

1972

# Maylom F. Erickson v. Sterling Bennion : Brief of Respondent

Utah Supreme Court

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

**MAYLON F. ERICKSON and  
MRS. MAYLON F. ERICKSON**

*Plaintiffs-Appellants*

**vs.**

**STERLING BENNION,**

*Defendant-Respondent*

---

**RESPONSE**

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**APPEAL FROM THE DISTRICT COURT  
IN AND FOR MILLARD COUNTY  
HONORABLE J. HARRIS**

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## AUTHORITIES

### STATUTES CITED

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### CASES CITED

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Western Union Canal Company vs. Provo Bench  
Canal and Irrigation Company, 208 Pac. 1119

Anderson vs. Pleasant Grove Irrigation Company,  
490 Pac. 2d, 897 .....

Lynch vs. McDonald, Supra .....

IN THE SUPREME COURT OF THE STATE OF UTAH

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MAYLON F. ERICKSON and  
MRS. MAYLON F. ERICKSON,

*Plaintiffs-Appellants,*

} Case No. 12617

vs.

STERLING BENNION,

*Defendant-Respondent.*

APPEAL FROM THE FIFTH DISTRICT COURT  
IN AND FOR MILLARD COUNTY, STATE OF UTAH

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HONORABLE J. HARLAN BURNS, JUDGE

---

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff in the above entitled case seeks to recover damages alleged to have resulted from defendants negligently permitting run-off water to flow down highway barrow pit approximately one-fifth mile to plaintiff's home.

## DISPOSITION IN THE LOWER COURT

The case was tried to the Court sitting without a jury, with the Honorable J. Harlan Burns, Judge. The Court found that the defendant was not negligent and that the plaintiff failed in his burden of proof in establishing negligence of the defendant, which proximately contributed to the damages alleged.

The Court further found that there was sufficient believable evidence of contributory negligence on the part of the Plaintiff in maintaining a dam or barrier in the form of a gravel roadway extending from the State Road in front of the premises, damming the barrow pit, to provide ingress and egress to plaintiff's property without benefit of culvert or pipe to permit runoff waters to pass under driveway.

## RELIEF SOUGHT ON APPEAL

Defendant and Respondent, Sterling Bennion, seeks to sustain the judgment in favor of the defendant, granted by the Lower Court.

## STATEMENT OF FACTS

Defendant, Sterling Bennion, is a resident of Delta, Millard County, State of Utah and has so resided and farmed there for 48 years last past. T-110. That all of his life, defendant engaged in farming and that for more than 40 years he had farmed the property consisting of 40 acres where his home is located, approximately two miles East of Delta, Utah, on the North side of the road referred to as the Delta-Fillmore road.

Mr. Bennion's farm is an irrigated farm and he is a stockholder of the Melville Irrigation Company, and as such is entitled to the use of water from the Company on

call by notifying the water master of the Company. In 1968 the defendant was growing about 20 acres of wheat on the South-East part of the 40 acres and was raising alfalfa on the balance of the 40 acres. T-111.

The farming practices of Mr. Bennion with regard to this property had remained essentially unchanged for a period of approximately 40 years. The head ditch supplying the water to the field runs across the North end of his property and waters the land toward the South. T-113. The wheat being grown was furrowed to provide better irrigation practice and to allow for uniform irrigation of the parcel involved. T-114.

For years past Mr. Bennion has owned a right of way for run-off water along the barrow pit which presently runs parallel along the North side of the Delta-Fillmore Highway, and has never sold it. T-124, line 11. His use preceded the construction of the Erickson or Ivie homes by many years. T-124, and the old drainage ditch still exists from the Bennion property East past the Cook property, down to the Erickson property and between the Erickson and Ivie property. T-164-23, and would continue to carry water except that it has been filled up in front of the Ivie home and the Erickson home, T-164, to provide a drive way or drive ways from the top of the Delta-Fillmore road to the North onto the property of the Plaintiff, Exhibit 2-3.

About Ten (10) years ago, the State made certain improvements to the Delta-Fillmore road and constructed a small connecting road for approximately one-half mile in a North-South direction, running immediately parallel to defendant's East boundary line. This connecting road served to connect the Delta-Fillmore road with Highway No. 6-59 T-129. The State Road Department, with the help of their engineer, Mr. Hilton, provided for a culvert approximately 20 rods North of the Southeast corner of the Bennion property, to carry the run-off water East

past the connecting road, T-120. The channel along the barrow pit of the Delta-Fillmore road, beginning at the Southeast corner of the Bennion property, continued Easterly however, along the said barrow pit and extra water on occasions has run in the channel along the barrow pit and would continue to so run to a place several hundred yards East of the Erickson-Ivie homes and onto vacant brush land, were it not for the drive ways daming the barrow pit and channel in front of both Erickson and Ivie homes. T-123.

Because the culvert constructed by the State would not carry the run off and as a special and extra safeguard, Mr. Bennion has constructed a big dike along the entire East side and South side of his farm, T-126, where he kept the dike built up approximately one and one-half to two feet above the level of the ground. That in the Southeast corner of the field he would on occasions drive in and out with a tractor and equipment. Sometimes the indentation of the wheel would require that he build the dike up to the normal height. The Southeast corner was the corner for natural drain from which water could enter the barrow pit of the Delta-Fillmore road.

Water in years past ran down the barrow pit and on to waste land east of the Erickson home and none had ever previously run on to the Erickson yard. Bennion frequently went along the dike where the wheel had knocked it down and shoveled in dirt. T-127. That he built it up in the month of June, 1968, prior to the irrigation turn in question. T-128, line 3. That in June of 1968. Mr. Bennion ordered a stream of water, the same as (I usually do) T-129-5. He received the stream about noon or maybe 1 o'clock P.M. T-129-24. That upon receiving the four to five foot stream of water, he turned it on to an area comprising approximately one-third of the 20 acre wheat patch at about 1 o'clock in the afternoon. T-130-24. He turned it off of the first one-third portion of the wheat patch when it reached the end of the patch.



about 6 or 7 o'clock at night and turned it onto the second or middle one-third of the wheat patch. T-131-1. When the water finished irrigating the middle one-third portion of the wheat patch, he turned it off at approximately 12 o'clock midnight. At 1 A.M. he returned to the house after making the turn on the third portion of the wheat field, T-131. At 5 o'clock in the morning, when it was just coming light, T-131, but before daylight, his testimony was, "It was just getting through the third portion of the wheat patch, and there was a little bit going through the wheel track where I had driven with the tractor." He shoveled the area where the wheel tracks had been made, so it couldn't run through, for about five minutes, then drove in his truck to the head of the land and shut all of the water off of the wheat entirely, T-132-21, and then went back over to the dike to see if there were any weak spots. In getting back to the dike it was within a few minutes of five o'clock in the morning, T-132-30."

At this time there was no water across the connecting road East of the Bennion property and all the water was contained on the Bennion property and the source was shut off so that no more water would run onto the grain land.

One hour after Mr. Bennion turned the water off of the wheat patch and observed that the water was contained behind the dike, Mr. Erickson came by along the Delta-Fillmore road on his way to work, and testified as follows:

Q At six o'clock was there any water between your property and Mr. Bennion's property?

A "No, there wasn't."

Q You observed?

A "Yes, because when I went to work there was a car coming down that road from the highway East of Mr. Bennion's property, there was a car coming. I naturally looked to see where that car was, if it

*was close to the stop sign or something and I noticed there was no water in the road then."*

Q Then it was long after daylight if any water ran off Mr. Bennion's property, was it not?

A "It would have to have been after I went to work at 6:00." T-90-15. Further testifying, Mr. Erickson, the Plaintiff stated as follows:

Q Ordinarily if the water is turned off a piece of ground, before it starts running over the end, the ground will absorb the water that is on it and it will sink into the soil, will it not?

A "Yes." T-92-15.

At this point Mr. Erickson, the Plaintiff, was asked:

Q Do you know of your own knowledge of anything Mr. Bennion himself did that was misjudgment or or irregular?

A "No, because I didn't talk straight to Mr. Bennion". T-92-30

After the water was turned off of the wheat patch and apparently more than an hour thereafter, and following 6:00 A.M., the ground had not absorbed the water and the dike would get wet, weakened, and some water would push through and Mr. Bennion would dam it up. T-134-18. The water did not run over the dike. T-134-17. Except that at 5:00 o'clock in the morning there was just a little going over the wheel track which was completely dammed off, T-136-2, after Mr. Bennion shut off the small amount of water that was running through the wheel tracks at 5:00 in the morning, and turned the water onto alfalfa land in another portion of the field, he described his actions in the following testimony:

Q What did you do after that?

A "I saw it was running onto the alfalfa there. I saw

there was no more getting onto the wheat at all, and I didn't think that there was any damage being done at all by the water down below. I wasn't worried at all because the water hadn't gone far enough and I had just turned the water down and kept it on the alfalfa. I shoveled along the dike at different times. Whenever I went past there during the day and there was still water there and I went up and down the dike to see how it was getting there and if it would go through the ground. The dike had been dry and it had worked through in places and I went up and down the dike to try and figure out and stop those places where the water was getting away." T-142.

When some water had impounded in front of the Erickson home, having run down the channel in the borrow pit, the gravel driveway into the Erickson property and the Ivie property dammed the water from continuing East along the borrow pit in the channel on either side of the Erickson property. But when a little cut was made through the driveway, with grader, in front of the Ivie place and the Erickson place, the stream of water ran through and took some of the water off and it ran right down the old drain ditch and if there had been a bigger ditch or cut, the water would have all gone down into the drain ditch East. T-159.

## ARGUMENT

POINT I. *There are sufficient facts to support the Trial Court's findings of no actionable negligence of Defendant.*

The Appellant in his brief, page 14, makes a correct statement of the law in the case involved, when he quotes from *West Union Canal Co. vs. Provo Bench Canal & Ir-*

though it were the transcript of the proceedings. It is pointed out that the use of depositions, as provided under Rule 26-C, subsection D UCA (1) may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as witness, or where the witness is dead or out of the country. The witness testified freely upon the stand at the trial of the case and no effort was made by counsel for the plaintiff to use the deposition for the purpose of contradicting or impeaching the testimony of the witness. It is submitted that it is improper to attempt to take material out of the deposition, especially where counsel for the defendant objected to the form of the question or the relevancy of the matter and the trial court has not had occasion to rule upon the objections made to the question. Plaintiff's Brief, page 3-4, 12.

In his effort to establish negligence the plaintiff quoted from Utah Code Annotated 1953, Sec. 73-1-8, the following language. "Duties of owners of ditches - Subcondition - The owner of any ditch, canal, flume or other water-course shall maintain the same in repair so as to prevent waste of water or damage to the property of others, and is required, by ditch, bridge or otherwise, to keep such ditch, canal, flume or other watercourse in good repair for the same cause as any public road or highway so as to prevent obstruction to travel or damage or overflow on such public road or highway." Plaintiff's brief, pg. 11. The testimony of the defendant, Mr. S. A. Bennion, is that he maintained a large dike 1 1/2 to 2 feet high along the entire East boundary of his property and along the South boundary of the property. TR 126. That he frequently built up, maintained and kept in good condition the two foot dike. T-126. The defendant ordered and received what appeared to be a normal stream of water from the Watermaster. TR 129-5. That he turned it on the first one-third of his wheat acreage until the

water had run to the end of the land. TR 130. He then at approximately 6 o'clock in the evening turned it on the second one-third portion of the wheat acreage and permitted it to run until approximately 12 o'clock to 1 A.M., and at 1 A. M. turned the water onto the last one-third section of wheat land. That at 5 A. M. in the morning, and before it was light, he observed the water getting to the end of the land of the third one-third section, and after building up the dike where tire marks had worn it down, shut the water off of the wheat land completely. TR 132-21. After shutting the water off of the land completely, he returned to the dike, which is extra-ordinarily diligent, and there was no water across the adjoining connecting road. T 132-30. Plaintiff testified there was no more water getting onto the wheat at all, because he had taken care of it before it ran over. T 142.

The defendant is completely absolved from negligence by the testimony of the Plaintiff himself when asked on examination, "at 6 o'clock in the morning was there any water between your property and Mr. Bennion's property?" Answer, "There wasn't." Question, "You observed?" Answer, "Yes, because when I went to work there was a car coming down that road from the highway East of Mr. Bennion's property, there was a car coming. I naturally looked to see where the car was, if it was close to the stop sign or something, and I noticed there was no water in the road then." Question, "Then it was long after daylight if any water ran off Mr. Bennion's property, was it not?" Answer, "It would have to have been after I went to work at 6 o'clock." TR 90-15. At least one hour before Mr. Bennion had turned the water from the wheat field onto an entirely different area of the field, on the alfalfa. The defendant was further asked, Question. "Ordinarily, if the water is turned off a piece of ground before it starts running over the end, the ground will absorb the water that is on it and it will sink into the soil,

will it not?" Answer, "Yes." T-92-15. And the further important question of Mr. Erickson, "Do you know of your own knowledge of anything Mr. Bennion himself did that was misjudgment or irregular?" Answer, "NO." TR 92-30.

There was no act or omission testified to by any person that would establish negligence on the part of the defendant which proximately contributed to the injuries complained of.

Mr. Bennion testified that no water ran over the dike which he had constructed along the lower end of his cultivated land and the defendant stated that he made numerous trips along the dike during the morning in question and would stop the water where it came through the dike places causing cracks or fissures in the ground. T 142.

The instant case is entirely different from any case cited by the plaintiff in his brief. Referring to *Jordon v. Mt. Pleasant*, 49 Pac. 46, 15 Utah 449, Appellant quotes the Court as saying that, "the City is liable for damage resulting from the overflow of a natural stream caused from barriers erected in the stream by the City." In that case the City constructed barriers to avoid flood damage and when they became clogged the stream bed overflowed its banks, which is an entirely different situation than the instant case where the defendant attended his water carefully and prevented it from overflowing and used all reasonable diligence to take care of it and was not worried because he had used diligence and it had been shut off an hour before any seeping through the dike occurred. T 142. As with an Irrigation company so with a water user, an Irrigation company is not an insurer against damage caused to others by its water it is only liable for its negligence. *Western Union Cable Company vs. Provo Bench Canal and Irrigation Company*, 208 Pac. 1119.

The very recent case of *Anderson vs. Pleasant Grove*

Irrigation Company 490 Pac. 2d, 897. The Court found that there was over capacity of flow of water in an irrigation ditch caused by closing a main headgate by the Watermaster which produced the flooding. The same constituted a definite act of negligence and is distinguished from the case at bar where there was no over capacity or no improper closing of a main headgate, to cause overflow, but merely a dry condition of nature permitting water to seep through a dike which ordinarily water did not seep through. The Court, in the Anderson-Pleasant Grove case, held that the Irrigation Co. or the Watermaster did no dissipate their duty by an unwarranted or an illegal delegation of the obligation in order to avoid responsibility by passing the buck to stockholders. That case is determined on an entirely different issue and set of circumstances, and the negligent acts described. In the instant case, the plaintiff himself recognized there was no misjudgment or irregular conduct on the part of the defendant. T 92-30.

POINT II. *There was sufficient evidence to justify the Court in its finding that the contributory negligence of the plaintiff contributed to the injury or damage, if any.* The Exhibits B 2, 3, 4, introduced by the plaintiff, conclusively establish that along the barrow pit of the Fillmore-Delta road, immediately in front of the Erickson and Ivie property, the plaintiffs have caused to be constructed or maintained, a drive way from the County Road to their own premises to avoid driving into the barrow pit to seek entrance or egress to their own property. The Exhibits further establish that no culvert or pipe is put through the drive way to enable rain water or other escaping water to pass along the barrow pit for which it was intended.

The testimony of the defendant was that after some water had impounded against the driveway of the plain-

tiff and a cut was made through the driveway, with a grader, in front of the Ivie and Erickson place, that the stream of water ran through and took some of the water off and it ran down the old drain ditch, and if there had been a bigger ditch or cut through the driveway, the water would have all gone down into the drain ditch to the East. T-159. The Court, based upon the testimony and the Exhibits, after analyzing and considering all the evidence, was justified in its finding that the Plaintiffs were contributorily negligent in damming off by the roadway any waters coming along the barrow pit and the plaintiff himself forced any such water onto his own front yard.

It is also important to note that the home and property of Mr. Mont Cook is also built along the highway and is between the Bennion property and the Erickson property and would be the property ordinarily damaged from escaping water. The Cook property received no damage. TR 142. The water passed along the barrow pit in front of the Cook property, unimpeded by driveways made by the property owner and what water passed along the barrow pit was forced by plaintiff's driveway onto his own front yard.

The Court was also justified in considering that irrigation by flooding is the normal and natural method of irrigating yards and properties in the area and that it is not uncommon for water to run across garden spots or lawn areas or other areas planted to vegetation to a depth of 6 to 8 inches.

The Plaintiff, on page 18 of his brief, described the lack of Court's ability to understand the issue because of prior cases and pressing business. On the contrary, the Court in the instant case had complete and ample time to review not only the testimony and evidence of the witnesses



nesses but the arguments and brief of counsel and the cases that were submitted by counsel in memorandum. And in determining the issues involved, the Supreme Court has the duty to review the evidence in light most favorable to the trial court's findings. As the Court has stated in *Lynch vs. McDonald*, *Supra*, "While some of the testimony is admittedly in conflict and not in complete harmony with testimony given in companion case, we find there is ample competent, substantial, clear and convincing evidence to support the facts therein." The same is applicable in the instant case. The trial court's position can be upheld either on the grounds of lack of negligence on the defendant, or the contributory negligence of the plaintiff. The failure of the plaintiff to bear the burden of establishing damages by reason of negligent acts of the defendant proximately contributing to the injury is fatal to his case.

## CONCLUSION

For the reasons stated herein, the respondent respectfully requests this Court to affirm and uphold the judgment of the trial court, being the trier of the fact and in

the best position to determine the credibility of the testimony and the sufficiency of the evidence to justify the decision.

Attorney for Defendant, Respondent

Respectfully submitted,

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