

1960

Salt Lake County Cottonwood Sanitary District et al v. Clements T. Toone and Elmina S. Toone : Brief of Appellants

Utah Supreme Court

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Roy F. Tygesen; Attorney for Defendants and Appellants;

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

SALT LAKE COUNTY COTTON-
WOOD SANITARY DISTRICT,
AN IMPROVEMENT DISTRICT,
in Salt Lake County, by LAMONT
B. GUNDERSON, EDWIN Q.
CANNON, and ABRAM BARKER,
its board of TRUSTEES,

Plaintiff and Respondent,

vs.

CLEMENTS T. TOONE and
ELMINA S. TOONE, his wife,

Defendants and Appellants.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANTS

ROY F. TYGESEN

*Attorney for Defendants
and Appellants.*

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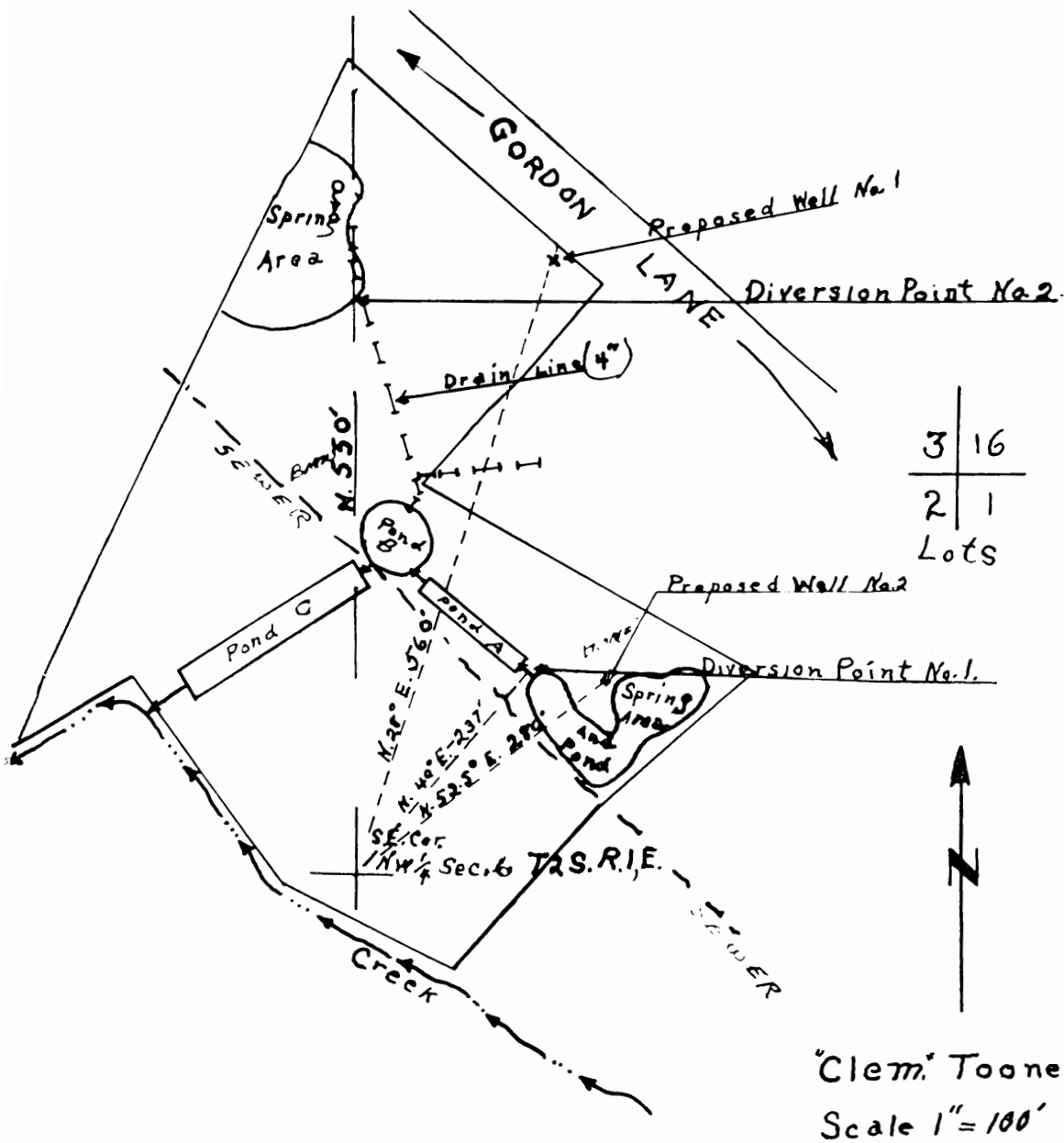
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3	16
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"Clem." Toone
 Scale 1" = 100'

Clements T. & Elmina Toone
 Magna Utah

IN THE SUPREME COURT of the STATE OF UTAH

SALT LAKE COUNTY COTTON-
WOOD SANITARY DISTRICT,
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in Salt Lake County, by LAMONT
B. GUNDERSON, EDWIN Q.
CANNON, and ABRAM BARKER,
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Plaintiff and Respondent,

vs.

CLEMENTS T. TOONE and
ELMINA S. TOONE, his wife,

Defendants and Appellants.

Case No. 9275

BRIEF OF APPELLANTS

STATEMENT OF FACTS

This is an appeal from Summary Judgment entered by Judge A. H. Ellett, one of the Judges of the Third Judicial District Court, in and for the County of Salt Lake, wherein the Court granted Plaintiff's motion for Summary Judgment, but instead of awarding Plaintiff judgment as asked for in its motion, granted Defendant

judgment for nominal damages in the sum of one dollar. Defendant appeals.

The primary issue between the parties hereto relates to the proper measure of damages.

Plaintiff contends that the measure of damages was the fair market value of the land immediately prior to the sewer installation, and its fair market value immediately thereafter.

Defendant and Appellant contend (1) that the question of damages to the land under the "Before and After Rule" was settled by agreement and stipulation to be \$1,000.00 which was paid to Defendants, for right of way and all damages incurred in Plaintiff crossing Defendant's land with their sewer line, including "before and after rule"; and that, (2) That by stipulation the question as to damage for loss of water was expressly reserved pending determination of the amount of water, if any, was lost. (3) That the proper measure of damage was, either (A) Cost to Defendants to restore said water; or, (B) That Plaintiff be required to restore said water.

Judge Ellett having ruled that the measure of damage was the "Before and After Rule" and that Defendant's position was "contrary to Law" and that "Defendants have suffered no damage". Defendants appeal.

The land in question consists of approximately six acres, located on Gordon Lane, approximately four or five blocks east of State Street, and between 4400 South and 4500 South, in Murray, Utah, area.

At the time Defendants bought the land from his father in 1955, it consisted largely of pasture and farm land, with no improvements or buildings. (Transcript page 18, line 7-8-9) (Tr. p. 7, line 7-12, inc.) At the time there was a “spring Area and Pond” used for stock watering purposes, and irrigation. (See map)

This “spring area and pond” was filled with “toolies and stuff”. (Tr. p. 19, line 1-4 inc.) (Tr. p. 19, line 13)

On the northwestern portion of the land was another “spring area” so marked on map. This was used to maintain pasture, to sub-irrigate land to south and the area south and southeast of ponds, as well as to irrigate same. (Tr. p. 17, line 25) (Tr. p. 37, line 8) (Tr. p. 39, lines 3-5-11-12) (Response to make more definite, hereinafter referred to as “Response” paragraph 7) (Jesse Hulse affidavit)

The land sloped from Gordon Lane to Big Cottonwood creek.

The land was approximately level except for gradual slope to the South, with the exception of a high knoll in the Northeast corner North of “spring area and pond.”

In 1955 when Toone bought the land, and for a long time prior thereto, water from these springs not used for watering stock, irrigation, and sub-irrigation, was drained off through a drain ditch to Big Cottonwood Creek. (Jesse Hulse affidavit) (Tr. p. 16, line 11) (Tr. p. 20, line 24) (Tr. p. 69, line 18-30, inc.) (Tr. p. 70, line 1-7, inc.)

As early as seventeen years prior to getting the land, and when Toone's father first bought the land, Appellants dreamed and planned making an "estate" of the six acres involved. (Tr. p. 4, line 26) That dream began to have reality when Defendants bought the land in June of 1955. (Tr. p. 3, line 28)

That plan and program to create an "estate" out of the six acres, included, enclosing the entire area with trees and dense shrubs, secluding the same from outside observations; a home set up on the knoll north of "spring area and pond," overlooking the entire area; a driveway from Gordon Lane to Barn and east to knoll where home was to be built; bordering the lane on the west side from Gordon Lane to "pond B" with trees, shrubs, and a rail criss-cross fence; landscaping the knoll with rock retaining walls, lawns, shrubs, flowers and orchard; a barn with living quarters, and stalls for raising pure bred stock, with a loft created into a recreation room; a duplex for temporary rental units, later to be converted into guest cabins; and finally a series of four ponds with five spill-ways, to create ponds for raising fish, and for beautification.

Pending the time the entire project was completed, Defendants anticipated receiving revenue from selling fish from the ponds by the public being permitted to catch their own fish, and pay for the same, the raising of pure bred stock, and rental from living quarters in barn, and duplex.

Development and use of water from "Spring area

and Pond” and “spring area” was vital to this program.

(Tr. p. 30, line 30) (Tr. p. 30, line 15) (Tr. p. 43, line 3-8, inc.) (Tr. p. 44, line 15) (Tr. p. 46, line 10-16, inc.) (Tr. p. 47, line 20-30, inc.) (Tr. p. 48, line 1-2-19-20) (Tr. p. 49, line 14-25, inc.) (Tr. p. 50, line 10 & 21-30, inc.) (Tr. p. 51, line 1-27, inc.) (Tr. p. 76, line 6-11, inc.) (Tr. p. 77, line 4-23, inc.) (Tr. p. 79, line 1-2-10-11) (Tr. p. 81, line 23-27, inc.) (Tr. p. 82, line 16-30, inc.) (Tr. p. 83, all) Resp. para. 1. para. 4) Pre-trial order page 2) Defendants counterclaim 1-2)

That pursuant to carrying out said program for an estate, and prior to Defendants being deeded the land in June, 1955; Defendants applied to “Soil Conservation” for financial and engineering assistance in draining “spring area,” developing water for fish culture, and for irrigation, farming and beautification of the area. This service included drawing plans (they drew map) testing for water tables, volume of water needed for fish culture, construction of drains, dams, ponds, etc. to obtain the maximum use of available water on the property for fish culture, irrigation, sub-irrigation, beautification, as well as restoring some pasture land to more beneficial use.

The program was finally approved by soil conservation and the agreement signed, and work was ready to start on draining “spring area,” when Plaintiff commenced this action in condemnation. The matter was held in abeyance pending the effect of Plaintiff’s sewer installation.

When the “spring area” completely dried up after running of the sewer line, the project was abandoned.

The agreement was voided and the 210.00 promised by Soil Conservation as well as supervision of the program, was never carried out.

(C. B. McAllister Affidavit) (Amended answer — para. 4-5) (Response, para. 9) (Tr. p. 18, line 22-24, inc.) (Tr. p. 23, line 28-30, inc.) (Tr. p. 24, line 1-13, inc.) (Tr. p. 32, line 7-26, inc.) (Tr. p. 34, line 14-30, inc.) (Tr. p. 35, line 1-30, inc.) (Tr. p. 36, line 1-2-3) (Tr. p. 37, line 28-30, inc.) (Tr. p. 38, line 1 & 15-28, inc.) (Tr. p. 39, line 13-30, inc.) (Tr. p. 64, line 21-30, inc.) (Tr. p. 66, line 25-27, inc.) (Tr. p. 83, line 29-30) (Tr. p. 84, line 1-30, inc.) (Tr. p. 91, line 8-23, inc.).

Prior to Plaintiff installing its sewer, Defendants installed gate for lane from Gordon Lane; graveled driveway from Gordon Lane to Barn and pond B, and east to knoll where home was to be built; put in rail fence from Gordon Lane to barn on west side of driveway, planted trees and shrubs along same area, planted trees and shrubs along all fence lines, and edge of creek; had land surveyed and set up corner posts; and had architect draw plans for Barn and home. All of this was completed prior to Plaintiff’s suit being filed. (Tr. p. 7, line 10-11) (Tr. p. 11, line 10-19, inc.) (Tr. p. 91, line 5-10, inc.) (Tr. p. 30, line 15-17, inc. — 24-30 inc.) (Tr. p. 31, line 1-3 inc.) (Tr. p. 82, line 21-30, inc.) (Tr. p. 83, line 1-9, inc.)

Work on the barn and home started at about the same time Plaintiff installed its sewer line.

The major project completed prior to Plaintiffs filing this action, was the construction of four ponds (see map — Spring area & pond and ponds A*B*C) This consisted of ponds eight to ten feet deep. In the “spring area & pond” the “toolies” and growth was excavated and the pond depth lowered. Pond “A” was a new pond excavated under supervision of “Soil conservation,” as was pond B. Pond “C” was the old drain used to drain waste water to cottonwood Creek. This ditch was cleaned out and pond lowered to create a long pond. All for purposes of fish culture and beautification.

The five dams were started at about the same time Plaintiff installed its sewer line or shortly thereafter. (Tr. p. 30, line 15-30, inc.) (Tr. p. 31, line 1-3, inc.) (Tr. p. 82, line 21-30, inc.) (Tr. p. 83, line 1-9, inc.) (amended answer — para. 2) (Response para. 2) (Tr. p. 14, line 21-30, inc.) (Tr. p. 18, line 25-30, inc.) (Tr. p. 19, line 1-30, inc.) (Tr. p. 20, line 1-20, inc.) (Tr. p. 21, line 1-21, inc.) (Tr. p. 25, line 21) (Tr. p. 77, line 9-12, inc.) (Tr. p. 91, line 5-13, inc. and line 19-30, inc.) (Jesse Hulse affidavit)

On July 16, 1957 the present suit for condemnation was filed. Prior thereto extended discussions were had as to granting right of way. Toone insisting that the sewer line would drain his land of water that was vital to his program. The Plaintiff’s engineers, trustees, and attorneys for Plaintiff were consulted, and Defendant’s objection to the sewer line were expressed. Defendants insisted the sewer line by-pass their land. (Tr. p. 31, line

23-30, inc.) (Tr. p. 32, line 1-6, inc. and 27-30, inc.) (Tr. p. 33, whole page) (Tr. p. 34, line 1-13, inc.) (Def. answer)

Finally, after suit was filed, and prior to hearing by the Court, a stipulation was entered into, and right of way given, for which Plaintiff paid Defendant \$1,000.00, reserving the right to damages for loss of water. (Stipulation) (Amended answer, para. 1-5, inc.) (Second amended answer — para. 1-3, inc.) (Reply to second amended answer, para. 1-2) (Pre-trial order — page 2, para. 1) (Lamont B. Gunderson affidavit (Notice of readiness for trial, para. 5)

There was a definite understanding between the parties that the Defendant would be restored to his original position so far as loss of water was concerned, and for that reason the right of way was given, and the stipulation entered into. The long period from the time the sewer was installed in 1957, till the final entry of Summary Judgment, was in anticipation that possibly the water would restore itself. (Stipulation — para. 3, drawn by Plaintiff) (Amended answer, para. 1-5, inc.) (Second amended answer, para. 1-3, inc.) (Pre-trial order, page 2, para. 1-2) (Gunderson affidavit — particularly paragraph 6)

The sewer line was constructed across Defendant's property in June or July, 1957. (Tr. p. 34, line 1-7, inc.) (Tr. p. 14, line 26-27) (Tr. p. 27, line 15)

Prior to granting the right of way, and during the time Plaintiff installed its sewer line over Defendant's

land, Defendant urged the engineers for Plaintiff and the contractors to install a series of clay dams to prevent loss of Plaintiff's water. Defendant also urged that points along the line be kept open to determine if the water was escaping, where it was flowing, and if possible take preventative measures, all to no avail. Plaintiffs constructed only one clay dam. (Tr. p. 54, line 29-30) (Tr. p. 55, line 1-6) (Tr. p. 56, line 6-30, inc.) (Tr. p. 57, line 1-30, inc.) (Tr. p. 58, line 1-14, inc.) (Tr. p. 59, line 21-30, inc.) (Tr. p. 60, line 1-24, inc.) (Tr. p. 61, line 12-30, inc.)

In the course of laying the sewer line over Defendant's property, the following occurred (1) "spring area & pond" went down to one-half its original level, and then gradually came back till the six inch drain from said pond to drain ditch, which formerly flowed within 1/2 inch of full pipe, was two inches of flowing a full pipe. This difference was never restored.

When "spring area & pond" was excavated by Defendants, a series of springs were discovered and developed in the bottom, furnishing a constant flow, the year round, through drain pipe of 1/2 inch from being full. For more than a year after Plaintiff installed sewer this drain pipe never reached within two inches of full flow. After about a year, the water from "spring area & pond" was diverted through Pond "A" and six inch drain pipe abandoned. (Response, para. 3) (Response, para. 10 A*C) (Tr. p. 14, line 7-30, inc.) (Tr. p. 16, line 26-30, inc.) (Tr. p. 17, line 1-11, inc.) (Tr. p. 21, line 22-30, inc.) (Tr. p. 22, line 1-10, inc.) (Tr. p. 22, line 1-10, inc.)

(Tr. p. 24, line 15-30, inc.) (Tr. p. 25, whole page) (Tr. p. 26, line 1-26, inc.) (Tr. p. 27, line 22-30, inc.) (Tr. p. 28, line 1-8, inc.) (Tr. p. 57, line 8-24, inc.) (Tr. p. 61, line 12-30, inc.) (Tr. p. 62, line 1-5, inc.) (Tr. p. 87, line 12-21, inc.)

When Plaintiff installed their sewer line, pond "A" had been excavated, and was full. When it was excavated, a series of springs were developed in the bottom of the pond. This flow from these springs was constant the year around, and was observed by Defendant for almost a year from time pond was excavated until Plaintiff installed sewer line. The water from these springs went from pond "A" through pond B & C and into Cottonwood Creek, when McAllister made first measurement of water at outlet of pond "C".

When Plaintiff installed its sewer line parallel to and within thirty feet of "Pond A" the pond went completely dry, no springs flowed in the bottom, and the pond remained dry, and no springs flowed during a year's observation by Defendant, from time sewer was installed, until water from "spring area and pond" was channeled into pond "A".

Based on measurements made by David Toone in 1959 at outlet of "spring area & pond" and outlet of "Pond A" no water is developed in pond "A". (Tr. p. 20, line 1-4, inc.) (Tr. p. 57, line 8-24, inc.) (Tr. p. 87, line 12-30, inc.) (Tr. p. 89, line 22-24, inc.) (Tr. p. 90, line 1-13, inc.) (Tr. p. 87, line 12-21, inc.) (Response, para. 3-4)

Prior to Plaintiff installing sewer line, and for many years prior thereto, "Spring Area" (see map) consisted of a series of springs, which sub-irrigated most of pasture land in vicinity, sub-irrigated farm land to south, and land laying south of ponds "A" and "B". It was also used for occasional irrigation. It at one time had a four inch drain into pond "B" which long ago had been clogged up with tree roots. It was this area that "Soil Conservation proposed draining, installing a series of drains so that the "spring area" could be drained resulting in more usable land for pasture, more water for fish culture, and still leave enough for irrigation and sub-irrigation. The water so developed, to be put to beneficial use for fish culture was estimated to amount to at least 28/100 second feet, constant year round flow into pond "B".

Shortly after Plaintiff installed its sewer line this "spring area" dried up completely, as did other springs between Plaintiff's sewer line and Gordon Lane. The area instead of being a good pasture area and a bog, dried out so completely that the grass in pasture and the "pete bog" caught fire and burned for months, before the fire department was able to extinguish it. The fire left a burnt out area of some depth and area, requiring fill dirt, top soil and replanting. In 1959 the springs were still dried up. (R. B. McAllister affidavit) (Jesse Hulse affidavit) (amended answer) (Defendants second amended answer and counterclaim para. 2-5, inc.) Defendant's third answer and counterclaim para. 2-4, inc.) (Response, para. 7-9-10D-10E) (Tr. p. 14, line 1-3, inc.) (Tr. p. 22, line 13-30, inc.) (Tr. p. 23, line 1-5, inc.)

(Tr. p. 34, line 14, 30, inc.) (Tr. p. 35, line 1-7 & 21-30, inc.) (Tr. p. 36, line 1-3, inc.) (Tr. p. 37, line 5-30, inc.) (Tr. p. 38, line 1-30, inc.) (Tr. p. 39, line 1-30, inc.) (Tr. p. 47, line 1-30, inc.) (Tr. p. 52, line 15-30, inc.) (Tr. p. 53, line 1-18, inc.) (Tr. p. 59, line 5-30, inc.) (Tr. p. 60, line 1-30, inc.) (Tr. p. 64, line 2-30, inc.) (Tr. p. 65, line 1-2, 10-13, 25-26, inc.) (Tr. p. 66, line 23-28, inc.) (Tr. p. 69, line 10-11) (Tr. p. 72, line 1-30, inc.) (Tr. p. 73, line 1-22, inc.) (Tr. p. 77, line 23) (Tr. p. 83, line 29-30) (Tr. p. 84, line 1-30, inc.) Tr. p. 92, line 3-11, inc.)

When Plaintiff installed its sewer line, the water table on Defendant's farmland south of sewer line, was within one foot of the surface, and the land required little or no irrigation. Shortly after Plaintiff installed its sewer line, the water table dropped to a point there was no sub-irrigation of the area, except immediately adjoining the creek. When the second sewer line was installed in 1958-59, at a depth of some eight to ten feet, no sub-surface water was found. No pumping of their trench was required, and their trench was only a few inches above Plaintiff's sewer line. On the other hand when Plaintiff installed its sewer line in 1957, they had to pump sub-surface water constantly. Their sewer line was approximately ten feet deep to bottom of gravel bed they used to lay their sewer pipe on to maintain its stability.

Prior to Plaintiff installing its sewer line, the area south of the sewer line was entirely sub-irrigated, requiring little or no irrigation. Now the entire area will

have to be irrigated regularly to raise crops. The water table has dropped from less than one foot below the surface to ten feet or more below the surface. (Response, Para. 7-8-10D-10F) (Tr. p. 16, line 10-25, inc.) (Tr. p. 17, line 23-28, inc.) (Tr. p. 39, line 3-30, inc.) (Tr. p. 60, line 25-30, inc.) (Tr. p. 61, line 1-9, inc.) (Tr. p. 67, line 5-23-24) (Tr. p. 68, line 1-4, inc. & line 21-27, inc.) (Tr. p. 69, line 1-27, inc.) (Tr. p. 85, line 4-24, inc.) (Tr. p. 88, line 20-30, inc.) (Tr. p. 89, line 1-18, inc.) (Pl. sewer line 10 feet deep, Tr. p. 53, line 25)

Water used for fish culture (trout raising) requires a year around constant flow. With the waters developed in "spring area & pond," "Pond A," and Soil Conservation program for "spring area" there would have been enough water developed to raise 5,000 pounds of "legal size" fish for sale, per year. Now with present flow, including basement drain, but not well near home, Defendant will have to reduce his fish culture program by two-thirds, to a point it is no longer practical, and the "Soil Conservation" accordingly abandoned the program. (R. B. McAllister affidavit — para. 6) (Tr. p. 51, line 11-27, inc.)

There can be no question that Defendant's loss of water was due directly to Plaintiff installing its sewer line.

In relation to the amount of water lost by Defendant, as a direct result of Plaintiff installing its sewer line over Defendant's land, based on measurements made before and after such sewer installation, but not including water

lost in sub-irrigation, on which no measurement has been made, Defendant represents:—

In 1955 or 1956, and at least a year prior to Plaintiff's installing its sewer line, R. B. McAllister, engineer for Soil Conservation, made a series of tests and measurements. Included was installing a measuring flume at outlet of pond "C".

At the time measurement was made, the source of water flowing out of pond "C" into Big Cottonwood Creek, was solely from springs in bottom of "spring area & pond" and springs developed in bottom of pond "A". This measurement was after ponds had all been excavated, and prior to drilling well near home and "spring area and pond" and prior to developing drain in basement of home. That measurement was 28/100 second feet. (R. B. McAllister Affidavit, para. 7-10, inc.).

The next measurement at the same point, with the same type of measuring flume, was made by David Toone under the direction and advice of Mr. McAllister, in 1959, showed a flow of 18/100 second feet. (Toone Affidavit)

In the meantime, and after the measurement of McAllister, showing 28/100 second feet, the sewer line was installed (1957) the well was drilled near the home and permitted to flow into the ponds, and finally through outlet of pond C where measurement was made. In addition, a drain was installed when basement for home was dug, and springs developed, and a basement drain installed, draining this new water into ponds. (1957-1958)

These two new sources were included in the 1959 measurement of 18/100 second feet, made by David Toone. (Toone affidavit, para. 5) (Tr. p. 28, line 15-30, inc.) (Tr. p. 29, line 12-14, inc.) (McAllister Affidavit)

In order to determine how much water was developed from well, and basement drain, these two sources were channeled into one stream, and measured by the same measuring device, shortly after the 18/100 second foot measurement was made. That showed, after a series of measurements, a constant flow from well and basement drain, of 9/100 second foot. This flow was included in 18/100 second foot measurement made out of Pond "C". (Toone Affidavit, para. 8-9)

Accordingly the flow from "spring area & Pond," and Pond "A" had been reduced by Plaintiff's sewer line, from 28/100 second foot (1956) to 9/100 second foot (1959), or a loss to Defendant of 19/100 second foot.

Over and above this loss of water from springs already developed, was the loss of the prospective water to be developed from "spring area."

After Mr. McAllister and others from "Soil Conservation" had made extensive tests, drilling test holes, and measuring water table, etc. it was determined that 28/100 second feet of water could be developed for fish culture from "spring area" over and above the need for pasture, sub-irrigation and irrigation. This was to be accomplished by a series of drains, dams, and headgates. The plans were fully drawn, the agreement signed, and

work ready to commence, when Plaintiff's suit was instituted.

Pending the installation of the sewer line, no action was taken on this project.

After the sewer line was installed this "spring area" dried up completely and the project abandoned. (McAllister Affidavit, para. 11-16, inc.)

Defendant's loss of water from "spring area" 28/100 second foot; and from "spring area & pond" and "Pond A" 19/100 second foot. Total loss to Defendant 47/100 second foot.

This does not include loss of sub-surface water irrigating farm land.

Direct loss to Defendant over and above loss of water included, abandonment of fish culture program; abandonment of program for "estate" and loss of revenue from raising trout for sale, pending sale of estate.

Defendant's position is that he is entitled to be restored to his former position, so far as water is concerned. That the burned out area be restored; and that the seepage from "spring area & pond" and "Pond A" be corrected.

STATEMENT OF POINTS

POINT A

THE COURT ERRED IN ENTERING SUMMARY JUDGMENT. BASED UPON THE PLEADINGS, ISSUES OF FACT WERE AT ISSUE WHICH ENTITLED DEFENDANTS TO HAVE THEIR POSITION DETERMINED BY A JURY.

POINT B

JUDGMENT UPON SUMMARY PROCEEDINGS SHOULD HAVE BEEN FOR AMOUNT DEMANDED BY DEFENDANTS IN THEIR SECOND AMENDED ANSWER, AND NOT FOR THE \$1.00 NOMINAL DAMAGE.

POINT C

THE COURT ERRED IN DETERMINING THE MEASURE OF DAMAGE WAS THE DIFFERENCE BETWEEN THE FAIR MARKET VALUE OF THE LAND BEFORE AND AFTER THE SEWER WAS INSTALLED.

POINT D

THE COURT SHOULD HAVE DETERMINED THE MEASURE OF DEFENDANT'S DAMAGE SHOULD HAVE BEEN THE COSTS TO DEFENDANT OF RESTORING SAID WATER, INCLUDING THEIR COSTS FOR LOSS OF SOIL CONSERVATION ASSISTANCE, FILL IN BURNED OUT AREA, SEALING PONDS FROM SEEPAGE, AND COSTS FOR IRRIGATION RESULTING FROM WATER TABLE OF FARM LAND BEING LOWERED.

POINT E

OR, THAT PLAINTIFFS SHOULD HAVE BEEN ORDERED BY THE COURT TO RESTORE TO DEFENDANTS THE WATER THEY HAD PRIOR TO THE SEWER INSTALLATION, INCLUDING THAT THAT WAS IN PROCESS OF BEING DEVELOPED IN CONNECTION WITH THE SOIL CONSERVATION PROGRAM, ALL AT PLAINTIFF'S EXPENSE.

POINT F

THAT THE COURT ERRED IN EVEN CONSIDERING THE FAIR MARKET VALUE RULE, "BEFORE AND AFTER," SINCE THE PARTIES HERETO STIPULATED AS TO THE DAMAGE DONE TO DEFENDANT'S LAND AS BEING \$1,000.00, WHICH WAS PAID TO DEFENDANTS AS AGREED DAMAGES. THAT THE PLAINTIFF AGREED TO HOLD HIM HARMLESS FROM ANY LOSS OF WATER RESULTING FROM THE INSTALLATION OF THE SEWER, AND THEREFORE DEFENDANT'S MEASURE OF DAMAGE IS HIS COSTS IN RESTORING SAID WATER; OR IN THE ALTERNATE THAT PLAINTIFF AT ITS OWN EXPENSE RESTORE SAID WATER TO DEFENDANT'S FARM LANDS AND FISH PONDS.

ARGUMENT

POINT A

THE COURT ERRED IN ENTERING SUMMARY JUDGMENT. BASED UPON THE PLEADINGS, ISSUES OF FACT WERE AT ISSUE WHICH ENTITLED DEFENDANTS TO HAVE THEIR POSITION DETERMINED BY A JURY.

SUMMARY JUDGMENT. It is Defendants' position that there is a distinction between over all damages resulting to a larger piece of land, by the taking of a portion thereof by condemnation, as in this case, the agreed damage of \$1,000.00; and direct damage suffered to a particular object. To illustrate, certainly the "before and after" rule would not include damage to a car, live stock, building, crops, etc., that Condemnor may have caused in the course of exercising his right of way. 78-34-10 U.C.A., 1953, para. 5, provides that each damage must be assessed separately.

In *Southern Pacific Co. vs. Mrs. Helen Sheehan Arthur, et al*, decided May 25, 1960, green sheet case #9123, being a condemnation proceeding, the Court allowed damages for gravel taken, damages for leaving a large excavation which hampered sheep grazing, and reserved the right to damages to mining claims, pending determination in another Court the question of mining rights. Plaintiff was required to deposit damage money in the latter matter, with the Court pending the determination of mining rights.

Apparently here there were three distinct measures of damage arising out of condemnation proceedings, which the court adopted in arriving at "just compensation."

It is Defendant's position that his extra damages, over above that agreed upon as severance damage, or the application of the "before and after" rule, is loss of 47/100 second foot of water; profit from sale of fish at the rate of 5,000 pounds per year; expense of irrigation; the restoring the burnt out area; and correcting the seepage condition created in "spring Area & pond" and "Pond A".

This Court, in *Harve vs. Hights Bench Irrigation Co.*, 318 Pac. 2nd 343, 7 Utah 2nd 58, ruled that it was a proper question for jury to determine damage done to Plaintiff's land when Defendant pushed over trees, and left them and dead brush and other debris on Plaintiff's land.

Incidentally this same case indicated punitive damages would be proper where conduct is wilful, are is in utter disregard of property owners' rights.

Certainly in the present case, Plaintiff, its engineers and contractors had little or no regard for Defendant's water rights. Only one clay dam was installed. It seems to Defendant there was an utter and wanton disregard of Appellant's interests.

Weber Basin Water Conservancy District vs. John R. Gailey, 303 Pac. 2nd 271, 5 Utah 2nd 385, was a case in condemnation where the lower court limited the issue as to damages strictly to land taken. The land owner claimed damages for loss of spring floods, seepage, sub-irrigation, and expenses of leveling the land to suit changes in method of irrigation and farming.

This Court, at page 272, quoting Nickols on Eminent Domain, 9.221, said, "It is well settled that when public work is laid out through a tract of private land, the owner is entitled to receive, in addition to the value of the land taken, compensation for injury that will be done to the remainder of the tract by the construction and operation of the public work."

In *State vs. Bird & Evans, Inc.*, 265 Pac. 2nd 639; 1 Utah 2nd 276, the Defendants contended they were entitled to damage for road closed, over and above damages otherwise allowed for land condemned. This Court found that the road had not been closed, but had it been closed, land owner would have been entitled to additional damage.

In *State vs. Ward, et al.*, 189 Pac. 2nd 113, this Court distinguished between damage for land taken, and damage to property owner's home.

Again, Judge Latimer in a concurring opinion in *Bertagnoli et al. vs. Baker et al.*, 215 Pac. 2nd 626, points out the drastic nature of condemnation proceedings, and stresses that the rights of property owners must be zealously guarded.

It seems to appellant that a proceeding in summary judgment, and awarding \$1.00 damage, hardly seems a zealous guarding of Defendant's rights.

In *E. M. Ross vs. George Peperdine Foundation, et al.*, 344 Pac. 2nd 368, this court said "a summary judgment is not a trial upon the merits, it determines only whether any triable issues of fact exist."

Disabled American Veterans, a Utah State Dept. vs. Roy A. Hendrixon, et al., 340 Pac. 2nd 416, 9 Utah 2nd 152, is cited for the following holding by this Court, "The facts alleged by the party against whom summary judgment is taken, must, on such motion, be taken as true."

The Court held the question as to whether Plaintiff was unincorporated was a question of fact, precluding summary judgment.

Francis Hendrickson Olsen vs. Neil Macy, 340 Pac. 2nd 985 — 86 Ariz. 72; decided June 24, 1959, had this to say, "Summary Judgments will only be granted — if the pleadings, depositions, and admissions on file, together with affidavits, if any, show there is no genuine

issue as to any material fact and the moving party is entitled to judgment as a matter of law." Arizona apparently takes a critical view of summary judgments.

California seems to have the same attitude.

Van M. Griffith vs. Dept. of Public Works, et al., 338 Pac. 2nd 920, has this to say, "The better rule is that the facts alleged in the affidavits of the party against whom the motion is made, must be accepted as true, and that such affidavits to be sufficient need not necessarily be composed wholly of strictly evidenciary facts." "In other words, the affidavits are to be construed with all intendments in favor of the party opposing the motion."

Again in this same case "The summary judgment statute was not intended nor can it be used as a substitute for existing methods in the trial of issue of facts. If there is any doubt as to the propriety of the motion, Courts should, without hesitancy, deny the same."

This Court in *Franklin D. Richards vs. Robert A. Anderson*, 337 Pac. 2nd 59; 9 Utah 2nd 17, after sustaining the lower court granting a summary judgment, had this to say, "It is true that summary judgment is a severe measure which Courts should be reluctant to use, and that doubts should be resolved in favor of allowing a full trial of the case." Again in the same case at page 60, the Court said, "When a summary judgment is granted against a party, he is entitled to have the Trial Court, and this Court on review, consider all the evidence and every inference fairly to be derived therefrom in the light most favorable to him."

Judge McDonough had this to say in *Arnell H. Welchman, et al. vs. Merrill J. Wood, et al.* 337 Pac. 2nd 410, 9 Utah 2nd 25, "Summary judgment is a drastic remedy and the Court should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial."

A half hour pre-trial, and about the same time in hearing motion for summary judgment, hardly appeals to Defendant as an opportunity to fully present their contentions. Particularly when Defendant had interviewed and was ready to subpoenae seventeen witnesses to support his contentions.

This Court, in *Agnes Lundberg vs. Legrand P. Backman*, 337 Pac. 2nd 433; 9 Utah 2nd 58, at page 433, had this to say, "If the affidavits filed by the parties, in support of and against the motion, are to be conclusive, on the question presented, one can readily conclude that no justiciable issue of fact remained to be resolved. But our rule 56 provides that not only the affidavits, but the pleadings, admissions and depositions (where appropriate) must be considered by the Court in making its determination."

Defendant and Appellant contend that granting of summary judgment in the present action was contrary to law.

As to Appellant's Point "B":

POINT B

JUDGMENT UPON SUMMARY PROCEEDINGS SHOULD HAVE BEEN FOR AMOUNT DEMANDED BY DEFENDANTS IN THEIR SECOND AMENDED ANSWER, AND NOT FOR THE \$1.00 NOMINAL DAMAGE.

Judgment should have been in Appellant's favor for damage demanded. In this case Plaintiff filed the motion for summary judgment, asking that "the Plaintiff is entitled to judgment as a matter of law," and motion "dismissing the Defendant's action."

The Court did neither. The Court entered judgment in favor of Defendant and awards him nominal damage of one dollar.

Presumably the issues were all in Defendant's favor so far as the judgment of the lower court was concerned.

Accordingly the judgment should have been for amount claimed by Defendant in his pleadings.

POINT C

THE COURT ERRED IN DETERMINING THE MEASURE OF DAMAGE WAS THE DIFFERENCE BETWEEN THE FAIR MARKET VALUE OF THE LAND BEFORE AND AFTER THE SEWER WAS INSTALLED.

As to Defendant's Point "C" — Error in using the "before and after" rule. Both parties hereto in their long drawn out discussions in this matter, seem agreed that the real issue in the case is the proper measure of damage. Plaintiff's position being the "before and after" rule applies. Defendants contend otherwise. Judge Van Cott in pre-trial, and Judge Ellett on hearing of motion

for summary judgment apparently agreed with Plaintiff's position.

The determination of the proper measure of damage is the controlling factor in this litigation.

If this Court sustains the lower Court, then of course the proceedings are at an end.

On the other hand, if this Court sends the matter back for trial, but only on the question of the propriety of summary judgment, then the parties hereto, and presumably the lower Court, will not have this Court's views as to the proper measure of damage.

If the lower Court rules, as they did before, that the "before and after" rule applies, Defendant, presumably will again appeal. If the lower Court holds otherwise, presumably Plaintiff will appeal. It would certainly expedite matters were this Court to set out in this appeal, its position as to the proper measure of damage. The remainder of Appellant's brief will be directed to the question of the proper measure of damage.

Defendant contends that the "before and after rule" was disposed of by stipulation and the payment of \$1,000.00, and that issue was not before the Court.

Further that there was an agreement to restore Defendant to his original position, so far as water was concerned.

In *Southern Pacific Co. vs. Arthur*, previously cited, the Court said the question to be determined was, "what

would be 'just compensation' " by the Appellant to the Respondents for property taken."

It seems clear that in this case Defendant's property (water) was taken, and certainly \$1.00 is not just compensation for 47/100 second foot of water.

In that case, the Court referring to the Kennecott Copper Company tailing pond having no value on the market, said, "This fact however, did not make the property valueless, instead its value could be ascertained from the opinion of well informed persons as to what a reasonable purchaser would be willing to pay for the property on the open market SHOULD THEY FIND IT SUITABLE FOR THEIR PURPOSE."

Should not in the present case, if the "before and after" rule applies, the Defendant be permitted to show the value as an estate, with and without 47/100 second foot of water, and with and without sub-irrigation?

In the same case the Court said, "Rather the evidence revealed that the damages were of a special kind to the grazing use to which the range lands owned by Respondents were fitted, and therefore even though there had been no actual taking of any lands they were entitled to just compensation under the provisions of paragraph three above, (referring to 78-34-10, U.C.A., 1953) for diminution of value of their lands by substantial injury done to the only available natural crossing and lambing grounds."

Again in the same case, the Court said, "The evidence was that the value of Respondent's remaining lands which were used for sheep grazing purposes were substantially diminished by the condition in which the land was left after the taking of the fill materials, SINCE THE VALUE OF THE RANGE LAND DEPENDS ON FACTORS PECULIAR TO ITS USE AND A PERSON BUYING FROM A PERSON WILLING TO SELL WOULD TAKE ALL SUCH FACTORS INTO CONSIDERATION IN DETERMINING WHAT HE WOULD BE WILLING TO PAY."

Appellant contends the question of "an estate" should have been considered, and was an issue of fact for the jury, precluding summary judgment.

Weber Basin Conservancy District vs. Harold L. Ward, et al., 347 Pac. 2nd 862, Defendant claimed his damages should include anticipated value of dairy business he was operating. This Court said, "we are in accord with what appears to be the better view adopted by the trial court, that the condemnee is entitled to fair market value of his property at the time of service of the summons in the condemnation proceedings as provided by statute; (3) and that all the factors bearing upon such value that any prudent purchaser would take into account at that time should be given consideration, including any POTENTIAL DEVELOPMENT in the area reasonably to be expected."

Should not the Defendant's program be considered as a measure of damage? Defendant concedes that as farm

and pasture land, the fair market value would be less, than that as a subdivision. But what right has Plaintiff to say, or the lower Court, yea, even this Court, "Mr. Toone, irregardless of your plans, we say to you, make this farm into a subdivision, or no damages."

When have we reached a stage that by condemnation proceedings, the rights of property owners, their intended use of land, their dreams, are dumped into the rubble heap, because the great power of condemnation carries with it no limitation.

POINT D

THE COURT SHOULD HAVE DETERMINED THE MEASURE OF DEFENDANT'S DAMAGE SHOULD HAVE BEEN THE COSTS TO DEFENDANT OF RESTORING SAID WATER, INCLUDING THEIR COSTS FOR LOSS OF SOIL CONSERVATION ASSISTANCE, FILL IN BURNED OUT AREA, SEALING PONDS FROM SEEPAGE, AND COSTS FOR IRRIGATION RESULTING FROM WATER TABLE OF FARM LAND BEING LOWERED.

POINT E

OR, THAT PLAINTIFFS SHOULD HAVE BEEN ORDERED BY THE COURT TO RESTORE TO DEFENDANTS THE WATER THEY HAD PRIOR TO THE SEWER INSTALLATION, INCLUDING THAT THAT WAS IN PROCESS OF BEING DEVELOPED IN CONNECTION WITH THE SOIL CONSERVATION PROGRAM, ALL AT PLAINTIFF'S EXPENSE.

POINT F

THAT THE COURT ERRED IN EVEN CONSIDERING THE FAIR MARKET VALUE RULE, "BEFORE AND AFTER," SINCE THE PARTIES HERETO STIPULATED AS TO THE DAMAGE DONE TO DEFENDANT'S LAND AS BEING \$1,000.00, WHICH WAS PAID TO DEFENDANTS

AS AGREED DAMAGES. THAT THE PLAINTIFF AGREED TO HOLD HIM HARMLESS FROM ANY LOSS OF WATER RESULTING FROM THE INSTALLATION OF THE SEWER, AND THEREFORE DEFENDANT'S MEASURE OF DAMAGE IS HIS COSTS IN RESTORING SAID WATER; OR IN THE ALTERNATE THAT PLAINTIFF AT ITS OWN EXPENSE RESTORE SAID WATER TO DEFENDANT'S FARM LANDS AND FISH PONDS.

Defendant's Points D*E*F. These relate to Appellant's position that he is entitled to have the water restored to him.

Defendant contends that there is no feasible way to restore the spring flow, and so in the alternate, the water flowing out of pond "C" into Big Cottonwood Creek, could be captured and pumped back, to restore to Defendant his original flow. The state engineer has heretofore denied Defendant's application for new wells to be drilled, to replace water lost, and to be used for irrigation and fish culture. New wells in the area are limited to culinary use. If Plaintiff has a better answer to restoring to Defendant, his water, we are now willing and always have been, that Plaintiff try out his plan, or present his proposal to the trial Court for its consideration.

It now is, and always has been, Defendant's position, that all he wants is his water back.

On the point that Plaintiff should be required to restore to Defendant his water at their expense, we cite *Current Creek Irrigation Company vs. Orville Andrews, et al.*, 344 Pac. 2nd. 528, 9 Utah 2nd 324. Also *Hansen*

vs. Salt Lake City, 205 Pac. 2nd 255, where the Court held if user of water is put to pumping expense to retain his supply, the party causing the same should pay for the pumping.

Kano vs. Arcon Corp., 326 Pac. 2nd 719, 7 Utah 2nd 431, where a subdivision had changed point of delivery of Plaintiff's irrigation supply, the court held, "The requirement of the lower Court that the Defendant, at their expense, deposit the water at the boundary of Plaintiff's land so that they may enjoy a gravity flow, SEEMS FAIR AND REASONABLE."

CONCLUSIONS

A. The Court erred in entering summary judgment.

B. The Court erred in using "before and after" rule as measure of damages, for reasons, (1) The damages as to loss of water, burned out area, and seepage, were separate and distinct damages, and should be determined separately, separate and apart from the "before and after rule" and in addition thereto; and (2) The damage to over-all property was disposed of by agreement and stipulation, and was not an issue before the Court; and (3) The parties by agreement, and stipulation, agreed to make Defendant whole, so far as water loss was concerned, and that agreement should be enforced, as being the sole question before the Court.

C. The true measure of damage, and to give to Defendant his "just compensation" for property taken

(water) is the restoration of that water by Plaintiff at its sole expense, now and in the future; or that Defendant be reimbursed for his expense in so doing, including waters already developed, waters in process of development, and additional water needed to replace that lost for sub-irrigation, together with all expenses incident thereto, including, control pond seepage, restore burnt out area, irrigation costs.

Appellants and Defendants respectfully submit that the judgment of the lower Court should be reversed; the case remanded for trial, with instructions as to the proper measure of damages.

Respectfully submitted,

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and Appellants.*