

1960

# Larry L. Jones and Della Mae Jones v. Grow Investment and Mortgage Co. : Brief of Appellant

Utah Supreme Court

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Aldrich, Bullock & Nelson; Attorneys for Defendant and Appellant;

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**In the Supreme Court of the  
State of Utah**

**FILED**

JUL 10 1967

**LARRY L. JONES and DELLA MAE**

**JONES, his wife,**

**Plaintiffs and Respondents,**

**vs.**

**GROW INVESTMENT AND MORTGAGE  
COMPANY,**

**Defendant and Appellant.**

Clerk, Supreme Court, Utah

**CASE  
NO. 9240**

**APPELLANT'S BRIEF**

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**UNIVERSITY OF UTAH**

**JUL 10 1967**

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# In the Supreme Court of the State of Utah

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COMPANY,

Defendant and Appellant.

**CASE  
NO. 9240**

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## **APPELLANT'S BRIEF**

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### **STATEMENT OF FACTS**

Since this appeal involves a determination of issues of both law and fact, a somewhat detailed statement of the facts is desirable.

After some preliminary negotiations, the respondents, in the latter part of October, or the forepart of November, 1958; purchased from the appellant a new "model" home in Utah County, Utah, located on real property described as follows:

Lot 3, Block 4, Plat "B", Keyyridge Heights  
Subdivision, Orem, Utah County, Utah



Mr. Jones, one of the respondents, first saw the property between October 20 and October 30, 1958 (Tr. 22). He visited the property with the appellant's salesman on at least two and possibly three occasions (Tr. 26 and 27). In addition to those visits, he was given a key to the home and drove by and looked at it a couple of times and showed it to other people (Tr. 27). He made arrangements to purchase the house and moved into it, bachelor style, in November, 1958, and Mrs. Jones arrived from Grand Junction with the furnishings in December of that year (Tr. 21). The property was conveyed to the respondents by the appellant on or about December 12, 1958, by warranty deed, subject to "deed restrictions and easements of record." (Complaint, paragraph 1, Findings of Fact, paragraph 8)

When Mr. Jones went upon the property in the latter part of October, 1958, he observed the irrigation ditch, of which he subsequently complained, along the east end of the property (Tr. 22, 28). He also observed the extension of the ditch as it traversed the east end of the contiguous property on the north, and observed that it was "a big ditch" (Tr. 28). He could see no difference between this open ditch, and its appearance as it traversed the rear of his property, and the same ditch as it extended along its entire length to the north (Tr. 30), and he testified, on cross-examination, that this extended ditch to the north appeared, at the time of trial, to look the same as his ditch did when he moved into the property in question in November, 1958 (Tr. 30).

Notwithstanding the fact that Mr. Jones, a drilling engineer by profession (Tr. 29), observed the ditch at the

rear of his property and its extension to the north, he testified, on cross-examination, that he did not make **any** inquiries of **anyone** concerning the ditch or where any of the water went in any of the ditches he observed (Tr. 29 and 30). The ditch was a large irrigation ditch, about two and one-half feet deep and two and one-half to three feet wide (Tr. 44). Although Mr. Jones testified, at one point, that the ditch appeared to be pretty well filled up (Tr. 22 and 23), it required about six large dump truck loads of gravel and dirt to fill the same (Tr. 152).

Mr. Jones was informed by Mr. Uibel, the appellant's salesman, of the existence and nature of the irrigation ditch toward the end of October, 1958, and was informed of the use made of the same (Tr. 72 and 73). He also was advised that he might fence the property provided such fence were installed on the west side of the ditch (Tr. 73 and 74). Mr. Jones' version of this conversation differed somewhat from the version of Mr. Uibel, when Mr. Jones testified in rebuttal, but he had already testified on cross-examination that he made **no** inquiries of **anyone** concerning the ditch (Tr. 29 and 30).

It is clear from the evidence that in the latter part of October, 1958, when the sale of the property was negotiated and in November, 1958, when the sale was consummated, there was a typical irrigation ditch extending the full width of the property at the rear thereof through which, at regular intervals, there flowed a stream of water amounting to four or five second feet (Tr. 47 and 48). From the southeast corner of the property, irrigation water was conveyed through a covered and water proofed concrete pipe (Tr. 91) extending to the west and across the

street to other properties. There was no clear proof and no substantial evidence that the covered pipe running east and west is actually upon the property of the respondents. The evidence is more persuasive that it is upon the abutting property on the south.

After the transaction had been concluded and the deed to the respondents recorded, the respondents installed a fence on three sides of the property and left the front open (Tr. 23) and installed a 22 inch pipe along the east end of the property and covered the same and leveled the surface (Tr. 25). This pipe connected with the existing pipeline running east and west at the south side of the property and the existing steel protective grating in that pipeline was removed and reinstalled at the north end of the new pipeline by the respondents (Tr. 25). At the time of the trial, there was no visible evidence of any ditch or pipeline on the respondents' property. About Christmas time in 1958 (Tr. 24) and before installing the pipeline at the east end of the property, the respondents commenced to fill in the open ditch, but received an objection thereto by a lower water user as soon as the filling process was started (Tr. 24).

The ditch and pipeline in question service approximately 15 acres of land below the respondents' property (Tr. 6). These water users have received water through the ditch and pipeline in question for several years, including the years 1957 and 1958 (Tr. 10, 11, 13, 14 and 16). The water is used in turns as prescribed by the water master (Tr. 18), and these turns occur about once every week during the irrigation season (Tr. 18). The usual irrigation season runs from May to the last of October (Tr. 41)

(Ex. 4). Mr. Martin, one of the respondents' witnesses, testified, on cross-examination, that he used the water through the irrigation ditch and pipeline in question "every water turn as such is prescribed by the water master \* \* \* \*" (Tr. 18) and the respondents' witness, Mr. Rappleye, when asked to examine his water ticket for 1958 and the spring of 1959 (Ex. 4), and state whether or not he took the water on most of the dates shown thereon, testified: "Well, yes, most of the time" (Tr. 46).

Mr. Jones testified that there was rubbish and debris in the ditch when he examined it in October, 1958, and stated that it looked like a pretty well filled up ditch (Tr. 22). At the same time, he testified that the ditch looked the same at that time as the extension of the same to the north looked at the time of the trial (Tr. 30). Referring to pictures of the open ditch extending north from the respondents' property which were taken at the time of the trial, (Ex. 1, 2 and 3), Mr. Kenner, the respondents' principal witness, testified that it showed a ditch "which is probably quite a typical irrigation ditch with growth \* \* \* \*" (Tr. 33).

Sometime after a covered pipe had been installed by the respondents at the rear of their property, they complained to various officers or personnel of the appellant company by telephone, and at least on one occasion by letter addressed to Mr. Grow, concerning the cost, only, of installing the pipe (Tr. 96), but on no occasion, until the filing of the complaint, was any mention made by the respondents of the pipeline along the south side of the property (Tr. 96 and 97). There was no easement recorded for the irrigation ditch or pipeline (Findings of Fact), but

at the time Mr. Jones examined the property in the latter part of October, 1958, he saw a visible, open irrigation ditch across the rear of said property (Findings of Fact). On the basis of the foregoing, the respondents sought judgment against the appellant for breach of warranty against encumbrances and the court, in its memorandum decision, found for the respondents and entered judgment against the appellant for damages in the sum of \$750.00, from which decision and judgment the appellant has prosecuted this appeal.

## STATEMENT OF POINTS

### POINT I

THE COURT ERRED IN FAILING AND REFUSING TO FIND, AS A MATTER OF LAW, THAT THE EXISTENCE OF THE OPEN, VISIBLE AND NOTORIOUS IRRIGATION DITCH AND EASEMENT DID NOT CONSTITUTE A BREACH OF THE COVENANT AGAINST ENCUMBRANCES.

### POINT II

THE COURT ERRED IN FAILING AND REFUSING TO FIND, AS A MATTER OF LAW, THAT UPON OBSERVING THE OPEN, VISIBLE, AND NOTORIOUS IRRIGATION DITCH TRAVERSING SAID PROPERTY THE RESPONDENTS HAD AN AFFIRMATIVE DUTY TO INVESTIGATE AND MAKE INQUIRY CONCERNING THE SAME AND THAT INQUIRY OF THE APPELLANT ALONE WAS NOT SUFFICIENT.

### POINT III

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT THE EXCEPTION FROM

THE DEED OF CONVEYANCE OF THE COVENANT AGAINST RESTRICTIONS AND EASEMENTS OF RECORD, INCLUDED OPEN, VISIBLE, AND NOTORIOUS EASEMENTS OBSERVED BY THE RESPONDENTS.

#### POINT IV

THE COURT ERRED IN FAILING AND REFUSING TO FIND, AS A MATTER OF LAW, THAT THE RESPONDENTS WERE ESTOPPED FROM ASSERTING ANY CLAIM OF BREACH OF WARRANTY FOR THE EASEMENT ENCUMBRANCE BY VIRTUE OF HAVING HAD ACTUAL NOTICE OF THE EXISTENCE OF SAID EASEMENT OR OF HAVING BEEN APPRISED OF FACTS IMPOSING UPON THEM THE DUTY OF FURTHER INQUIRY.

#### POINT V

THE COURT ERRED IN FINDING THAT THE VISIBLE, OPEN IRRIGATION DITCH ACROSS THE REAR OF THE PROPERTY APPEARED TO DEAD-END AT THE SOUTH LINE OF THE PREMISES INVOLVED AND TO BE ABANDONED.

#### POINT VI

THE COURT ERRED IN FINDING OR CONCLUDING THAT THE 22 INCH CEMENT PIPE RUNNING IN A WESTERLY DIRECTION FROM THE END OF THE REAR OPEN DITCH WAS UPON THE PROPERTY IN QUESTION AND IN FURTHER FINDING THAT SAID PIPELINE WAS COMPLETELY COVERED AND NOT VISIBLE TO THE RESPONDENT, LARRY L. JONES.



## POINT VII

THE COURT ERRED IN FINDING THAT THE APPELLANT'S AGENT REPRESENTED THAT THE DITCH AT THE REAR OF SAID PROPERTY COULD BE FILLED IN AND THE YARD LEVELED AND IN FAILING AND REFUSING TO FIND, UPON THE EVIDENCE, THAT THE APPELLANT'S AGENT INFORMED THE RESPONDENT, LARRY L. JONES, THAT SUCH FENCE WOULD HAVE TO BE INSTALLED WEST OF SAID DITCH.

## POINT VIII

THE COURT ERRED IN FINDING AND CONCLUDING THAT THE RESPONDENTS FIRST LEARNED THAT THERE WAS AN EASEMENT BY PRESCRIPTION ACROSS THEIR PREMISES FOR SAID IRRIGATION DITCH WHEN THEY HAD PROCEEDED TO FILL IN THE SAID DITCH.

## POINT IX

THE COURT ERRED IN FINDING THAT THE RESPONDENTS WERE DAMAGED BY THE PRESENCE OF SAID EASEMENT IN THE SUM OF \$750.00 AND IN FAILING AND REFUSING TO FIND THAT THE RESPONDENTS SUFFERED NO DAMAGE.

## POINT X

THE COURT ERRED IN PERMITTING THE RESPONDENTS' WITNESS, MR. KENNER, TO TESTIFY AS TO WHAT HE USUALLY CONSIDERED TO BE A REASONABLE WIDTH OCCUPIED BY AN EASEMENT.

**POINT XI**

THE COURT ERRED IN SUSTAINING THE RESPONDENTS' OBJECTION TO THE TESTIMONY OF THE APPELLANT'S WITNESS, MR. GROW, UPON THE QUESTION OF WHAT THE CANAL COMPANY DID IN THE WAY OF ACQUIESCING TO CHANGES IN THE EASEMENT OVER SAID PROPERTY.

**POINT XII**

THE COURT ERRED IN OVERRULING THE OBJECTION OF THE APPELLANT TO THE QUESTION POSED BY THE RESPONDENTS TO MR. STEIN AS TO THE DIFFERENCE IN THE VALUE OF THE LAND IN QUESTION IF THE SAME WERE 12 FEET NARROWER AND 12 FEET LESS DEEP.

**THE ARGUMENT****POINT I**

THE COURT ERRED IN FAILING AND REFUSING TO FIND, AS A MATTER OF LAW, THAT THE EXISTENCE OF THE OPEN, VISIBLE AND NOTORIOUS IRRIGATION DITCH AND EASEMENT DID NOT CONSTITUTE A BREACH OF THE COVENANT AGAINST ENCUMBRANCES.

The weight of authority and the better reasoned rule in the United States and particularly in the arid and semi-arid regions of the west supports and sustains the proposition that purchasers of property obviously and notoriously subjected at the time to some right of easement or servitude affecting its physical condition, take such property



subject to such right without any express exceptions in the conveyance, and the vendors are not liable on their covenants by reason of the existence of such easement. KUTZ vs. MC CUNE, 22 Wis. 628, 99 Am Dec 85. See also, 55 Am. Jur. 626, Sect. 154 and Anno. 57 A.L.R. 1427 and 1545 and 64 A.L.R. 1482 and 1499. The foregoing case of KUTZ vs. MC CUNE involved a conveyance of a tract of land by a deed containing the usual ocvenants of seisin and against encumbrances, without exceptions to those covenants. At the time of the purchase, between 30 and 40 acres of the land were flowed by a mill-pond created by a dam on land not belonging to the grantor, which dam had been maintained long enough to create a prescriptive right in the owner of it to flow the land in question. The action was brought by the grantee for breach of the covenants of seisin and against encumbrances by reason of this existing right of flowing. The Court pointed out that the same principle has been applied in the case of highways open and in use upon land at the time of the conveyance of the same, RAWLE ON COVENANTS, 141 et Seq; SCRIBNER vs. HOLMES, 16 Ind. 142, and indicated:

“In the case of the highway, the doctrine does not rest upon the fact that the right is in favor of the public, but that the easement is obvious and notorious in its character, and that therefore the purchaser must be presumed to have seen it, and to have fixed his price for the land with reference to its actual condition at the time.”

The Court went on to state:

“The substantial foundation for both classes of decisions is the strong, natural presumption that the parties sell on the one hand, and buy on the other, the

property in its actual physical condition, and subject to such rights, either in favor of the vendor or others, as that physical condition obviously indicates, without exceptions or reservations concerning them in the deed. So that the decisions that an existing highway in favor of the public, and a right of flowing the land conveyed by the vendor, as it was done at the time of the conveyance, do not constitute breaches of the covenant against encumbrances for which the vendor is liable, really rest upon the same principle."

The reasoning of the Courts in supporting this proposition was set out with clarity in the Idaho case of *SCHURGER vs. MOORMAN*, 20 Idaho 97, 117 P. 122, 36 LRA N.S. 313, in his language:

"Encumbrances are of two kinds, viz: (1) such as affect the title: and (2) those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or a right-of-way, of the latter. Where encumbrances of the former class exist, the covenant referred to, under all the authorities, is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title. Such encumbrances are usually of a temporary character and capable of removal. The very object of the covenant is to protect the vendee against them. Hence, knowledge, actual or constructive, of their existence, is no answer to an action for breach of such covenant. Where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects, not the title, but the physical condition of the property, a different rule prevails."

The Idaho case quoted from the Pennsylvania case of *MEMMERT vs. MC KEEN*, 112 Pa 315, 4 ATL 542, in

which the Supreme Court of Pennsylvania had under consideration the question as to whether an open, notorious easement of which the purchaser had full notice at the time of the purchase and the execution of the deed should constitute a breach of covenant against encumbrances. The Idaho case involved a canal which imposed a servitude upon the complainant's property.

In *DESVERGERS vs. WILLIS*, 56 Ga. 515, 21 Am Rep 289, cited in the Idaho case, the Supreme Court of Georgia had under consideration the question as to whether or not a covenant against encumbrances contained in a deed was broken by the existence of a public road over the land, which was known to the purchaser at the time of purchase. In passing upon that question, Chief Justice Warner, speaking for the court, said:

"The decisions of the Courts of this country are not uniform upon this question, but the weight of authority, we think, is that the existence of a public road upon the land known to the purchaser, is not such an encumbrance as would constitute a breach of the covenant of warranty. This view of the question is sustained by the better reason, especially as applicable to the condition of the people of this State."

In *HOLMES vs. DANFORTH*, 83 Me. 139, 21 Atl. 845, the Supreme Court of Maine also considered the question as to whether or not a covenant against encumbrances was broken by the existence of a public road, and held that the purchaser took the deed with notice of the existence of the road, and that "he must accept the land cum onere, and will not be allowed to complain of that encumbrance as a breach of the covenants in his deed."

In the New York case of *WHITBECK vs. COOK*, 15 Johns 483, 8 Am, Dec. 272, involving, also, the question of a public road, the court said:

“It must strike the mind with surprise that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and chooses to have it included in his purchase, shall turn round on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers.”

The Idaho case which has been cited in some detail herein involved land coming under the “Carey Act” granting easements over public lands, but this was not the determining factor in the decision.

The question of the effect of the existence of a drainage ditch right-of-way upon a covenant against encumbrances in a deed was also considered in the case of *STUHR vs. BUTTERFIELD*, 151 Iowa 736, 130 NW 897, 36 LRA N.S. 321, and the Court employed this language:

“Ordinarily the allowance of damages to a vendee with full knowledge of the physical conditions evidencing an easement which cannot be changed subsequently by the vendor, and which are so apparent that they must have been taken into account in making the transfer, on a breach of warranty against encumbrances immediately upon receiving a deed containing such

warranty, is little less than putting a premium on dishonesty \* \* \*,"

The California Supreme Court has likewise supported the position of the appellant in the case of *SISK vs. CASWELL*, 112 Pac. 185, in holding that where there is a physical burden on real estate which is visible, the presumption, in the absence of an express agreement, is that the burden is not an encumbrance, within a covenant against encumbrances. See also, *SOMERS vs. LEISER*, a recent Washington case, reported in 259 P. 2d, 843, involving a visible easement.

In the Nevada case of *MONTESA vs. GELMSTEDT*, 270 P. 2d 668, the Court held that where the plaintiff purchased property from the defendant with full knowledge of lateral irrigation ditches and their use, the plaintiff was charged with notice of the apparent easement, and the servient character of her property, even though the deed to her by the defendant contained no express reservation thereof. This case involved land which had formerly been used and cultivated, primarily for agriculture, but was yielding to the inroads of subdivisions and home building. In this respect, the facts sharply parallel those in the instant case.

Open and visible burdens on property are reciprocal and the purchaser of property burdened by such open and visible easements is held to take the same with the benefits and subject to the burdens existing. *WAKEN vs. GILLESPIE*, 153 Okla 78, 4 Pac. 2nd 1028; *ROLLO vs. NELSON*, 96 Pac. 263, 34 Utah 116, 26 LRA (N.S.) 315.



## POINT II

THE COURT ERRED IN FAILING AND REFUSING TO FIND, AS A MATTER OF LAW, THAT UPON OBSERVING THE OPEN, VISIBLE, AND NOTORIOUS IRRIGATION DITCH TRAVERSING SAID PROPERTY THE RESPONDENTS HAD AN AFFIRMATIVE DUTY TO INVESTIGATE AND MAKE INQUIRY CONCERNING THE SAME AND THAT INQUIRY OF THE APPELLANT ALONE WAS NOT SUFFICIENT.

It is clear from the evidence that the respondents made no inquiry of anyone concerning the irrigation ditch they observed at the back of the property. In response to a question propounded to the respondent, Larry L. Jones, by appellant's counsel:

Q. "Did you make any inquiries of anyone concerning the ditch back of your place?" (Tr. 29)

The respondent answered:

A. "No sir, I did not." (Tr. 30)

Open use and enjoyment of an easement over land is constructive notice to the purchaser of the land of the existence of such easement and the rights of the owner thereof where inspection of the premises would readily reveal such facts as to put the purchaser on inquiry. TAYLOR INV. CO. vs. KANSAS CITY POWER & LIGHT COMPANY, 322 Pac. 2nd 817, 182 Kan. 511, citing 28 C.J.S. Easements, 49.

In the New Mexico case of MUTZ vs. LE SAGE, 397 Pac. 2nd 876, 61 NM 219, the court held that one who purchased land across which a well defined, clearly marked road ran and who knew that neighbors were using the road,

but who failed to make inquiry, concerning their right to do so was charged with notice of the facts which an inquiry would have disclosed.

The inquiry to be made by one who sees visible signs of an easement should not be confined to the grantor alone. *WRIGHT vs. WILLIS*, 23 Ky L. Rep. 565, 63 S.W. 991.

For physical conditions which will charge the purchaser of a servient estate with notice of an easement, see Annotations at 41 ALR 1442 and 74 ALR 1250.

### POINT III

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT THE EXCEPTION FROM THE DEED OF CONVEYANCE OF THE COVENANT AGAINST RESTRICTIONS AND EASEMENTS OF RECORD, INCLUDED OPEN, VISIBLE, AND NOTORIOUS EASEMENTS OBSERVED BY THE RESPONDENTS.

The record disclosed that there were no written easements of record affecting this property. It is clear in this case that the parties considered the existence of the visible easement and attempted to provide for an exception thereto in the wording of the deed. The fact that unfortuitous circumstances alone decreed that the easement, the existence of which was well known to all the parties to this transaction, was born of prescription and had therefore not been recorded, should not be allowed to defeat the manifest intention of the parties in excepting from the usual covenants of the appellant's deed "restrictions and easements of record". Since there were no easements which had been recorded, it is obvious that the parties contemplated the existence of the visible prescriptive easement and

sought, by the wording of the deed, to signify the intention of the respondents to accept and of the appellant to convey the property burdened with the easement and to provide for its exclusion from any covenant against encumbrances. Recordation is manifestly only a substitute for actual notice. It is constructive or substituted notice and should not be accorded greater weight than the indisputable actual notice of the respondents in this case. The Kansas case of *FEDERAL SAVINGS & LOAN INSURANCE CORPORATION vs. URSHELL*, 157 Pac. 2d 805, 159 Kansas 674, held that notice of an easement will be imputed to a purchaser where the easement is properly recorded or is of such character that a purchaser, acting with ordinary diligence, would learn of its existence.

#### POINT IV

THE COURT ERRED IN FAILING AND REFUSING TO FIND, AS A MATTER OF LAW, THAT THE RESPONDENTS WERE ESTOPPED FROM ASSERTING ANY CLAIM OF BREACH OF WARRANTY FOR THE EASEMENT ENCUMBRANCE BY VIRTUE OF HAVING HAD ACTUAL NOTICE OF THE EXISTENCE OF SAID EASEMENT OR OF HAVING BEEN APPRISED OF FACTS IMPOSING UPON THEM THE DUTY OF FURTHER INQUIRY.

The argument in support of Point III hereof is equally applicable to Point IV.

There can be no question in this case that the respondents were aware of the existence of the large, open, and visible irrigation ditch. In response to the question put to



the respondent, Larry L. Jones, on cross-examination, as to whether or not he saw a ditch there, he replied:

A. "Yes Sir. I am not blind; I could see that ditch, It was a big ditch." (Tr. 28)

Yet he testified, further, that notwithstanding this fact, he did not make **any** inquiry of **anyone** concerning the ditch (Tr. 30). To employ the language of the Supreme Court of Iowa in the case of *STUHR vs. BUTTERFIELD*, cited above, to permit the respondents, under these circumstances, to later recover for breach of warranty against encumbrances "is little less than putting a premium on dishonesty." This is particularly true where, as in this case, an attempt was obviously made to limit the covenants of the grantor in its deed by excepting easements obviously thought to be of record. In determining the existence of such an easement, the purchaser of the servient estate is chargeable with knowledge of facts which he would have acquired by the exercise of ordinary diligence and the observance of facts of common knowledge in the vicinity. *BERLIN vs. ROBBINS*, 38 P. 2nd, 1047, 180 Wash., 176.

For physical conditions which will charge the purchaser of a servient estate with notice of an easement, see annotations at 41 ALR 1442 and 74 ALR 1250.

## POINT V

**THE COURT ERRED IN FINDING THAT THE VISIBLE, OPEN IRRIGATION DITCH ACROSS THE REAR OF THE PROPERTY APPEARED TO DEAD-END AT THE SOUTH LINE OF THE PREMISES INVOLVED AND TO BE ABANDONED.**

The finding of the Court that the ditch across the rear of the property which the respondent, Larry L. Jones, observed appeared to dead-end at the South line of the premises involved and to be abandoned is contrary to the great weight of the evidence and cannot be reconciled with the uncontroverted and unbiased evidence and testimony found in the record. The plaintiff, according to his own admission, viewed the property between the 20th and the 30th day of October, 1958 (Tr. 22). According to his own testimony, the ditch at the rear of the property was clearly visible (Tr. 28) and he observed the extension of the ditch for an indefinite distance to the north (Tr. 28). Even if it be conceded that there may have been some trash and debris in the ditch, the respondents' testimony that the ditch appeared to dead-end at his property and to be abandoned is not credible when considered with the testimony of the lower water users to the effect that the irrigation season extended from May to the **end of October**, during which time the water users had water turns about once **every week** from a stream carrying from **four to five second feet** (Tr. 18, 41, 46, and Ex. 4). The testimony of Mr. Martin and Mr. Rapleye, both respondents' witnesses, shows that the ditch in question was being **actively** used at almost exactly the time when Mr. Jones, according to his own admission, examined the property. A ditch characterized in the manner the respondent, Larry L. Jones, attempted to characterize it, could not possibly have accommodated an irrigation stream of four to five second feet and the consistent and extended use of the ditch for irrigation purposes for the entire irrigation season of 1958 could not have rendered to the ditch an appearance of being aban-

done. This physical evidence has to be set completely at naught as well as the testimony of Mr. Uibel to the effect that he informed the respondent, Mr. Jones, respecting the nature and use of the ditch, and the testimony of Mr. Jones must be accepted in toto concerning a conversation about the ditch which he testified to having had with Mr. Uibel after he had already testified on cross-examination that he made **no** inquiry of **anyone** concerning the ditch at the back of the place (Tr. 29 and 30, to sanction the finding of the court. The respondent evidently encountered no difficulty in discovering the grate at the easterly end of the covered pipeline and removing it to the north end of the pipe he installed and it is submitted that the law, under the circumstances, imposed upon him a duty of more than "a casual inspection," as set out in the Memorandum Decision of the Court. It is inherently improbable that the volume of water which was conveyed through the ditch for the entire irrigation season of 1958 and extending to the end of October of that year could have created such a situation in the ditch as to leave the respondent or anyone else with the impression that the ditch had been abandoned and renders equally improbable the conclusion that he could have failed, on reasonable inspection, to see where the ditch connected with the covered pipeline running east and west along the south side of the property. The pictures of the ditch to the north taken at the time of trial (Ex. 1, 2 and 3) clearly depict a typical irrigation ditch, and these pictures, it must be remembered, were taken long after the end of the irrigation season.

In MC DOUGAL vs. LAME, 39 Ore. 212, 64 Pac. 864, the Supreme Court of Oregon held that a ditch by which

water was diverted from its natural channel for mining purposes was notice of the right to maintain it across the premises, where, for part of the way at least, its existence was plainly marked upon the ground, **although elsewhere it had become nearly filled with debris.**

## POINT VI

THE COURT ERRED IN FINDING OR CONCLUDING THAT THE 22 INCH CEMENT PIPE RUNNING IN A WESTERLY DIRECTION FROM THE END OF THE REAR OPEN DITCH WAS UPON THE PROPERTY IN QUESTION AND IN FURTHER FINDING THAT SAID PIPELINE WAS COMPLETELY COVERED AND NOT VISIBLE TO THE RESPONDENT, LARRY L. JONES.

The argument submitted under Point V above is equally applicable to Point VI, and may be addressed to the same. It is submitted further, that there is no clear or convincing evidence in the record establishing that the covered pipeline on the south is even upon the property in question. The pipeline was installed on the south in the spring of 1957 (Tr. 90 and 91). Mr. Grow testified that he was not sure that the pipeline was even on Lot 3, Block 4, Keyyridge (Tr. 90). When first asked by respondents' counsel where, with respect to the south side of the lot on which the house in question was situate, the ditch ran west, Mr. Rappleye, the respondents' witness, testified:

A. "It went right through the fence line on the next place south of it" (Tr. 7).

It is true that after some goading and helpful questioning by counsel, the witness placed the ditch on the lot to

the north of that fence (Tr. 8). How he could testify as to the position of the ditch with reference to the fence prior to the installation of the pipeline in 1957, or to the pipeline itself, cannot be understood, since the fence referred to in the picture the witness was examining when the question was propounded to him was not installed until **after** the acquisition of the property by the respondents in the latter part of 1958 (Tr. 23). The Court's finding is rendered more impotent by the testimony of Mr. Heal to the effect that the distance between the north and south fence lines at the front of the property measured between 70 and 71 feet, (Tr. 147) by actual measurement, whereas the corresponding distance shown on the plat of the survey is 68.2 feet (Tr. 119). This issue becomes important in view of the fact that all the real estate people who testified as to damage, attributed such damage, almost exclusively, to the pipeline on the south, and almost completely discounted any damage on account of the easement at the rear of the property (Tr. 54, 112, 138, and 145).

## POINT VII

THE COURT ERRED IN FINDING THAT THE APPELLANT'S AGENT REPRESENTED THAT THE DITCH AT THE REAR OF SAID PROPERTY COULD BE FILLED IN AND THE YARD LEVELED AND IN FAILING AND REFUSING TO FIND, UPON THE EVIDENCE, THAT THE APPELLANT'S AGENT INFORMED THE RESPONDENT, LARRY L. JONES, THAT SUCH FENCE WOULD HAVE TO BE INSTALLED WEST OF SAID DITCH.

On this point, there is a conflict in the testimony of

Larry L. Jones and Fred Uibel. We believe, however, that Mr. Uibel's testimony more nearly accords with what the physical features of the land revealed. Also, it should be remembered that before giving his version of the conversation with Mr. Uibel, Mr. Jones had already testified, on cross-examination, that he did not make **any** inquiries of **anyone** concerning the ditch back of the place (Tr. 30). In the face of the undisputed use that had already been made of the ditch to convey an irrigation stream consisting of four to five second feet of water for the full irrigation season of 1958, extending to the last of October of that year, the respondents' version of the conversation with Mr. Uibel is not worthy of belief.

#### POINT VIII

THE COURT ERRED IN FINDING AND CONCLUDING THAT THE RESPONDENTS FIRST LEARNED THAT THERE WAS AN EASEMENT BY PRESCRIPTION ACROSS THEIR PREMISES FOR SAID IRRIGATION DITCH WHEN THEY HAD PROCEEDED TO FILL IN THE SAID DITCH.

There is no question but that the Respondent, Larry L. Jones, observed the ditch at the rear of the property, in October, 1958, before a sale of the property was consummated and recognized that it was an irrigation ditch (Tr. 28). Observing the ditch as he did, **within days of its actual use**, he was charged with knowledge of those facts which the exercise of ordinary diligence would have revealed and with notice of those facts which a reasonable inquiry would have disclosed. *BERLIN vs. ROBBINS*, 38 Pac. 2d 1047, 180 Wash. 176; *MUTZ vs. LE SAGE*, 297 Pac. 8d 876, 61



N.M. 219; FEDERAL SAV. & LOAN INS. CORP. vs. URSCHEL, 157 Pac. 2d 805, 159 Kan. 674. See also, PIONEER MINING CO. vs. BANNOCK GOLD MINING COMPANY, 60 Mont, 254, 198 Pac, 748, which held that the existence of a ditch and flume running to a mill was notice to the purchaser of the servient estate. Also, annotations at 41 ALR 1442 and 74 ALR 1250.

## POINT IX

THE COURT ERRED IN FINDING THAT THE RESPONDENTS WERE DAMAGED BY THE PRESENCE OF SAID EASEMENT IN THE SUM OF \$750.00 AND IN FAILING AND REFUSING TO FIND THAT THE RESPONDENTS SUFFERED NO DAMAGE.

It is, of course, Appellant's primary position on this appeal that the existence of the open, visible, and notorious irrigation ditch and easement did not constitute any breach of Appellant's covenants against encumbrances and that, therefore, no damages can properly be found in favor of the respondents. But even if the circumstances of this case spelled out a cause of action for the respondents, which the appellant denies, nevertheless, there is no competent evidence upon which damage in the sum of \$750.00 or in any amount could be properly found by the court. In the first place, all of the real estate people who testified on the element of damage, and which was the only evidence submitted on that subject, indicated that no damage of any consequence could be attributed to the ditch at the rear of the property (Tr. 54, 112, 136, and 145). This means that the damage, if any, must be attributed solely to the covered pipeline on the South and this poses further difficulties:

First, there is no concrete or substantial evidence that this pipeline is even on the property in question. On the contrary, there is substantial evidence to the effect that it is not (Tr. 7, 90, and 147). Second, the only testimony which accorded to the pipeline (assuming it was upon the property) any substantial damage whatsoever was that of Mr. Kenner, the respondents' witness, who predicated his estimate of such damage upon matters of assumption and conjecture void of legal sanction. First, he admitted that his estimate was one of speculation (Tr. 55). Second, he stated that the element of damage involved the considerations the ditch would create in the mind of a potential buyer (Tr. 53). The best evidence on this item is a subjective examination of the feelings of the buyers at the time of purchase. In the light of Mr. Jones' testimony, this was evidently not a proper element to consider. When asked by his counsel:

Q. "Would you have purchased this property had you known there was a ditch along two sides of it?"  
(Tr. 25)

he answered:

A. "In a way we would have and in a way we wouldn't have. The only argument would have been whether we wanted our boy to be around an open ditch or not." (Tr. 26)

To this add the further fact that, with such knowledge, they did purchase the property. Mr. Kenner's testimony was not predicated on this latter consideration and it is clearly evident that the ditch made no serious impression upon the respondents in reaching their decision to buy the property. Third, Mr. Kenner testified that the biggest single factor which he considered was "would that ditch always



exist in its present spot or was there permission to change that right of way" (Tr. 55). This consideration was not legally proper in view of the fact that there was not a scintilla of evidence in the record to the effect that the ditch would not always exist in its present location and the only evidence offered on that subject was rejected by the court (Tr. 132). Fourth, Mr. Kenner's testimony was predicated on the legal conclusion and erroneous assumption that the pipeline on the south, in effect, consumed 10 to 16 feet of the respondents' land (Tr. 64) and he evidently attributed to that footage 100% loss of value. Fifth, at another point in his testimony, Mr. Kenner gave the impression that he attributed his depreciation rate of 10% largely to the presence of the 90 degree turn in the ditch (Tr. 60), but without showing that any damage or problem had ever resulted from such turn and admitting that he had never run into a situation where depreciation had been predicated on such a factor (Tr. 60). The entire line of Mr. Kenner's testimony was contradictory and based on assumptions and legal conclusions improperly admitted into evidence. On the other hand, the testimony of Mr. Stein, Mr. Heal, and Mr. Swapp all support the conclusion that the damage, if any, was strictly nominal (Tr. 112, 116, 125, 136, 138, 141, and 145).

It should also be noted that the ditch at the rear of the property constituted a potential benefit to the respondents. First, the lower water users all rent their irrigation water (Tr. 19) from year to year and there is no reason to suppose that the respondents could not be accorded the same privilege and utilize such water to service their lot. In addition, as indicated by Mr. Heal, some people would con-

sider the presence of the ditch as an asset and conclude that it enhanced the value of the property (Tr. 141). See 14 Am Jur. 555, Sect. 110, citing STUHR vs. BUTTERFIELD and SCHURGER vs. MOORMAN, cited herein.

## POINT X

THE COURT ERRED IN PERMITTING THE RESPONDENTS' WITNESS, MR. KENNER, TO TESTIFY AS TO WHAT HE USUALLY CONSIDERED TO BE A REASONABLE WIDTH OCCUPIED BY AN EASEMENT.

Without specifying whether the easement was for the purpose of a  $\frac{3}{4}$  inch pipeline or an airplane runway, the court permitted respondents' counsel to ask Mr. Kenner this question:

Q. "Where you are appraising a piece of property, Mr. Kenner, and the easement is a prescriptive easement, what do you usually consider as a reasonable width to take into consideration as being occupied by the easement?" (Tr. 64)

Over objection of Appellant's counsel, the witness was permitted to answer and the objection was overruled (Tr. 64). The answer of Mr. Kenner was as follows:

A. "This is a practical point, I think, largely, and I would say that from 12 to 16 feet—or rather, from 10 to 16 feet is the conventional or usual prescribed easement." (Tr. 64)

This testimony and the ruling of the court with respect thereto were improper for the reasons (1) No sufficient foundation was laid to determine what type of easement was referred to and (2) being a prescriptive ease-

ment, no consideration was given to the essential element of the nature and extent of use upon which the easement was established, and (3) the question called for a legal conclusion. The answer of the witness was significant and prejudicial, bearing on the measure of damage, since he accorded to his judgment of the damage suffered, considerations of the quantity of land taken by the easement.

## POINT XI

THE COURT ERRED IN SUSTAINING THE RESPONDENTS' OBJECTION TO THE TESTIMONY OF THE APPELLANT'S WITNESS, MR. GROW, UPON THE QUESTION OF WHAT THE CANAL COMPANY DID IN THE WAY OF ACQUIESCING TO CHANGES IN THE EASEMENT OVER SAID PROPERTY.

Testifying on the measure of damage to be accorded the presence of the easement, the court permitted Mr. Kenner to state that the biggest single factor which he tried to take into consideration was this: "Would that ditch always exist in its present spot or was there permission to change that right of way" (Tr. 55). At the same time, the court sustained the objection of Respondents' counsel to the following testimony of Mr. Grow bearing on that subject:

A. ". . . . so I called the Canal people and, as I recall there were two of the Canal executives—I remember picking up one of them—and took them out to look at the situation and get their recommendations." (Tr. 90)

The court first sustained the respondents' objection to this testimony on the ground that it was not material (Tr.

91). Later, in the re-direct examination of Mr. Stein, the following exchange between the court and counsel ensued:

THE COURT: "The objection will be sustained. May I ask if you have any evidence at all as to whether or not this pipeline was constructed with the acquiescence or at the instance of the Canal Company or anything like that?" (Tr. 132)

MR. BULLOCK: If the court please, you sustained the objection when I was asking Mr. Grow concerning the matter and I think it error to have done so. That was the purpose, to show that the pipeline was put in there with the full acquiescence of the Canal Company and they specified the type of pipe that should go in there and the size." (Tr. 132)

MR. SORENSEN: "We think we would have no objection if he brought in a member of the Canal Company to testify to that." (Tr. 132)

MR. BULLOCK: "I don't think we need a member of the Canal Company to say so." (Tr. 132)

THE COURT: "I imagine you would. It would be hearsay." (Tr. 132)

THE COURT: "I think it would be hearsay if you had Mr. Grow state what the Canal Company said or **did.**" (Tr. 132)

MR. BULLOCK: "I don't intend to have him state what they **said.** I intend to have him state what he **did** and who was present at the time that he **did** it and **what he did.**" (Tr. 132)

THE COURT: "I think it is still hearsay." (Tr. 133)

MR. BULLOCK: "Well then, your honor's ruling with respect to the matters that I wanted to go

into with Mr. Grow still stands, is that correct?" (Tr. 133)

THE COURT: "Yes." (Tr. 133)

The foregoing ruling was clearly error and was prejudicial. It was erroneous because it excluded testimony as to what the parties **did** as distinguished from what the parties **said**, with reference to the installation of the pipeline on the South. The testimony offered was clearly not hearsay and was competent out of the mouth of Mr. Grow. The ruling was prejudicial because the court had already permitted Mr. Kenner to testify that he thought the biggest single factor he tried to take into consideration in assessing the damage was: "Would that ditch always exist in its present spot or was there permission to change that right of way?" (Tr. 55)

## POINT XII

THE COURT ERRED IN OVERRULING THE OBJECTION OF THE APPELLANT TO THE QUESTION POSED BY THE RESPONDENTS TO MR. STEIN AS TO THE DIFFERENCE IN THE VALUE OF THE LAND IN QUESTION IF THE SAME WERE 12 FEET NARROWER AND 12 FEET LESS DEEP.

The same argument addressed to Point X of this brief is applicable to Point XII.

Over the objection of Appellant's counsel, respondents' counsel was permitted to ask Mr. Stein on cross-examination if the value of the house would be different if the lot were 12 feet narrower and 12 feet less deep (Tr. 123). Over Appellant's further objection, respondents' counsel

was further permitted to attempt to educate the witness on the conclusions of law, as follows:

Q. "You know, don't you, that of course an easement for a ditch takes more area than the ditch itself occupies." (Tr. 126)

A. "It could, yes." (Tr. 126)

Q. "You know why, don't you?" (Tr. 126)

A. "Yes." (Tr. 126)

Q. "That is, the owners of the ditch have a right to go on the premises with equipment and men?" (Tr. 126)

Rights under a prescriptive easements are proscribed and measured by the nature and extent of use under which the easement was created, and the whole tenor of the testimony at this point and in this vein, presumed facts not in evidence and rested upon legal conclusions.

### CONCLUSION

The trial court erred in its Findings of Fact as set out herein and in its application of the law thereto, and the Findings and Conclusions and Judgment of the court should be reversed.

Respectfully submitted,  
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