

1958

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

Utah Supreme Court

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In the Supreme Court of the State of Utah

FILED

MAR 25 1958

RUSSELL KANO and TOMMY SEO,

Plaintiffs and Respondents,

Clerk, Supreme Court, Utah

vs.

ARCON CORPORATION and BARCON
BARCON CORPORATION, Utah cor-
porations, and MAE L. BAGLEY, LEO
L. CAPSON, GLEN L. PECK and
MANFORD A. SHAW,*Defendants and Appellants.*Case No.
8739

BRIEF OF RESPONDENTS

GLEN E. FULLER

Attorney for Respondents

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Respondents contend that appellants' Statement of Facts is misleading, immaterial, incorrect and contrary to the evidence in many particulars and therefore prefer to re-state the facts in a manner consistent with the chronology of events, the evidence, and the findings of the lower court (R. 114-119).

In the year 1894 a young boy of 14 by the name of William Ferguson lived with his parents on a farm in the area of 13th East and 56th South Streets in Salt Lake County. This area contained many springs which created a stream, known as "Spring Runs," where he swam, herded cows and spent much of his boyhood and subsequent lifetime (R. 255, 256). At the trial of this case, some 63 years later, Mr. Ferguson (now 78 years old) appeared and outlined the transition of the area from practically a pioneer outpost to the present time.

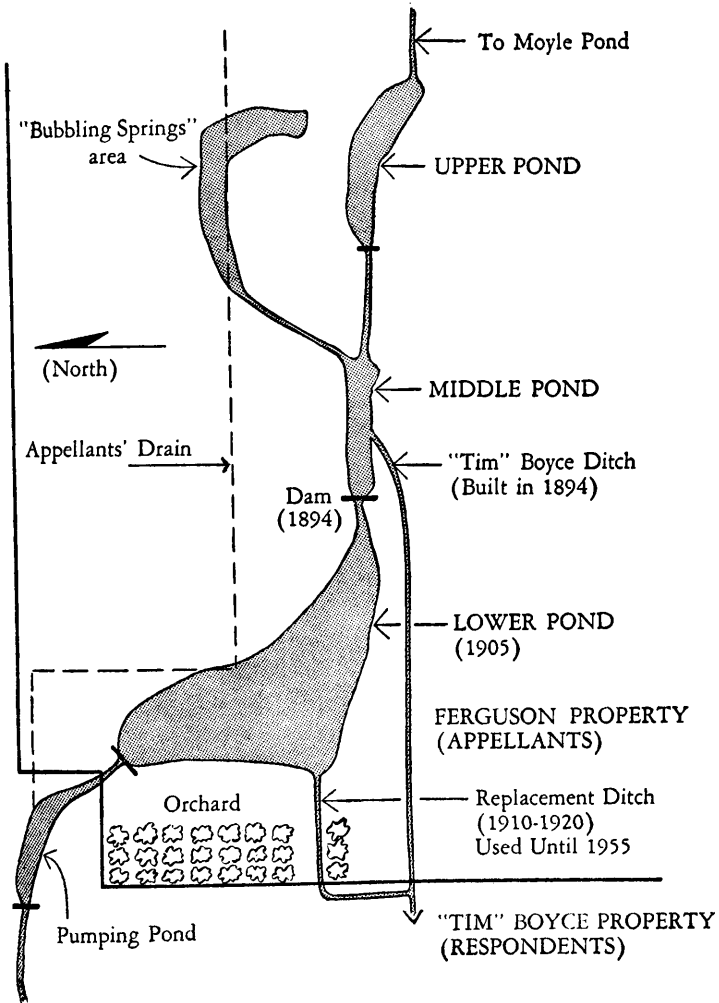
For the purposes of general reference a map has been prepared and inserted on page 5, showing the general area which is the subject of this law suit.

At that time the stream had cut a deep gully through the western portion of what will be referred to as the "Ferguson Property," having been created by natural waters long before man came to the Salt Lake Valley (R. 299). One of the biggest sources of water which fed the stream was a large spring area (see map—p. 5, "Bubbling Springs" area), which Mr. Ferguson described as follows:

"That is where your big spring was . . . it was ten feet across and sand was bubbling up in there. You could see the gravel, and there was fish in there over a foot long" (R. 262).

From the "bubbling springs" area to the point where the stream left the west end of the Ferguson property, the stream into which it flowed dropped approximately six to eight feet in elevation (R. 220, 299). After leaving the Ferguson property the stream entered the east end of the property of Mr. J. W. "Tim" Boyce, predecessor in interest of respondents.

SPRING RUNS
As shown on Exh. 1-P
(Aerial Photo)



Realizing the value of this excellent stream of water, the elder Ferguson decided to use it for fish culture and irrigation purposes. "Tim" Boyce, the neighbor on the west, also decided to utilize part of the water for irrigation purposes, and so the two neighbors, being assisted by young William Ferguson, jointly furnished the materials and labor and constructed a dam across the channel at a point where it was only necessary to back the water to a depth of approximately three or four feet (R. 153, 258-260), thereby making it possible to take water out of the stream on both sides.

From this pond (referred to as the "Middle Pond") the elder Ferguson and "Tim" Boyce took a spirit level and marked the course of a ditch to run west to the Boyce property (R. 259). Without the assistance of animals or machinery, and by using simple tools, the three of them picked and dug a ditch from the "Middle Pond" to the east boundary of the Boyce property. These neighbors traded work a good deal of the time (R. 267, 275) and the Fergusons used the jointly constructed ditch to water an orchard which was located just west of where the "Lower Pond" was subsequently built.

William Ferguson stated that he kept in close contact with the area over the years and up to the present time (R. 273). During his visits Mr. Ferguson observed that "Tim" Boyce continued to use the water from Spring Runs every year, and grew potatoes, hay, grain, sugar beets and corn on his farm (R. 273).

Between 1903 and 1905 Mr. Ferguson built both the Upper Pond and the Lower Pond, primarily for the purpose of utilizing the water for fish culture (R. 264). Also, com-

mening at about that time and at intervals thereafter until approximately 1934, several flowing wells were drilled in the vicinity to supplement the flow of spring water during the winter months when the spring flow receded somewhat. However, these wells were subsequently capped prior to the commencement of this litigation and have no bearing on the issues in this case as far as the parties to this appear are concerned since they tapped water sources far beneath the water which created the "bubbling springs."

At some time between 1910 and 1920, according to Mr. Ferguson, the ditch which was built in 1894 from the "Middle Pond" to the Boyce property was replaced with a new ditch (R. 266) which served the Boyce property and the Ferguson orchard from the "Lower Pond."

In 1914 a general water adjudication was made of the waters of Big Cottonwood Creek in the case of "*The Progress Company vs. Salt Lake City, et al.*, No. 8921" in the Third District Court of Salt Lake County. This adjudication was finally terminated in the Utah Supreme Court in 1918, 53 Utah 556, 173 P. 705. The Sixteenth paragraph of that Decree adjudicated the waters here involved to J. W. "Tim" Boyce, the Fergusons and others in the general area for fish culture and irrigation purposes.

Respondents Seo and Kano purchased the "Tim" Boyce farm from a man by the name of Brinton Bagley in 1944. This farm consisted of approximately 25 acres, of which 20 acres has been farmed and irrigated since 1894. Respondents have raised celery, cabbage, onions, lettuce, corn and similar crops which they have marketed in the Salt Lake area. Celery has been their main crop.

The Utah Legislature in 1949 passed Sections 100-2-14 and 100-5-15, Utah Code Anno., 1943, which in general provided that claimants to the use of water which had been established by diligence usage prior to 1903 could file a statement in the office of the State Engineer setting forth the particulars of their claim.

Although the legislative act provided that it was unnecessary to file such claims where there had been a court decree adjudicating the rights as to any waters, Mr. John Ward, who was in the office of the State Engineer at the time, prepared a Statement of Diligence Claim (Exh. 4-P) for respondents, at their request, giving as his reason that the Cottonwood Decree did not sufficiently specify the particular rights of each of the individuals designated in the Sixteenth paragraph. The Statement of Water Users Claim which respondents filed on October 13, 1949, was the very first statement filed in the office of the State Engineer under the 1949 Act (Exh. 4-P).

Appellants Shaw and Capson came into the picture in February, 1955, at which time they acquired the Ferguson property from subsequent owners. During the month of February Shaw and Capson contacted the respondents concerning the possibility of purchasing parts of the lands owned by them adjacent to the Ferguson property on the west. However, respondents informed Shaw and Capson that they were not interested in selling any property, and further advised them of their water rights and facilities (R. 168).

About a week later Shaw and Capson came to discuss the water matter with plaintiffs, and asked Mr. Seo where he wanted his ditch placed (R. 168):

"I want you people to tell me where you want that ditch placed, and I will have it there for you."

A general discussion took place and a rough sketch was prepared of the substitute facilities which appellants agreed to construct. It was even decided (R. 168) that a run-off or waste channel could be constructed on the Kano-Seo property, running north along their east line and dumping back into the channel of the stream. It was also agreed that an open ditch, conveying water by means of gravity, would run east from their property to the source of the water.

About April 15, 1955, a group of individuals which included Shaw, Capson, John Ward and the respondents, met on the Ferguson property, at which time the course of the ditch was determined and Mr. Shaw stated:

"This is where the ditch will go. Through here, right into your property."

Mr. Seo testified (R. 170) that he informed Mr. Shaw it would be satisfactory to place the ditch as indicated. At no time during the trial did Mr. Shaw deny making the statements previously quoted.

On May 12, 1955, it became apparent to respondents that appellants were not only filling in the ponds and destroying their ditches, headgates and other irrigation works, but that they had constructed an underground drainage system (see Map—p. 5) for the purpose of intercepting all spring water in the area (R. 427). Further, appellants took earth-moving equipment and lowered the level of the land east of respondents' property, thereby making it impossible for water to enter

respondents' property by means of a gravity flow (Exh. 5-P). Respondents contacted an attorney the next day, who in turn wrote a letter (Exh. 34-D) to appellant Shaw, notifying him of the seriousness of the situation. Appellant Shaw ignored their request that something be done (R. 421).

The drain which defendants constructed collected all of the water which they had previously been able to secure by gravity flow and discharged it into the natural channel of Spring Runs Creek at the point where the original channel of Spring Runs entered the property of respondents. This drain was so constructed that it ran through the very middle of the "bubbling springs" area (R. 160—Also see Map). This is exactly contrary to the statements on page 6 of appellants' brief. Further, although appellants' statement of facts states that there was no visible surface stream when the ponds were filled, the evidence showed that just before they were filled, the "bubbling springs" area had been covered over with earth-moving equipment and the ponds were drained, thereby temporarily stopping the flow of surface waters (R. 393—also note May 20, 1955 flow from area as shown on Exh. 7-P).

Being unable to secure water immediately because the point at which it was being discharged was about 7 feet lower than the point where their gravity ditch originally entered their property, respondents suffered losses to their crops and incurred other expenses. They were forced to construct a dam in the channel of Spring Run Creek on their own property, and to temporarily rent and later purchase a pump.

Although appellants claim in their statement of facts (Br. 5) that respondents brought a separate suit against Salt

Lake City due to capping of the wells, such is a clear misstatement. These respondents were merely made nominal defendants by Salt Lake City in an action which it brought against the State Engineer arising out of a denial of requests for change applications. The issues in that case were not found against these respondents; rather, the order granting the change application was expressly made subject to the water rights of these respondents and fully protected them, thereby making an appeal totally unnecessary. There is not now, and probably never was, any real issue between Salt Lake City Corporation and respondents.

The lower court awarded respondents damages for costs of pumping, crop losses, and expenses incurred for purchase of pumping equipment and the construction of a dam for pumping purposes.

STATEMENT OF POINTS

- I. APPELLANTS HAD NO RIGHT TO INTERFERE WITH THE WATER SOURCES AND NATURAL CHANNEL OF SPRING RUNS.
- II. APPELLANTS CANNOT DESTROY EASEMENTS CREATED TO CONVEY WATERS ACROSS THEIR LANDS TO THE LANDS OF ANOTHER.
- III. APPELLANTS SHOULD BE REQUIRED TO PUMP A QUANTITY OF WATER SUFFICIENT TO IRRIGATE RESPONDENTS' LANDS.
- IV. THE MEASURE OF DAMAGES ADOPTED BY THE LOWER COURT WAS CORRECT.

V. THE JUDGMENT SHOULD STAND AGAINST FOUR OF THE APPELLANTS.

ARGUMENT

I

APPELLANTS HAD NO RIGHT TO INTERFERE
WITH THE WATER SOURCES AND NATURAL CHAN-
NEL OF SPRING RUNS.

Appellants contend that a point of crucial public interest is involved in this case. Respondents also contend that there is a crucial public issue involved, but not the one advanced by appellants. Whether a landowner has a vested right to force a neighboring owner to maintain the water table in an adjacent land at or near the surface level is not at issue under the facts before the court.

Respondents submit that the real public issue before the court concerns the right of a landowner to interfere with ditches, headgates, dams, natural water courses, and large and well-established springs located upon his lands to which appropriators have acquired vested rights to take and use the water and to maintain and use ditches and other easements in order to convey such water to the latter's lands.

Respondents submit that appellants have used pages 9 to 23 of their brief in developing legal concepts which are not at issue in this case. The cases there cited deal with *percolating water*, maintenance of *water tables* and *sub-irrigation* rights. However, we are not here concerned with percolating water, water tables or sub-irrigation problems; we

are concerned with the locally famous "Spring Runs," an active, dynamic water course which has been the subject of appropriation and a general court adjudication during its history.

It might be well to determine just what are "percolating" waters since appellants use much space in developing the topic. In the case of *Riordan vs. Westwood*, 203 P 2d 922 (Utah), the Utah Supreme Court, speaking through Justices Wade and McDonough, points out that the concept of "percolating" waters in this state has changed over the years and that the cases and texts were in confusion as to the term. That case accepted "percolating" waters to be—

"diffused waters in lands privately owned, percolating or seeping through the ground, moving by gravity in any or every direction along a line of least resistance, not forming any part of a stream or other body of water either surface or subterranean, *and, as far as known, not contributing or tributary to a flow of any defined stream or body of water . . .*" (Italics added.)

From the foregoing definition, and considering the factual situation involved, one can hardly imagine any waters anywhere which more completely depart from the foregoing definition. Compare the following established facts which fully support the court's Findings of Fact and Conclusions of Law (R. 114-121):

(1) "Spring Runs" were in evidence long before the white man came to Salt Lake Valley, and have been considered as "one of the old landmarks on the valley floor" (R. 299).

(2) These waters were so important as to be included within the Big Cottonwood Creek water adjudication of 1914.

(3) The waters which came to the surface in the "bubbling spring" area were "perched" waters, part of which originated far to the east in the Big Cottonwood Creek channel, and traveled underground on top of an impervious clay strata until they came to the surface in the "Spring Run" area (R. 299, 305, 322).

(4) Although the Moyle Pond located a short distance to the east had dried up and irrigation had ceased in the area, just prior to the activities of appellants complained of in this action, there was no noticeable effect on the subsequent flow of the springs which were collected in the drain system of appellants (R. 321, 329, 463).

Respondents wish to take sharp issue with certain statements contained in appellants' brief at pages 22-23 wherein they question whether any water would have been available in 1955 because irrigation had ceased in the immediate area. Actually, the flow from the drains that summer consisted of a flow of from four to six second feet (R. 157, 311), which by local standards is a good, big irrigation stream. Further, even as of May 20, 1955, a good, small stream was issuing from the drain despite a total lack of irrigation anywhere within miles at the time (Exh. 7-P). Commenting on the summer flows since 1955, Engineer John Ward was "surprised at the amount of water that actually came out of the drain" (R. 321, 329). Viewing the situation generally, respondents submit that appellants are now crossing their fingers lest the drain should get clogged and much of their subdivision float away.

Note: It will be well for the court to remember that appellants were careful to place their drain through the very heart of the "bubbling springs" area (See Map. Also R. 160).

Appellants would have the court believe that we have a situation somewhat akin to a sponge, where the "water table" becomes saturated to the point where it gradually overflows. Quite the contrary; it is hard to conceive of a more active spring area than that involved in this case. Nor do the cases of *Peterson vs. Cache County Drainage District*, 77 Utah 256, 294 P 289 and *Roberts vs. Gribble*, 43 Utah 411, 134 P 1014, serve to help their cause. In fact, respondents contend that both of those cases contain factual situations which pointedly distinguish this case.

In the case of *Roberts vs. Gribble* the waters involved were merely seepage and percolating water which the court found—

"Passed beneath the surface of and through the defendant's land . . . " and " . . . never reached said Sanpitch River by any known or defined channel or course . . . "

In the case of *Peterson vs. Cache County Drainage District* the waters involved there were actually percolating waters. The issue of the case involved the right of the defendant to dig a drain which lowered the water table of the land of the defendant which had previously made it possible for the plaintiff to irrigate his land by sub-irrigation. Notwithstanding any encroachment upon that case which may have been created by the decision of *Riordan vs. Westwood*, supra, it was pointed out that the water in that case did not flow in any well-defined channel and never reached the surface. The actual rule announced in that case was stated quite simply:

"Percolating water resulting from the irrigation of one's own land may be recovered and used by the owner

before it leaves his land without invading any right of an adjoining landowner."

A search of the cases has convinced this writer that there is not a single Utah case nor any other case quoted by appellants which would justify appellants' trespass upon the water and property rights of these respondents.

In the Utah case of *McNaughton vs. Eaton*, 242 P 2d 570, there was a situation where various sources of water flowed into McNaughton Gulch, which " . . . was a natural water course before the advent of irrigation water in this neighborhood." The waters in the gulch arose from (1) natural sources, (2) canal surplus and waste waters turned into the gulch to get rid of them, and (3) canal waters used to irrigate lands on both sides of the gulch which drained into it above plaintiffs' lands; and (4) other miscellaneous sources of water. The court observed that the three sources produced water which was subject to appropriation, and that since the usage began prior to 1903, no application to appropriate was necessary. In reversing the lower court and in affirming appellants' attorney, who was on the other side of the fence in that case, Justice Wade stated:

"Here we are not dealing with the collection of diffused waters from the soil but with the right to use waters which have already collected in a stream."

It is also interesting to note that plaintiffs' original Complaint (R. 2) and plaintiffs' Amended Complaint (R. 84) both alleged:

"5. The lands of plaintiff and defendant . . . overlie an artesian basin."

Since appellants' Answer (R. 96) admitted the foregoing allegation they appear to be in a rather untenable position at this point in view of the following quotation from *Riordan vs. Westwood*:

"These cases held that the waters of artesian basins are underground waters 'flowing . . . in known or defined channels' . . . and (are) subject to appropriation."

If appellants are permitted to interfere with water facilities and easements and rights to use water which have been protected and created by the long usage and diligence shown in this case, and considering the source and size of flow of the waters involved, respondents submit that there is hardly a water right in the State of Utah that cannot be destroyed at the will of the owner of the property upon which the water arises.

As stated in 56 Am. Jur. Waters, p. 505, Sec. 14:

" . . . the ordinary or natural course of water cannot lawfully be changed for the benefit of one person or class of persons to the injury of another. Accordingly, one who changes the course of a stream must do so in such manner as not to injure, or duly interfere with the rights of, the adjoining proprietor, either above or below, or on the opposite side of the stream."

II.

APPELLANTS CANNOT DESTROY EASEMENTS
CREATED TO CONVEY WATERS ACROSS THEIR LAND
TO THE LANDS OF ANOTHER.

Appellants next contend that the court erred in holding that respondents have an easement or right to require the maintenance of the Lower Pond on the Ferguson property. But the Judgment and Decree and the Findings of Fact and Conclusions of Law (R. 114-125) contain no reference whatsoever to requiring appellants to maintain the pond. On the contrary, the court made express findings that it was no longer feasible for respondents to secure water through their original facilities (R. 119, 123) and, in lieu thereof, ordered the appellants to install and maintain an electrical pumping system as a substitute means for securing water (R. 123).

These respondents have never insisted that appellants maintain the Lower Pond. In their discussions with appellants Shaw and Capson, respondents informed them that they would be satisfied with an open surface ditch which would convey water from the springs to their farm by a gravity flow. Respondents submit that they cannot see why appellants should raise any issue involving the *maintenance* of the Lower Pond.

Appellants' brief (p. 24-31) contain cases inapplicable to the factual situation in this case. Further, there is a noticeable absence of Utah decisions. However, their quoted annotation from 50 A.L.R. 841 clearly recognizes that there are circumstances which might require the continued maintenance of such a pond if respondents had so insisted in this case.

It appears from the facts that the original ditch which was constructed in 1894 from the Middle Pond to the "Tim" Boyce property (R. 259) was placed in a new location running out of the Lower Pond for the joint benefit of the owners of both the dominant and servient properties to both shorten

its length and yet water both the Ferguson orchard and the "Tim" Boyce farm (R. 271, 287). It can hardly be argued by appellants that the original ditch which tapped the channel at the dam in the Middle Pond was "abandoned" (Br. 4) as they wish the court to assume. It is obvious that the ditch easement was changed to a new location by mutual consent. The situation presented is quite different from requiring the maintenance of an artificial condition for the benefit of one who had contributed nothing to its erection or maintenance since the use by the "Tim" Boyce property of the Lower Pond was tied to the work and labor contributed by "Tim" Boyce in the construction of the Middle Pond.

The extent of respondents' rights would be covered in this court's pronouncement in *Tripp vs. Bagley*, 74 Utah 57, 276 P. 912:

" . . . The defendants, however, allege, and the evidence shows, that a natural water channel ran across the lands owned by the plaintiff on to the lands owned by defendant . . . While the law is well-settled that an easement by prescription cannot be acquired in less than 20 years continuous usage, such is not the law when applied to the right to convey water through a natural channel across the lands of another."

"The law is also well settled that, *when an easement has once been established, its location may be changed by an executed oral agreement between the owner of the servient estate and the owner of the dominant estate* (Citing cases). The consent of the owner of the servient estate to a change in the location of an easement may be implied from acquiescence . . . When the location has been changed by an agreement, either express or implied . . . *such location cannot again be changed again without the mutual consent of such owners.*"

“ . . . When a person has a right to convey water through a natural channel across lands of another, such right is not lost when the owner of the right constructs, without objection, an artificial ditch or ditches across such land and uses the same for a number of years to convey the irrigation water theretofor conveyed through the natural channel. In such case the owner of the easement has the right to continue to use the artificial ditch or ditches so constructed in lieu of the original natural water course.”

The foregoing rule was condensed in 56 Am. Jur., Waters, p. 702, Sec. 244:

“In like manner if several persons contract expressly, or so act that from their conduct a contract will be implied, for the creation, maintenance, or use of an artificial condition of a body of water, this contract will be enforced so far as it can be consistently with the rules of law.”

From the foregoing it appears that respondents could have insisted that the Lower Pond be maintained, not on any dubious “riparian rights” doctrine but on the basis of an oral change of location of the easement. However, since respondents were agreeable to locating their ditches in any reasonable manner which would deliver their water to them by gravity flow (R. 170) the issue raised by appellants would now be moot.

III.

APPELLANTS SHOULD BE REQUIRED TO PUMP A QUANTITY OF WATER SUFFICIENT TO IRRIGATE RESPONDENTS' LANDS.

Throughout their brief appellants acknowledge that they claim no interest in the water (Br. 9) and make no contest to the right to use it, yet whenever they try to establish a legal point they invariably refer to water law cases which actually involve contests to the use of water.

It is quite obvious that the ground area involved in this litigation had so much water that appellants were trying to dispose of it in every possible way. After they had constructed their drainage system, the stream flow which was discharged from the drain was as great as 4 to 6 second feet during summer months (R. 157, 311). Even during winter and early spring months since the drain has been constructed, at no time has the drain flow from spring sources been insufficient for respondents' irrigation needs (R. 166, 252, 463—Exh. 7-P).

The really significant observation peculiar to this case is that appellants have never contended that the amount of water conveyed across the servient property by respondents has constituted an unreasonable burden. Instead, they argue that the court has decreed to respondents a water right of approximately 3.0 feet per second. Respondents deny that the court decreed a "water right" in the sense implied. It only recognized in general terms the existence of the water right.

At the trial appellants introduced testimony from a Mr. Bagley to the effect that during approximately 16 years while he owned respondents' property he had irrigated fewer acres of land than respondents have irrigated. From this they argue that there has been a loss of part of the water rights by non-use—a matter which appellants elsewhere admit does not concern them. But they have missed the real issue entirely

because we are here dealing with easement rights for ditches and irrigation facilities which can only be lost or diminished by a non-use for 20 years. Even if Mr. Bagley had irrigated but one acre of land during his 16 years of ownership, any prior established easement rights would not have been lost unless an abandonment had been established. (See Amended Complaint—Count Two—R. 87, 88).

Since Mr. William Ferguson observed that "Tim" Boyce irrigated respondents' property every year subsequent to 1894 to grow corn, potatoes, sugar beets, grain and alfalfa (R. 273), appellants have failed to produce any evidence which would sustain their burden of proof that there either was no easement or that its size and extent has been lessened by non-use.

Our Utah Supreme Court has stated the rule quite clearly in the case of *Zollinger vs. Frank*, 110 Utah 514, 175 P 2d 714, 170 A.L.R. 770-775, adopting the rule set forth in 17 Am. Jur., Easements, Sec. 72:

"The prevailing rule is that where a claimant has shown an open, visible, continuous, and unmolested use of land for the period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of an easement by prescription, has the burden of rebutting this presumption by showing that the use was permissive . . ."

See also Thompson on Real Property, Sec. 394, Vol. I, page 509.

"We think the better rule is that described as the prevailing rule in the above quotation. That is, where a claimant has shown an open and continuous use of

the land for the prescriptive period (20 years in Utah) the use will be presumed to have been against the owner, and the owner of the servient estate to prevent the prescriptive easement from arising has the burden of showing that the use was *under* him instead of *against* him. This rule was mentioned in the recent case of *Big Cottonwood Tanner Ditch Co. vs. Moyle*, Utah, 159 P 2d 596 (on rehearing) 174 P 2d 148, 155, where it was said: "It is true that to establish an easement the use must be notorious and continuous and on this, adverseness—that is, holding against the owner—will be presumed."

In stating in the Judgment and Decree that "plaintiffs are the owners and entitled to the use of *approximately* 3.0 cubic feet per second of the waters of Spring Run Creek, . . ." (R. 123), the court was merely making a general observation which was immaterial to the actual decision on the matter. What is material to the decision is the requirement in the Judgment and Decree providing for a pumping system for respondents and ordering appellants to "maintain and operate the said electrical pumping system for plaintiffs."

Appellants contend (Br. 36) that they can be forced to pump water at the rate of three c.f.s. "almost at the whim of respondents." Such is not the case despite the fact that for three years they have refused to pump a drop of water.

Respondents insist only that appellants pump such amount of water as is reasonably and necessarily needed for their crops on 20 acres of land. As appellants indicate in their brief (Br. 34), the size of the flow need not exceed two second feet at any given time (R. 155). Nor will respondents expect appellants to pump more than the aggregate of 120 acre feet

per year testified as necessary by Engineer John Ward (R. 332), which is substantially identical with the amount (122.7 acre feet) which they set forth at the time they filed their Statement of Claim to Diligence Rights in 1949 (Exh. 4-P).

In fact, using the figures of their own witness, Mr. Templeton, of a five-month (May 15 to October 15) pumping period (R. 156, 218) at a pumping cost of \$15.00 per month (R. 233), plus a minimum of \$25.00 per year repair and maintenance cost, or a total yearly cost of \$100.00 for operation of an electrical pumping system which can now be installed due to the presence of electricity, respondents will agree to pump their own water if appellants will give them a sum of money which will, when invested at four (4%) per cent, yield \$100.00 per annum.

Should appellants decline any of the foregoing arrangements, it is submitted that the lower court retains ample jurisdiction to prevent appellants from suffering any undue hardship, since in any event respondents would be limited to the amount of water which could be beneficially used.

It is submitted that the cases quoted by appellant on pages 36 and 37 of their brief relate only to situations involving contests establishing decreed water rights where there is a requirement of exactness as between contesting claimants. Since respondents are not quarreling with appellants over the size of the water right, but rather seek such reasonable quantity of water as they have beneficially used, based upon established easement rights to convey such quantity of water across appellants' lands, it would have been more appropriate for appellants, both at the trial and on appeal, to have attempted to produce

evidence and law limiting the size of the water flowage easement on their servient property.

* * * *

Appellants have further sought to limit the quantity of water which must be pumped for respondents by claiming that it is geometrically possible to irrigate all but five acres of respondents' land by gravity flow from the catch-basin which was built for pumping purposes.

This point was raised when, during the trial, appellants took a survey crew and went upon respondents' lands to establish an imaginary contour line which a ditch might follow. Typically, this trespass was made without permission and resulted in considerable tramping around in a freshly planted onion patch (R. 452, 460).

Here, too, they have avoided the law and the facts:

(1) As a matter of law, it is not necessary for one having an easement for conveying water across the lands of another to substitute, at his own expense, a new method of conveying water in order to pacify a wrongdoer.

(2) The use of such a contemplated ditch would create "odd-shaped" fields (R. 454), would make it difficult to farm row-crops by making triangle pieces, would create roadway problems, would create "waste" ground, would cause uneven length of rows in each field, and would cause difficulty in operating machinery in narrow corners (R. 451).

(3) Respondents would have to bear the expense of constructing the ditch and the making of levees in some spots (R. 455).

(4) Any necessary enlargement of respondents' present impounding dam would cause seepage and would back water over the top of the outlet of appellants' drainage system (R. 455-457).

IV

THE MEASURE OF DAMAGES ADOPTED BY THE LOWER COURT WAS CORRECT.

At this point plaintiffs wish to quote pertinent provisions contained in the Utah case of *Hanson vs. Salt Lake City*, 205 P. 2d 255 at Page 261, which included language from the case of *Salt Lake City vs. Gardner*, 39 Utah 30, 114 P 147, for the purpose of illustrating the clear-cut right to damages in a case of this type. Since the Gardner case involved the right to a gravity flow of water, the statement quoted therefrom in the Hanson decision appears appropriate:

" . . . If it be held, therefore, that a subsequent appropriator of water need have no regard for the diverting means or methods of the prior appropriator, but may in fact or effect make prior appropriations of water unavailable with impunity, *then there is in fact no such a right as a prior right, but all rights may, at any time, be invaded or destroyed by a subsequent appropriator by simply making the diverting means used by the prior appropriator useless.* To permit such an invasion of a prior right would, in effect, amount to an indirect taking of a prior appropriator's water. This neither the legislative nor the judicial power can allow without permitting confiscation of property rights."

" . . . the risk of interfering with prior rights and the cost of any change in the prior appropriator's means or methods of diversion should be assumed and borne by the subsequent appropriator, . . . "

“ . . . As to surface waters, no one has ever seriously made the claim that a subsequent appropriator could deprive a prior appropriator of his water through the means of diversion which he established and make him pay an additional expense to get the water by a different means of diversion.”

Should a bare trespasser, making no claim to the use of water, stand in a better position than a junior appropriator?

In answering appellant's claim that respondents did not mitigate their damages, it would be well to realize that Mr. Seo did not actually discover until May 12, 1955, that appellants' activities prevented a gravity flow of water from ever coming to his lands (R. 427—Exh. 5-P). Prior to that date he was relying on express representations of Mr. Shaw and Mr. Capson that suitable gravity system would be installed (R. 170):

“This is where the ditch will go. Through there, right through your property.”

The next day they contacted their lawyer, who then wrote to Mr. Shaw (Exh. 34-D), but no answer was received in reply to their demands that something be done.

Respondents immediately thereupon built an earthen dam in the natural channel of Spring Runs in their own property so as to create a pumping pond and immediately sought pumping equipment (R. 427). It was about ten days later (May 23, 1955) before they were able to get water on their lands.

In the meantime they sustained extensive damages due to lack of water. An ample supply of spring water was then being discharged from the drainage system which defendants built,

having resumed its flow as soon as the drain was built on or about May 5, 1955 (R. 166, 215).

Although Shaw and the other appellants had indicated to respondents as late as April 15, 1955, that a gravity flow of water would be furnished by means of a ditch, the subdivision plat (Exh. 30) which shows the contemplated drain system having been inserted prior to March 29, 1955, makes it evident that we have here an intentional tort showing that appellants long previously had planned to do away with the source of respondents' water. This circumstance should relieve respondents of any necessity for minimizing their damages. See 15 Am. Jur., Damages, P. 441, Sec. 41:

"In some states the rule requiring one to minimize the damages arising from an injury to property does not apply in cases of intentional or positive torts . . . Thus, . . . the rule does not apply in cases . . . where one riparian owner diminishes or detains the water of a stream to the damage of another riparian owner."

If we allow to appellants the benefit of doubt and apply the ordinary rule of minimization of damages, they still are unable to complain. The evidence shows that respondents were very busy at the time preparing their ground for planting of celery plants and other crops, and that they were working from sunup to sundown (R. 428). In addition to their farm activities they also had to secure a pump and construct a substantial dam so as to create a pumping pond.

Further, they incurred cash expenses which certainly seriously impaired their financial position at the time—\$100.00 for pump rental, \$826.00 for pump and pipe, \$100.00 for a trailer to haul pipe and \$80.00 to construct a dam. In addition,

they incurred and paid pumping expenses of \$1,634.25 in 1955 (Exh. 9-P) and \$1,859.12 in 1956 (Exh. 10-P).

It is submitted that the proper rule to follow in respect to minimization of damage is set forth in 15 Am. Jur., Damages, p. 420, Sec. 27 (citing *Jankele vs. Texas Co.*, 88 Utah 325, 54 P 2d 425):

"One who is injured by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence, he cannot recover; or, as the rule is sometimes stated, *he is bound to protect himself if he can do so with reasonable exertion or at trifling expense*, and can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided."

"In cases of intentional torts, the injured person is not precluded, by his mere failure to exercise reasonable care to avoid the consequences of the injury, from recovering for so much of the damage as results from that failure." (Italics added).

Respondents' efforts certainly exceeded the test of a "reasonable exertion" and the sums spent were more than merely "trifling." From the same Am. Jur. citation, Section 28:

"The rule requiring one injured by the wrongful act or omission of another to minimize the damages resulting does not require the injured person to make extraordinary efforts or to do what is unreasonable or impracticable in his efforts to minimize those damages; reasonable diligence and ordinary care is all that is

required of him. The measure of his duty is such care and diligence as a man of ordinary prudence would use under the circumstances, and the efforts required of him must be determined by the rules of common sense, good faith, and fair dealing."

Sec. 29:

"The efforts required of the injured party to prevent or lessen his damages include a reasonable expenditure of money, which he may recover as part of his damages. *He is not, however, required to incur large expenses.* A common statement of the rule is that he must protect himself if he can do so at trifling expense. It appears that a want of sufficient funds will excuse an absence of effort to lessen damages." (Italics added.)

The measure of damages in cases of this kind has been well stated in the case of *Adamson vs. Brockbank* (Utah 1948), 185 P 2d 264. The proper elements of damages were outlined as follows:

"For *general damages*, the difference in the value of the land with and without the ditch . . . "

Testimony of Mr. Seo (R. 193, 197, 198):

Value of farm with gravity ditch	\$60,000.00
Value of farm without gravity ditch	45,000.00
	<hr/>
Net Loss in Value	\$15,000.00

Appellants should feel fortunate that the court restricted the measure of damages to a lesser amount which would allow for actual pumping expenses incurred and for a substitute method of putting water on respondents' lands.

Quoting further from *Adamson vs. Brockbank*:

". . . For *special damages*. . . the crops already planted or already *in existence* for the year . . . , "

Appellants complain because the court awarded respondents \$2,800.00 for loss of net receipts on a celery crop which could not be planted because of lack of water. Let us look at the facts:

(1) Celery was the main crop of respondents' farm (R. 147).

(2) The ground had been specially prepared for transplanting celery plants from the greenhouse (R. 171, 428).

(3) Respondents maintained their own greenhouse on their farm where they had 200,000 celery plants growing (R. 426—Exh. 8-P).

(4) Respondents had planted their celery plants about March 10, 1955, (over 2 months previously) and had spent a great deal of time in getting them to a stage suitable for transplanting (R. 171).

(5) The celery variety was specially grown and could not be replaced—"Utah Improved Jumbo."

In suggesting that respondents be allowed merely rental value for the land involved they overlook the loss of customer "goodwill" (R. 180) and the great amount of time and expense incurred in producing the celery plants, only to have them turn yellow and rot before their very eyes because they could not be planted. Appellants avoid any alternative suggestion that they should reimburse respondents for their loss of the greenhouse plants and other expenditures.

Appellants quote from 108 ALR 1174 as defining the rule of damages in the foregoing situation. However, respondents maintain that the quoted statement is the minority rule and that the majority rule would allow damages in this

situation. At page 1181-2 of the annotation the great majority of the cases state—

“ . . . if the plaintiff were confined to the actual or market value of the growing crop at the date of its destruction his damages would fall far short of compensation.”

From the annotation at 108 ALR 1181-4 the test of whether recovery should be allowed depends on a consideration of whether (1) the crop was in existence (note similar cases in the annotation involving rice crops), (2) there was a reasonable certainty that the expected crop would have materialized, (3) the crop was an important element of the farm program, (4) the acts of the defendant were something more than simple negligence, and (5) the relief afforded is adequate to compensate the injured party for his loss.

It is submitted that the destruction of respondents' celery crop and the damages awarded easily meet the foregoing tests.

Respondents' proof of damages is found in Exhibits 8-P 11-P and R. 171-192.

With reference to certain other damage matters mentioned by appellants in their brief which should be discussed, the following answers are given:

(1) *Must appellants buy two pumps?* (Brief 45).

No. They may take credit for the present pump or they may have it.

(2) *Mr. Seo "admitted he would not sell his tractor for" . . . \$500.00* (Brief 46).

The evidence established that respondents had to take a

W-D Allis-Chalmers tractor originally worth \$1,500.00 from other farm use and put it to operating the pump. In computing an overall loss of value of \$1,000.00 to the tractor, Mr. Seo did not state that he wouldn't sell the worn-out tractor for \$500.00. He said, in explaining their serious lack of working capital and financial means (R. 203):

A. Well, we can't afford to.

(3) *Appellants seek to attack the lower court's memorandum opinion* (Brief 46).

The court's memorandum is not part of the judgment role and is not properly before this court.

Adamson vs. Brockbank (supra)

It is not part of the findings and may not be used to impeach the findings.

Fowler vs. Security-First National Bank
303 P 2d 565 (California)

V

THE JUDGMENT SHOULD STAND AGAINST FOUR OF THE APPELLANTS.

As suggested by appellants in their brief, reference will be made to the evidence implicating appellants Shaw, Capson, Arcon Corporation and Barcon Corporation.

Both Shaw and Capson undertook to contact respondents, and to make promises regarding the ditches and water system, long before Arcon Corporation was formed on April 15, 1955 (R. 168, 170). Lloyd Jackson, the earth-moving con-

tractor, made direct arrangements with the same two individuals in February, 1955 (R. 397) for doing much of the work in the area.

Since Arcon Corporation was not in existence, it was only logical that Shaw would answer on cross-examination (R. 408):

A. There was no corporation prior to April 15, 1955.

Q. So, until that time, you and Mr. Capson would be dealing as individuals?

A. What dealings there were.

Q. And your activities, prior to that time, would be as individuals, would they not?

A. Yes.

* * * *

A. . . . the only purpose of the corporation would be to operate and build and develop the area, . . .

It is admitted that Arcon Corporation may be liable to respondents, which is obvious. As to Barcon Corporation, it caused the Bowden drain to be installed (R. 362, 411) which, according to Engineer John Ward, interfered with the flow of water into Spring Runs (R. 303, 328, 330).

As for appellants Glen L. Peck and Mae L. Bagley, respondents notified appellants' attorneys at the conclusion of the trial that they would stipulate to a dismissal as to them. However, had respondents voluntarily dismissed as to those two defendants this portion of this brief would have probably been in defense of a charge of releasing joint tort-feasors. The inclusion of those two defendants in the Judgment and Decree is as much the fault of their counsel, who represented them.

The Judgment and Decree can be dismissed as to Peck and Bagley insofar as respondents are concerned.

CONCLUSION

The writer sincerely believes that the trespass upon property rights which has occurred in this action transcends any legal or moral excuse which can be advanced in any civilized society. If appellants' actions in this case can be justified on the facts before the court, then Utah's unique and necessary concept of appropriation of water rights will be well on its way to destruction.

The Judgment and Decree should be affirmed in all respects as to defendants Arcon Corporation, Barcon Corporation, Shaw and Capson.

Respectfully submitted,

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