as to prevent the draining of such other lot as before, \* \* \*"

Farnham, at Section 827 (b), page 2429, further states:

“A landowner has no riparian rights in an artificial pond adjoining his land from which he has been accustomed to water his cattle and to take water for other farm purposes, where it is fed by water flowing through an artificial water course constructed for the purpose of diverting water from a natural stream into the pond for the operation of the adjoining landowner’s mill, *although such artificial water course and pond have existed for more than a century*, as such an artificial water course is temporary in its nature, as it is limited to the period during which the mill is used; *and the owner of the mill property may stop the flow of the water or construct a fence along the boundary line so as to deprive the adjoining owner of the use of the pond*. No presumption arises that a water course was constructed under an agreement with an adjoining owner under which he acquired prescriptive rights in the use of the water, from the mere fact of the existence of the artificial water course, *where all the works were constructed on the land of the owner of the water course, and no burdens were cast upon the adjoining owner.*” (emphasis added)

Farnham further states at page 2438:

“If the new channel is merely artificial and made for the accommodation of the dominant owner, mere acquiescence in the making of such use of the flow of the water as the circumstances will allow by the lower owner cannot be regarded as an adverse user. There must, in addition, be an assertion of the right to have the flow continued, and notice to the upper owner that he will not be permitted to change the flow.”

The subject is annotated in 88 ALR 130. The majority view is that where an owner constructs an arti-

ficial condition for his own use and a lower user incidentally benefits therefrom, the lower user cannot acquire a prescriptive right therein. The cases which follow this view deny the existence of a prescriptive right on the grounds that an adverse use is an essential element of the acquisition of prescriptive rights, and the enjoyment of incidental benefits of artificial improvements on another's lands lacks sufficient adverse intent.

The annotation at page 136 collects a number of cases involving dams. Every one of the cases there cited involves a situation where the dam had existed for more than the prescriptive period. An adjoining landowner had received benefits from the dam. The owner of the dam and reservoir in each of the cases for some reason or another wanted to abandon the dam and let the water return to its normal course or level. In each of the cases the adjoining landowner urged the right to have the dam maintained, *and in every one of the cases noted the courts held that no such right existed, and in each case the owner of the dam was permitted to abandon it.*

Representative of those cases are the following:

In *Goodrich v. McMillan*, 217 Mich. 630, 187 N. W. 368, 26 ALR 801, a predecessor in title of the defendant built a mill dam. The dam raised the natural level of several small lakes, causing them to overflow on to certain lower lands. After a period of 67 years, the dam became decayed by age and went out of existence. The plaintiffs, in the meantime, had built summer cottages and hotels on the adjoining land with reference to the artificial level of

the lakes and had enjoyed the benefits of such artificial level for a period of nearly 50 years. Plaintiffs alleged that the return to the natural level had damaged them seriously. They sought to require the defendant either to rebuild and repair the dam himself, or to permit the plaintiffs to enter upon defendant's premises to rebuild the dam. They asserted that they had acquired a right to have the waters maintained at the artificial level. The court held that no such right existed, and said that the defendant might either take out his dam or, after it went out, refuse to rebuild it, and as to that "*plaintiffs have no legal concern.*" The court quoted from an annotation in 50 ALR 841, as follows:

"In the absence of peculiar circumstances sufficient to constitute an estoppel upon the owner of the prescriptive right, or to give the adverse party himself an adverse right, the better opinion is that the mere acquisition of a prescriptive right to an artificial condition of water will impose no obligation to maintain such condition. The reason for this is that adverse use is necessary to establish prescriptive rights."

The Michigan court later followed the same rule in *Pere Marquette R. Co. v. Siegle*, 260 Mich. 89, 244 N. W. 239, and observed that the owner of a mill dam is not required to operate the dam for the benefit of a person who acquires the right to harvest ice from the mill pond.

In *Albert Lea v. Nielsen*, 80 Minn. 101, N. W. 1104, 81 Am. St. Rep. 242, adjoining landowners had improved their lands in reliance upon the permanency of an easement which had been acquired by a mill owner for the con-

struction of a dam. The court held that, even though the easement benefitted plaintiffs' lands, they cannot complain when the easement is abandoned.

In *Vliet v. Sherwood*, 35 Wis. 229, the defendant constructed a reservoir to operate a mill. Water ran through the defendant's mill and for a period of 20 years or more the plaintiff's lower mill used the water. The defendant, after a lapse of 20 years, had his mill destroyed by fire. Plaintiff claimed that she had acquired a prescriptive right to have the water flow from the defendant's reservoir to her mill in the same manner as it had flowed for more than 20 years. The court denied the plaintiff's claim to a prescriptive right, saying that the right must have been exercised adverse against the defendant, and that this element was lacking. The court observed that the plaintiff doubtlessly had derived incidental benefit from the reservoir, and that so long as defendant operated his mill, plaintiff would receive the benefit, but her use of the water after defendant had discharged it from his mill was not inconsistent with or adverse to the use which the defendant made of it.

In the principal case annotated, *Drainage District v. Everett*, 171 Wash. 471, 18 P. 2d 53, quoting from the syllabus, the court said:

“Neither the maintenance for the prescriptive period of a dam impounding the waters of a stream, nor the maintenance for the prescriptive period of drainage ditches by a drainage district organized by lower proprietors sufficient only to take care of the diminished flow, and their enjoy-

ment for such period of the land thus reclaimed, give the drainage district a right to have the condition so created continued for its benefit.”

It is, therefore, respectfully submitted that under the better reasoned authorities where an owner, as in the case at bar, constructs a fish pond for his own use, a lower user obtains no prescriptive right to compel the owner of the reservoir to maintain it. It is not controverted here that Ferguson built and maintained the dam for his own use. Nor is there evidence that respondents’ predecessors in any way contributed thereto. The dam was built for fish culture. Water was placed in it from 25 wells, and from the capturing of return flow from irrigation. The fish culture use was non-consumptive, and the overflow from the pond went down to the respondents’ land. The respondents’ use of this overflow was in no way adverse to the use and maintenance of the pond by appellants’ predecessors. Mr. Boyce was given express permission to use the water, but, when there was a water shortage in 1934, Mr. Bagley was expressly prohibited from using any water and he willingly complied by using no water during that year. (R. 340-41)

Since there is no evidence of an adverse, open and notorious use of the pond, and since appellants created the pond in question solely for their own use and benefit, the law is clear that respondents have no right to have the ponds maintained so that they can continue to enjoy their incidental benefits as adjoining landowners.

### POINT No. 3

THE COURT ERRED IN FINDING THAT RESPONDENTS ARE ENTITLED TO RECEIVE THREE CUBIC FEET OF WATER PER SECOND FOR THE IRRIGATION OF TWENTY ACRES OF LAND.

If the court holds that appellants are wrong on both Points 1 and 2, and that they have a duty to replace the water for the respondents, then in this regard the trial court committed three highly prejudicial errors. First, it has found, without any evidentiary support, that respondents are the owners of the right to receive 3 c. f. s. of water; second, it has ordered appellants to pump all of the water perpetually, despite the fact that all but five acres of the land can be irrigated by gravity flow; and, third, it has decreed a water right which is indefinite in its terms and which is unreasonable in its quantity.

- (a) The evidence does not sustain a finding that respondents have appropriated three cubic feet of water per second.

There is really no dispute in the evidence. The only witness who fixed the irrigated acreage was Mr. Bagley, who testified that during the nearly 16 years when he owned the land it was naturally wet. (R. 339). This is consistent with all the other evidence. The topographic map shows this area to be a swamp. (Exh. 3-D and 3-D-a) Mr. Ward indicated that the ground water was high enough to reach the root zone. (R. 339) When Bagley owned this land, many crops

needed no surface water at all (R. 339), and during the 16-year period Mr. Bagley irrigated no more than four acres of land (R. 341). Even if there had been an appropriation of sufficient water to irrigate 20 acres of land prior to 1903 (a matter on which there is no evidence), the 16 years when Bagley was on the place, *would have caused a forfeiture of water not used*. Under Section 73-1-4, U.C.A. (1953), an owner of a water right will lose it if he permits it to remain unused when it is available for five continuous years. The evidence without contradiction shows an appropriation of only sufficient water for *four* acres. The land was wet enough that no more water than this was needed. If in 1903 more water than that were appropriated, it was in any event forfeited by Bagley's 16 years of non-use.

A right initiated prior to 1903 cannot be enlarged after 1903 without a new filing with the State Engineer, *Wellsville v. Lindsay Land and Livestock Co.*, 104 Ut. 448, 137 P. 2d 634 (1943). In the case at bar respondents made no such filing. In recent years respondents changed alfalfa fields into row crops. Alfalfa, as the court judicially knows, and as Mr. Ward testified (R. 332), has a root zone that goes down many feet. It needed no artificial application of water on this land. Respondents have changed the nature of their use to row crops, which, according to Mr. Ward, take twice as much water (R. 332). This change was not made until 1944 and after their predecessor had irrigated only four acres of land less than three times per year. Mr. Bagley thus used probably less than twelve acre-feet of water per year.

Respondents started to divert and use, according to Mr. Ward, approximately six acre-feet per acre on the full 20 acres of land, or approximately 120 acre-feet per year (R. 331). There is no principle of law whereby they could increase their consumptive use of water from 12 to 120 acre-feet per year, and likewise increasing their claimed burden on appellants' land. This is an increase of 1,000 per cent. And yet, without a filing with the State Engineer and without a twenty-year prescriptive use as to the claimed burden on appellants' land, respondents claim that they had a vested right to so increase their consumptive use.

Aside from the extremely tenuous legal position in which respondents find themselves, they are confronted with an equally disconcerting question of fact. Simply stated, it is that there is nowhere any evidence of an appropriation of 3 c. f. s. of water. Indeed, respondents never at any time claimed that they had appropriated such an amount. To the contrary, respondent Seo testified as follows: (R. 155)

- Q. Now, in the irrigation of your farm lands, could you tell the court approximately what size of flow you used for your operations?
- A. We used to use between one and two second-feet.

He went on to testify that this usage was only intermittent, depending on whether winds would occur to accelerate the drying of the land (R. 155).

The court was thus confronted with uncontroverted testimony to the effect that (1) respondents did not have

the legal right to increase their appropriations beyond Bagley's right to irrigate four acres three times a year and (2) even though there was an unlawful increase in use, even that increase never exceeded a flow of two cubic feet per second. Despite this, the court decreed a water right of three cubic feet per second.

- (b) It was error to order appellants to pump water for more than five acres of respondents' land.

This is a simple point, but a very important one. The evidence is uncontradicted to the effect that after the lower pond on appellants' land was destroyed, respondents put a dirt dam in the channel on their own land and made a pond from which they pumped. (R. 445) They constructed a ditch, which respondents admitted had been used. Appellants caused a survey to be made and the unequivocal testimony was that an actual survey of the ground shows that all but five acres of respondents' lands can now be irrigated by gravity flow (R. 429-430). To place the burden upon appellants to pump in perpetuity enough water for 20 acres, when as a matter of fact all but five of the acres can be irrigated by gravity flow, was error.

- (c) It was error to decree a water right which is indefinite in its terms and unreasonable in its quantity.

If appellants must pump water for respondents they are entitled to a more definite decree than that fixed by the trial court. The court did not define the respondents' water right at all, except for a finding that they are

entitled to take water at the rate of three cubic feet per second. There is no indication when the season is to start, or when it is to end. There is no finding as to the acreage irrigated. Nor is there any indication as to how many acre-feet are to be applied to the land per year. Even if the evidence would sustain the three c. f. s. finding, it is highly prejudicial to order appellants to replace the water and not otherwise define the right. As the decree now stands, appellants would be required to pump water at the rate of three c. f. s. almost at the whim of respondents. Appellants' counsel objected and asked the trial court to fix the season of use and the duty of water, etc., but the objections were overruled.

The Utah Supreme Court has previously said that when it can not be determined from a decree how much water has been awarded thereby, the decree is void for uncertainty. A brief reference to some of the leading Utah cases will be helpful. In *Sharp v. Whitmore*, 51 Utah 14, 168 P. 273, the decree gave no indication as to the fall of the ditch, its velocity or the amount of land to be irrigated by it. It was therefore held that the decree was void. In *Francis v. Roberts*, 73 Utah 98, 272 Pac. 633, the decree of the trial was indefinite in that it failed to fix the irrigation season. The evidence was conclusive to the effect that in no season was irrigation necessary before April 1st. The court held that the decree should, therefore have fixed this date as the earliest time in any season for which the use of water in controversy by the defendants for irrigation should begin. Because of the failure to

fix this, the case was reversed. In *McNaughton v. Eaton*, 121 Utah 394, 242 P. 2d 570, the trial court failed to fix the details of McNaughton's water right. On appeal, the Supreme Court reversed, directing the lower court to determine the duty of water. In *Smith v. Phillips*, 6 Utah 376, the court reversed a decree for uncertainty, where the award was for "one good irrigation stream" of water from the creek in question 60 hours out of every sixteen days. In *Holman v. Pleasant Grove City*, 8 Utah 78, the court held that a decree which provided that in normal times the plaintiff was entitled to sufficient water to irrigate 60 acres of land was improper, since the decree should specify the amount of water necessary by an approved method of measurement. Similarly, in *Nephi Irrigation Company v. Jenkins*, 8 Utah 369, the trial court found that the defendant was the prior appropriator and decreed he was entitled to use water to the extent of his prior appropriation, but did not determine the extent thereof. The court held the decree was uncertain and should be set aside on appeal. In *Lost Creek Irrigation Company, v. Rex*, 26 Utah 485, 73 P. 660, the court awarded the plaintiff and defendant each one-half of the normal flow of the water in a creek after June 15th of each year. Held, the decree is too uncertain in that it fixes no time when the normal flow of water ceased and the high water began. In *Hardy v. Beaver County Irrigation Company*, 65 Utah, 28, 234 Pac. 524, the court stated that the main purpose of an action to quiet title is to determine the respective rights of the parties to the use of the water, and the decree should definitely award the respective rights to the parties to the action. The decree must be sufficiently

definite and certain as to the parties, the order of their respective priorities, the quantity of water which each is entitled to use, the times when they are entitled to use the water, and any other matter which the evidence of each particular case may develop. The failure of the decree to contain such elements with reasonable certainty is error.

In the case at bar, the decree does not even define the land to be irrigated. It decrees that respondents are the owners and entitled to the use of approximately three cubic feet per second of water from Spring Run Creek for the purpose of irrigating lands which respondents own in portions of Sections 8, 9, 16 and 17 of T. 2 S., R. 1 E. The acreage is not given. The particular land to be irrigated is not described. No element of the appropriation is fixed, except that respondents are entitled to "approximately" 3 c. f. s. (R. 123) Reference to the findings doesn't clarify. Finding No. 1 only provides that the respondents are the owners of "approximately" 25 acres of land. (R. 114) The evidence is uncontradicted that there is a substantial portion of this land located north of Spring Run Creek which is not irrigated, so there isn't even a finding as to the acreage irrigated, or for which appellants must for all time to come pump 3 c. f. s. of water. (R. 123)

It is submitted that where appellants have been ordered to pump in perpetuity the water for the lands of the respondents, there must be a more definite decree fixing the beginning and the end of the irrigation season,

the rate of flow, the duty of the land, and the total quantity of water in acre-feet respondents are entitled to receive. Otherwise, appellants are at respondents' mercy to pay for pumping upon demand with no limitation as to beneficial needs.

Finally, an observation must be made as to the reasonableness of the amount of water awarded. Certainly respondents must limit themselves to the quantity of water they can beneficially use. It is inconceivable that they could use on their approximately nineteen acres of ground a continuous flow of three cubic feet per second. This would amount to six acre-feet per day. They are claiming an unusually long irrigation season, totaling more than 220 days. A continuous flow would yield 1320 acre-feet of water, and on their acreage this would amount to more than 60 acre-feet of water per acre of land per year. In this state, where the Supreme Court has again and again affirmed as adequate a duty of water between three and four acre-feet per acre, this is fantastically high. There is no evidence to sustain such use.

The conclusion is inescapable. The trial court's decree of a water right of three c.f.s. is indefinite and excessive. It is, therefore, void.

#### POINT No. 4

#### THE COURT ERRED IN ASSESSING DAMAGES.

- (a) The court erred in awarding damages for loss of crops not planted.

One of the hornbook rules of damages, which is so clear that Professor McCormick states it unequivocally, is simply: "If the invasion merely prevents the plaintiff from planting his land, *the measure is not the value of the hoped for crop, but the rental value of the land for the season.*" *McCormick, Damages* § 126 (1935).

The cases all sustain this rule of damages. The head-note to *Franklin Drilling Co. v. Jackson*, 217 P. 2d 816 (Okla.) is a fair representation of existing case law:

"The measure of damage for anticipated loss of crops which could not be planted by reason of damage caused is the reasonable rental value of the land for the season."

An annotation in 108 ALR 1174 reaffirms the rule. It is entitled "Measure and Amount of Damage for Breach of Duty to Furnish Water, Gas, Lights or Power." The annotator states the rule on page 1185 as follows:

"The raising of a crop not yet planted being too uncertain, and damages based upon the assumption of loss of profits from such a crop being altogether too speculative, it has been held in a number of such cases that the true measure of damages for failure to furnish water for irrigation was the difference between the rental value of the land with the water and its rental value without it."

In support of this rule, the annotation cites many cases.

The law in Utah is well settled and supports this rule. In *Adamson v. Brockbank*, 112 Utah 52, 185 P. 2d

264, the court held that expected profits lost by a landowner on future crops of wheat which he failed to plant (because of lack of irrigation water) were not proper elements of damage for permanent destruction of his easement in an irrigation ditch which was destroyed by owners of adjacent land. If the crops were already planted or in existence, a different rule of computing damages would apply. But where the crops have not yet been planted, the complainant can only hope to recover the cost of preparing and cultivating the ground and the actual expense of purchasing seed which is lost by the inability to plant. (*Adamson* case at page 82) In the cases of *Naylor v. Floor*, 51 Utah 382, 170 Pac. 971 (1918); *Sharp v. Cankis Gianulakis*, 63 Utah 249, 225 Pac. 337 (1924) and *Petrofesa v. Denver & Rio Grande Western Railroad Co.*, 110 Utah 109, 169 P. 2d 808 (1946) the issue was the measure of damage to *crops which were growing*. It is admitted that in such a situation the profit reasonably to be expected, less cost of growing and harvesting, is the measure of recovery. In the *Petrofesa* case the plaintiff had been delayed in planting his celery crop because the defendant railroad had covered his irrigation ditch. The issue there before the court was the measure of damage to a crop *which had been planted late in the season*, such delay causing a loss when the celery was marketed. It was therefore appropriate for the court to apply the measure of damages applicable to growing crops.

The above cases are cited to emphasize the distinction between crops not yet planted and crops which are already planted. In the case at bar the respondents had

celery plants in a greenhouse and they claim that they were prevented from setting out the plants because of appellants' interference with the water. Consequently, respondents failed to plant celery in two and one-half acres of land which had been prepared for planting. They contend that, had they planted the land, they would have grossed \$5,000.00. Estimated harvesting and growing expenses are then deducted by the respondents and a net loss of \$2,800.00 is assessed. (R. 174)

It is submitted that it was manifestly erroneous to measure damages as if these were growing crops. The celery crop was never planted. Squash was planted and a lower gross was realized. To allow damages for expected profits of a celery crop which was never planted is absurd. There is no case which allows expected profits for a crop which was *never set in the ground*. It is even more ridiculous to allow expected profits for one type of crop (celery) when a different type of crop (squash) was actually grown on the land in question. All that respondents can hope to recover is the cost of growing the celery plants which were never planted. The cost of cultivating the land is not a logical item of damage since squash was planted and the cultivation was not a loss. Respondents might argue that the celery plants were growing crops since they were "in existence." This is without merit. The *Adamson* case, *supra*, mentions damage to crops which are "in existence" as an item of special damage. Every reasonable indication suggests that crops have three stages: (1) Before they are planted; (2) after they are planted, but before they come into existence;

and (3) after they come into existence (i. e., after they are growing). This interpretation is sustained by the fact that in the *Adamson* case there had been an expenditure for wheat which was not planted. The court was willing to allow the actual cost of the wheat as an expense, but never entertained the thought of allowing damages for expected profit on a crop of wheat that was never planted.

The rule allowing only the rental value of the land is a practical rule. Where the crop is planted, there is no way to salvage the seed and rent other lands. Where, however, the seed has not been planted, the operator may find other lands and run his risks of profit or loss. Thus, his damages are limited by the courts to the rental value of land.

- (b) The court erred in awarding damages which respondents failed to mitigate.

It is elemental in the law of damages that, absent some malicious act on the part of defendant, plaintiff is under an obligation to mitigate his damage. If he fails to do this, he can recover only the amount which his damages would have been if there had been a proper mitigation.

Respondents, if they had so elected, could have adopted either of two convenient methods of mitigating their damages. First, for a price of only \$25.00 per week, they could have rented a pump which would have pumped adequate water for their lands. (R. 413-14) Secondly, they could have put in a dam for a cost of only \$75.00 which would have been so situated that it would have provided gravity flow irrigation for fifteen acres. (R. 429-

30, 445, 452) Both of these solutions were reasonable, inexpensive and convenient. Either one would have provided water for ample acreage to plant the celery crop as early in May as they desired. Since respondent Seo testified that he knew as early as May 4 that water would not be delivered to them, and since he testified that he knew substantial damage would result (R. 204-06), there is no justification for failing to mitigate when either of the methods above would, at nominal cost, have prevented a claimed loss of a crop expected to gross \$5,000.00.

It is submitted that, under earlier arguments, appellants are not liable to respondents for any damages. If, however, damages are assessed for loss of crops, the amount can only be \$25.00 per week for three weeks as the rental value of a pump plus an additional \$25.00 to \$30.00 for gasoline to run the pump, or, in the alternative, the damage figure could be \$75.00, which was the cost of building the impounding dam which provided water for fifteen acres by gravity. (R. 445, 452)

(c) The court erred in awarding duplicate damages.

In referring to Finding No. 11, it appears that the court awarded general damages as follows:

|                                     |            |
|-------------------------------------|------------|
| Cost of a pump .....                | \$ 827.00  |
| Cost of dam for catch-basin.....    | 75.00      |
| Digging of dam for catch-basin..... | 75.00      |
| Cost of pipe—11 lengths @ \$25.45   | 370.95     |
| Hauling of pipe to land.....        | 100.00     |
| <hr/>                               |            |
| Total .....                         | \$1,411.75 |

There is no testimony whatever to indicate that the pump which was purchased is worn out or that the pipe is worn out. Yet, the court ordered appellants to install a suitable and efficient electrical pumping system for respondents. If appellants fail so to do, respondents are awarded judgment for an additional \$1,500.00. It is respectfully submitted that this is error. This requires appellants to buy two pumps. First, they must pay the full purchase price of the pump that respondents bought; and, second, they are required to pay for and install an additional pump. Certainly there should be a credit for the remaining value of the original pump if appellants are required to install a new one.

Appellants are also ordered by the decree to place the water to be pumped in perpetuity "at a point in the Northeast corner of plaintiffs' lands where the large drain enters plaintiffs' properties as a substitute system in lieu of the ditches and facilities which defendants previously destroyed." (R. 123) Again, no credit is allowed for the aluminum pipe which obviously still remains. The court simply granted respondents' prayer. In fact, reference to the memorandum indicates that the court granted respondents more than they wanted, and several matters were voluntarily eliminated when the findings and conclusions were presented. It appears that the trial judge did not go beyond a consideration of the question of liability. Having once determined the issues of law against appellants, the trial judge simply granted everything that had been mentioned in the evidence and, as to some items, doubled the damages. He ordered

appellants in the memorandum decision to pay the future cost of pumping, but still awarded respondents \$1,600.00 for estimated future pump operations. He ordered appellants to install the pump, but gave respondents a \$1,500.00 judgment for the same. In the top item on page 4 of the memorandum decision, he gave respondents tractor rental of \$946.00, labor costs of \$410.00, etc., and then under special damages gave judgment again for the same items. (R. 106) His total judgment as awarded by the memorandum decision was \$13,344.00. This was voluntarily cut down by respondents to \$8,217.00, thus eliminating nearly \$5,000.00 of duplicate awards.

We respectfully submit that respondents, under anybody's theory of the case, still have been permitted to recover the duplicate cost of the pump and the pipe.

- (d) The court erred in awarding other items of damage not sustained by the evidence.

This final subsection is intended to be a brief commentary on the nature of respondents' testimony and its adequacy in sustaining the damages awarded. Respondent Seo testified that his tractor which he had used for pumping had depreciated \$1,000.00 while being used for that purpose and that its present value was only \$500.00. Upon cross-examination, however, he admitted that he would not sell his tractor for that price. (R. 203) This was a clear confession that the depreciation really hadn't been as great as he testified on direct examination. Yet, the court awarded the full amount claimed in his initial testimony.

There are many things in respondents' testimony which simply do not ring true. Respondents were only without water until May 23rd, which is the date they started pumping. They allege that, because they were without water for ten days, enormous damage resulted. This seems incredible in light of the fact that, in respondents' suit against Salt Lake City because it capped its wells, respondent Seo testified that *they depended for early water on the wells* and that the surface flow did not normally start until after the middle of May. His specific testimony is as follows:

“Q. And about how early in the spring would it be before the spring water came in with the well water as a general rule?

“A. It would be after May.

“Q. Is that after May 1 or—

“A. Well, I believe it would be after the middle of May.”

Mr. Seo then testified in this trial that he knew by May 4th, when the ponds were destroyed, that appellants were not going to furnish him with water. He testified that he foresaw the impending damage, yet made no immediate effort to rent a pump or construct the impounding dam. (R. 204-06)

In light of respondent Seo's testimony that they relied on the water from the City wells for their early May water because water is not normally available from Spring Run Creek until after the middle of May, it should be noted that Mr. Ward testified that the drains would reach additional water which was not available at the sur-

face of Spring Run Creek. (R.322-23) Spring Run Creek flows only when the ground water tables are brought up to ground level. Thus, the effect of this testimony is that, if anything, the drains have made Spring Run Creek water available earlier in the year.

Also worthy of note is the fact that the demand letter (which is in evidence) written by respondents' attorney carried the date of May 16 and claimed that respondents would suffer damage "unless water is delivered to the property of my clients during this week, \* \* \*." Of course, May 23rd is within one week of May 16th (R. 425).

As a final observation, it is interesting to note respondents' income tax returns as a general reflection on the credibility of their testimony. Their income tax returns show that they operated less land in 1955 than they did in 1954 (because the land rented in 1954 wasn't rented in 1955). Yet, their gross and net income was higher in 1955 than it was in 1954. Their tax returns further show that their operating expenses were not substantially increased. This is of particular interest in light of the huge sums which were allegedly spent in pumping water. Certainly respondents' income tax returns do not corroborate their claims to much greater operating costs and enormous crop damage in 1955. Their explanation of variation in crop prices (R. 248-50) is hardly adequate.

It is believed that the items discussed under Point 4 clearly demonstrate that the damages awarded by the

trial court were excessive, duplicitous, unwarranted, and computed by using an erroneous measure.

POINT No. 5

THE COURT ERRED IN ENTERING JUDGMENT  
AGAINST ALL OF THE APPELLANTS.

The trial court rendered judgment against two corporations and four individuals. This is incredible in light of the fact that evidence adduced at the trial wholly failed to implicate any of the appellants except Arcon Corporation. The evidence showed that defendant Arcon Corporation was incorporated before any of the activity of which respondents complain was actually commenced. Arcon Corporation owned the property whereon the ponds were situated and performed the work which respondents contend interfere with their water. Before the judgment of the trial court can stand, it must be shown that all six of the named appellants were liable to the respondents. Since the judgment has been entered against all of the six appellants it must be shown that there was evidence before the trial court to justify such action. If the record contains any evidence of liability on behalf of *all* of the appellants, it is assumed that respondents will point to this evidence in their brief. If not, five of these appellants have been erroneously held liable to respondents. If this Court feels that the trial court's judgment and decree can be justified under any possible theory, then it is respectfully submitted that such judgment can only be sustained against Arcon Corporation, who owned the land and per-

formed the acts reasonably necesesary to subdivide it for residential purposes. The other appellants are entitled to a reversal and to their costs. Even if Arcon pays the judgment they have a continuing obligation to pump water, install pumps, etc., and have had to bring this appeal to be relieved of this burden.

## CONCLUSION

It is respectfully submitted that as against all of the appellants except Arcon Corporation, there is no evidence of any kind to sustain a judgment on any theory. As to all of these appellants, the case must be reversed and they should be awarded their costs. As to the remaining appellant, we submit that the judgment should be totally reversed, both because we had a right a make a reasonable use of (drain) our own land and respondents failed to prove any vested interest entitling them to require us to maintain ponds. If the court is unable to hold with us on these points, then we submit that the matter should be reversed to have the quantity of water and the other elements of the water right fixed with definiteness and certainty, that we should not, in any event, be compelled to pump water for lands which can be irrigated by gravity, and that the measure of damages assessed by the trial court is in error and should be reversed.

Respectfully submitted,

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