

1959

# N. M. Long & Co. et al v. Cannon-Papanikolas Construction Co. et al : Appellants' Reply to Brief of Respondents

Utah Supreme Court

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## Recommended Citation

Reply Brief, *N. M. Long & Co. v. Cannon-Papanikolas Construction Co.*, No. 8999 (Utah Supreme Court, 1959).  
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AUG 6 1959

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

N. M. LONG & COMPANY,  
a corporation, and MAGGIE J. SMITH,  
*Plaintiffs and Appellants*

**FILED**

AUG 5 - 1959

R. KAY MOWER and  
MRS. M. H. MOWER

Clk. Supreme Court, Utah

*Plaintiffs in Intervention  
and Appellants,*

Case No.  
8999

—vs.—

CANNON-PAPANIKOLAS  
CONSTRUCTION COMPANY,  
a partnership, EDWARD HOLMES  
and GRANT JENSEN,  
*Defendants and Respondents*

**APPELLANTS' REPLY TO RESPONDENTS' BRIEF**

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## APPELLANTS' REPLY TO RESPONDENTS' BRIEF

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In reply to the Respondents' Brief, Appellants respectfully submit the following:

Plaintiffs' complaint requested injunctive relief—R-5. During the trial counsel for appellants requested that the trial court consider injunctive relief as an issue and the court took the matter under advisement—R97. There-

after the court ruled on the matter and granted the request for injunctive relief, received evidence on the issue of injunctive relief, and considered the issue of injunctive relief—R-58.

Respondents for the first time in the brief before this court raised the issue of whether or not the dedication of a subdivision grants the defendants the right to destroy plaintiffs' adjudicated water rights, thus reversing the court's decision in an earlier decision, Civil No. 8921—R-52, and permitting the taking the water without responsibility therefor. This was not plead as a defense. It was not an issue in the pre-trial—R-24. No findings were made with respect to this item—R-48. Moreover, no evidence or discussion was ever had with respect thereto. An examination of the statute cited, namely, 57-5-4, U.C.A. 1953 does not even give a party dedicating a subdivision the right to drain the land and it is certainly therefore absurd to claim the statute gives a party subdividing property the right to destroy adjacent property owners' water rights, particularly an adjudicated water right—see R-52 where the court found the water of all three appellants had been awarded to them. These respondents were before the court and never objected or raised the issue of having other parties joined and are solely responsible for the resulting injuries and should be required to bear these responsibilities.

Answering Respondents' Point 1. Appellants have heretofore distinguished the Peterson-Cache County Drainage case, except for pointing out to the court that under that decision it not only made the land which was being drained more productive, but also kept in production the adjacent

land. The rulings of the Utah Supreme Court have consistently discouraged the elimination of productive agricultural land and encouraged exploitation of irrigation and productivity of land. This is demonstrated in the case of *Roberts vs. Gribble*, 134 P 1014—43 U 411 cited by respondents. Appellants have not heretofore treated this case. This is an important case in sustaining the position taken by appellants. In the *Gribble* case in 1907 the land owner's property which had been theretofore productive in the raising of hay and other farm products because of water being supplied on adjacent land, became swampy and marshy, the water destroying the crops.

"In 1907 the water appeared and destroyed our crops. \* \* \*"

In 1910 the respondent land owner constructed a number of wells on the marshy land and developed water to use on other of his adjacent land. The Court (opinion further stated):

"The water thus developed or collected being waste water which seeps or percolates into respondent's land from adjoining lands, he had the legal right to make whatever beneficial use of it he deemed proper, and he did not invade any right of appellant's by so doing. We think the right to the use of the water in this case comes squarely within the rule announced in the case of *Garns vs. Rollins*, 125 Pac 867, recently decided by this court. \* \* \*"

The *Gribble* case held that appellant, having no established water right could not require the respondent to so apply the water on his land that the seepage therefrom would be made available to appellant. This is significantly

pointed out when we consider the last paragraph in the Gribble case where the court says "We think the right to the use of the water in this case comes squarely within the rule announced Garn vs. Rollins."

An examination of the Garn vs. Rollins case shows that plaintiff Garns had a water right with respect to water upon said land. The lower court, however, stated:

"\* \* \* subject to the condition that the said water shall be beneficially used by the plaintiff or her successors in interest, exclusively upon the land described in her said complaint. \* \* \*"

The Utah Appellate court reversed the lower court eliminating the requirement that the water be used exclusively upon the area of land described. The plaintiff Garns who developed the water as had the plaintiffs in the case at bar was not required to so use the water so the overflow would benefit the defendant. The defendant acquired no such property rights in said overflow as to limit the manner of the use of the water by the party developing it. In other words, the developer can use the water on other land even if there is no run off available to others. This parallels all of the Utah courts' 'holdings in encouraging not only the development of water and its application to its most advantageous and beneficial use but also sustaining the property rights of the party developing the water. Again quoting from the Garns case, and the language used by the court in arriving at its conclusions:

"Under this doctrine it has been held that a landowner has no right, except for the benefit and improvement of his own premises or for his beneficial use, to drain, collect, or divert percolating waters

therein where such act will destroy or materially injure the spring of another, the waters of which spring are used by the general public for domestic purposes; *that he cannot drain, collect or divert such waters for the sole purpose of wasting them;* that the owner of land cannot gather percolating water by pumps or by natural means that it may be carried to a distant place for use by or sale to strangers having no right to it, in a case where the inevitable result would be to destroy a spring upon the land of an adjoining owner. \* \* \*"

This comes squarely within the points and issues raised by appellants.

Respondents in Respondents' Brief at Page 5 admit there is no competitive claims to the water and concede that all they claim is a right to waste it. Rather than taking comfort in this position, respondents should be alarmed. Our Supreme Court has declared the law to be that a person may not "DRAIN, COLLECT, OR DIVERT SUCH WATERS FOR THE SOLE PURPOSE OF WASTING THEM". Respondents apparently take the position that since there are no competitive claims for water the respondents stand immune from responsibility. Apparently the courts take exactly the opposite view and one destroying another's water right and wasting water has promptly received appropriate attention.

The court's attention is again invited in the Garns case to the following:

"No surface owner possesses the right to extract the subterranean water in excess of a reasonable and beneficial use upon the land from which it is extracted. Any additional extraction is not in the



exercise of a right if by such exercise the rights of others are injuriously affected. \* \* \*”

It is interesting to note that even where the water being drained is being beneficially used elsewhere it cannot be taken if it interferes with the rights of others. *Garn vs. Rollins* is not only a well considered case but also of sufficient importance to be referred to by Justice Wade in the *East Bench Irrigation vs. Deseret Irrigation Company*, 271 P2d at 456, also Shepard’s discloses other western states following the rationale. A close examination of these cases fortifies appellants position.

In the *Garns* case is also an interesting discussion on the English and the American Rule, and no doubt was the foundation for the rationale upon which the Utah Court adopted and adhered to the American Rule.

The balance of the cases cited under Point 1 are readily disposed of by merely citing the opinion of Justice Wade in the case of *Hansen vs. Salt Lake City*, 205 P2d 258, “WE ADOPT THE AMERICAN RULE \* \* \* .”

Counsel’s citations and discussion on the English Rule and cases following the same are not germane to the Utah law or the case at bar and a much more illuminating discussion of the same from an academic or moot question standpoint and reasons therefore is found in the *Garns* case.

Finally, the lower court found that appellants Long and Smith had an adjudicated water right to two second feet of water during the irrigation season and that appellant Mower had an adjudicated right to use the water in the pond for the propagation of fish—R-52.

This is significant when one considers the better position appellants are in when comparing all other cases where injunctive relief was granted where the parties did not stand in the favorable position of having the weight of a judicial determination fully establishing their water rights.

Respectfully submitted,

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