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Rich County-Otter Creek Irrigation Co. et al v. Grant Lamborn, Howard L. Lamborn and Keith Jessop : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF ALL THE RIGHTS TO USE OF WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF THE BEAR RIVER IN RICH COUNTY, UTAH

RICH COUNTY - OTTER CREEK IRRIGATION COMPANY, and WILLIAM T. REX, RAYMOND L. HOFFMAN, HENRY T. NICHOLLS, EMMA IRETA ARGYLE, FRANK H. JACKSON and ADEN W. THORNOCK,

Respondents.

— vs. —

GRANT LAMBORN, HOWARD L. LAMBORN and KEITH JESSOP,
Appellants.

FILED
SEP 30 1960

Clerk, Supreme Court, Utah

Case
No. 9285

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

This matter arises out of a general adjudication of the water rights on the Bear River in Rich County. The State Engineer proposed a decree awarding to Grant Lamborn, Howard Lamborn and Keith Jessop, the appel-

lants, water for 355 acres of land from the waters of Otter Creek. A protest to this allocation was filed by the Rich County-Otter Creek Irrigation Company and by the individual stockholders thereof, the respondents. The trial court awarded to appellants a primary water right for the 355 acres until June 1st, but after June 1st, the appellants were cut to only 180 acres. The appellants have appealed, because of this reduction. The respondents have cross-appealed, contending that appellants should have been cut down to a primary water right for 180 acres, even before June 1st.

THE FACTS

All of the parties hereto use water from Otter Creek in Rich County. The three appellants are the successors in interest to the ownership of a ranch which was owned by one James Jackson. (R. 227) The Rich County-Otter Creek Irrigation Company was organized in 1946. (R. 167) The stock in that company is owned by the individual respondents. Otter Creek has three branches: The North fork, the middle fork and the South fork. (R. 19, 80) All of the users except William T. Rex and the appellants divert their water below the confluence of these three forks. Much of the lands of William T. Rex are located along the North fork, and most of the water used by him is diverted from the North fork. (R. 123) The Jackson Ranch is located along the middle and South forks, above their confluence with the North fork. (R. 19, 20) The Jackson Ranch is so located that it can not divert water from the North fork. (R. 80)

Much of the land of the respondents which is located below the confluence of the three forks also has a water right from the Woodruff Canal. According to Mr. Lambert, Deputy State Engineer, the respondents, at the time of the State Engineer's survey, had a total of 1008.44 acres of irrigated land above the Woodruff Canal, and 1,178.19 acres located under and irrigated from the Woodruff Canal. (R. 98) Of this 1,008 acres above the canal, William T. Rex owned 700 and got his water mostly from the North fork. (R. 80, 123)

The State Engineer proposed a decree awarding to the Jackson Ranch a water right with a priority of 1870 from the middle and south forks to irrigate 355 acres. (Proposed Decree p. 159-61) The State Engineer also proposed to permit the Rich County-Otter Creek Irrigation Company, under thirteen specified claim numbers, to divert water for a total of 2,186 acres of land with a priority of 1875. (Proposed Decree, p. 157-8) The respondents objected to the proposal for the appellants, because the acreage proposed for the Jacksons (355 acres) was greater than that fixed by an earlier decree (180 acres). (This decree is referred to in the transcript as the Call Decree, and is Civil File No. 43, introduced as an exhibit.)

The acreage proposed by the State Engineer, both for the respondents and for the appellants, was greater than the acreage specified in this decree by Judge Call. The Judge Call Decree awarded a water right to the respondents for a total of 1,960 acres, and for the Jackson Ranch a total of 180 acres; the State Engineer proposed 2,186

acres for the respondents, and 355 acres for the appellants. (Proposed Decree p. 157-61)

The Call Decree expressly left one matter for future determination. It awarded to each of the parties water for specified acreage. It then decreed that the defendant Jackson was the owner of:

“... and entitled at all times during the irrigation season, to-wit, from April 1st to November 1st, each and every year, to divert and use from the flow of the waters of the south and middle forks of Otter Creek, in Rich County, State of Utah, a sufficient quantity of water for the irrigation of 180 acres of his land, the watering of stock and for domestic use *and in addition said defendant Richard Jackson is entitled to the seepage and underflow of all the water which drains into said Otter Creek by subirrigation, west of his land, in the proportion that 180 acres bears to the total of 2,140 acres.*” (P. 2 of Call Decree, Civil No. 43.) (Emphasis added)

The court then appointed one Joseph F. Neville, a civil engineer, to take measurements of the water:

“... in all branches of said Otter Creek, also to make computations of the volume of seepage and underflow by subirrigation, and to ascertain the total quantity of water available for irrigation in said Otter Creek Irrigation system, consisting of 2,160 acres for a basis of an equitable division among the plaintiffs and defendant Richard Jackson, as herein defined. . . .” (The decree was for 2,140 acres, and the 2,160 mentioned here in the decree would appear to be an error.)

The measurements contemplated by the decree to be made by Mr. Neville, to permit the stream to be adminis-

tered with due credit being given for return flow were never made. (R. 52) At the time of the Call Decree in 1919, the the court found that Richard Jackson was in fact irrigating 380 acres (Finding No. 8, Civil No. 43) and as noted, the Call decree cut this back to 180 acres, but “*in addition,*” it provided in the above quoted language for Mr. Jackson to receive his share of the return flow. The court obviously contemplated that this return flow would be studied by the engineer then appointed by the court, and that the decree would be administered accordingly, but the engineer did not follow through. (R. 52) The plaintiffs called witnesses who testified that the owners of the Jackson Ranch simply continued to irrigate the ranch as it had been irrigated prior to the Call Decree. (R. 21, 22, 36, 41, 61, 67) There was testimony both from witnesses called by the plaintiffs (R. 34) and from the respondents (R. 146) themselves to the effect that some acreage, about 25 to 30 acres (of the 380 acres being irrigated at the time of the Call Decree) were taken out of cultivation, but as will be pointed out in detail in the Argument, most of the respondents who were called as witnesses, admitted on cross-examination, that the Jacksons had continued to irrigate the 355 acres, and to mature hay crops thereon. (See, for example, pages 147, 171, 116, 129)

The surveys made by the State Engineer in connection with the General Adjudication suit also disclosed that 355 acres were being irrigated on the Jackson Ranch (R. 98-9), and Mr. Lambert, Deputy State Engineer, testified that at the time the surveys were made in 1946, the

meadows appeared to have been established irrigated meadows, as distinguished from newly reclaimed lands. (R. 99-100) The appellants thus contended that even though the Call Decree cut them back to 180 acres, it also had awarded them credit for the return flow and contemplated the appointment of an engineer to measure the return flow; (R. 87) that the engineer did not follow through (R. 52) and Jackson and his predecessors just kept using the water, during the ensuing nineteen years from 1920 through 1939, when water rights could be acquired by adverse use. *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P. 2d 634. The plaintiffs thus argued that they and their predecessors had established the right by adverse use to continue to use water for the 355 acres until they had made their hay crop about July 1st. The trial court accepted this argument from the beginning of the irrigation until the 1st of June each year, but held that after June 1st there had been an interruption, and the appellants were cut back to 180 acres after the 1st of June. It is from this conclusion that the plaintiffs have appealed.

ARGUMENT

The law in regard to the application of the doctrine of prescription, or adverse use, as applied to water rights, is discussed in detail by the court in *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, *supra*. After holding that the doctrine of adverse use would apply to water until 1939, the court divided over the question of whether a Mr. Nicholls had been legally

interrupted in his use of the water. There, as here, Nicholls had been a party to a decree which fixed his rights. But Nicholls nevertheless continued to use the water in violation of the decree, as Jackson did here. The trial court had found from the evidence that there had been an interruption, and, therefore, denied Mr. Nicholls' claims. The Utah Supreme Court reversed. The evidence on which the trial court had found that there was an interruption is detailed by Mr. Justice Larsen, who wrote the prevailing opinion on this point, at page 493 of the Utah Reports. The evidence is also discussed by the minority opinion of Chief Justice Wolfe, commencing at page 454.

The case clearly stands for the proposition that water need not be used continuously throughout the irrigation season in order to support a claim of acquisition by adverse use. It is sufficient if the water is used intermittently as needed. In this regard, the Jacksons testified that they did shut the water off and turn it on as needed. (R. 38, 41) That case also clearly stands for the proposition that it is not a sufficient interruption for the decreed owner merely to shut the water out of one of the ditches of the adversor or to turn it off his field. The interruption must take the water while the adversor claims the right to use it and while he needs it. We believe that the evidence here, as in the Wellsville case, requires the conclusion that the appellants' predecessors used the water as needed to mature their crops of hay on the full 355 acres of land until July 1st of all but unusually dry years, and that the parties then voluntar-

ily shared the water. There is considerable testimony from the respondents on direct examination to the effect that they shut the water off and interrupted the use by Jackson. (R. 75, 105, 156) It is, however, axiomatic that the testimony elicited from them on cross-examination constitutes admissions which are legally binding on them.

We believe that the testimony requires a finding that until about the 1st of July, the Jacksons used the water as needed. After the 1st of July the downstream users needed water more, because the water was turned out of the Woodruff Canal at about this time (R. 193), and thereafter they shared the water.

In regard to the use of water on the Jackson Ranch, we have certain practical considerations which are not in dispute. First, it should be noted that clear back in 1919, when the parties had their lawsuit which resulted in the Call Decree, the trial court then found that Richard Jackson, predecessor of plaintiffs, was irrigating 380 acres of land. The court so found in its Finding of Fact No. 11, where the court stated:

“That said defendant Richard Jackson is the owner of and entitled to irrigate 180 acres of land from the water flowing in the south and middle forks of the said Otter Creek . . . but notwithstanding the said defendant Richard Jackson, without right . . . did wrongfully divert, use and appropriate water from the said Otter Creek . . . in excess . . . of 180 acres of land, to-wit, 380 acres . . .”

Thus, at a date forty years ago the Jackson Ranch was fully developed with a ditch system, etc., so that 380 acres of land could be and was being irrigated.

Secondly, the Call Decree did not completely settle the rights of the parties, because “in addition” to water for 180 acres, Richard Jackson was decreed to own his proportionate share of the return flow, and the court appointed one Joseph F. Neville to make measurements and computations of the volume of seepage and underflow, and thus to ascertain the total quantity of water available of irrigation. (p. 3 of Decree, Civil 43) Neville did not proceed as contemplated by the court, and the measurements of the return flow were never made. (R. 52) It is, therefore, reasonable to believe, as many of the witnesses testified, that Richard Jackson and his successors in interest continued to irrigate the entire farm. We will refer to this testimony in detail below.

Third, in 1946, when the State Engineer’s office made the surveys to use in the General Determination of Water Rights, the Jackson Ranch, which was being irrigated, consisted of 355 acres. The State Engineer’s proposed decree on pages 159-161 awarded to the Jackson Ranch water for 355 acres. The hydrographic survey maps are in evidence, as Ex. B, and Mr. Lambert testified that the actual surveys indicated slightly more than that shown in the proposed determination. (R. 98-9) Also, in 1946, when the State Engineer made the survey, the Jackson meadows had the appearance of having had water applied to them, and they didn’t have the appearance of being newly broken up or newly planted. (R. 100)

Fourth, much of respondents’ lands covered by the Call Decree are also watered from another source — the Woodruff Canal. (R. 98) This is not contraverted and

this fact throws considerable light on the manner in which water would normally have been used from 1919 to date. In 1919, the Call Decree found and adjudged that respondents and their predecessors were irrigating 1,960 acres of land from Otter Creek. (Decree, Civil 43) At the time of the hydrographic survey by the State Engineer, this had been increased to 2,186 acres. (R. 98) Of this acreage, 1,008.44 was located above the Woodruff Canal, and thus had to be watered solely with Otter Creek water. The balance, consisting of 1,178.19 acres, was located below the Woodruff Canal and was irrigated from it. (R. 98) Further, of the 1,008 acres located above the Woodruff Canal, 700 acres belonged to William T. Rex, who watered almost exclusively from the North fork. (R. 80, 123) This water originating in the North fork was not available to the Jackson Ranch (R. 80)

The canal water was usually adequate for the land irrigated from it. In this regard, respondents' witness, Leonard Hellstrom, testified that he was one of the parties in the lawsuit resulting in the Call Decree. (R. 74) He had some canal water for part of his land, but had to use Otter Creek water for the higher ground. (R. 77)

“Q. Did you have all of the canal water you needed, Mr. Hellstrom?

“A. Usually we did pretty well.

“Q. That came out of the Bear River, did it?

“A. That came out of the Bear River. . . .

“Q. The canal water was adequate and you weren't much concerned about Otter Creek water for that ground. Now that's correct, isn't it?

“A. Yes.

“Q. Now that was true of nearly all of the parties that owned water down in that area, wasn't it? They all had canal water for a great deal of their land?

“A. Most of them, I think.

“Q. And that canal water has provided you most years with all the water you needed for the land under the canal?

“A. Yes, what was under the canal.” (R. 78, 79)

The witness was then asked whether there was always plenty of Otter Creek water for the land above the canal, and he answered, “Sometimes there was, and sometimes we'd have to go rustle it.” He was then asked if they used to go up the North fork to get the water, and he answered, “No. Mr. Rex had most of the North fork. He owned about that much or right close.” He was asked whether the 700 acres awarded to Mr. Rex in the 1919 decree came out of the North fork, and he answered, “I think nearly all of it.” He was then asked if the amount not irrigated from the North Fork was about ten acres, and he answered, “Yes, something like that, and the balance was North fork.” (R. 79, 80) Mr. Rex agreed that he looked to the North fork for “most” of his water. (R. 123) and that Rex could not interfere much with the middle and South forks and this is why Rex didn't bother Jackson so much. (R. 128) He also said that he commingled the North fork with the South and middle forks and with the combined stream irrigated only about 60 acres of his 700. (R. 131)

So of the 1,008 acres above the Woodruff Canal 700 was irrigated by Mr. Rex mostly from the North Fork (640 acres totally and the other 60 partially). This left only some 308 acres of land above the Woodruff Canal and below the North fork, which were fully dependent on the middle and South forks for water — other than for the Jackson land.

The Woodruff Canal was shut off about the 1st of July (R. 193), and then the full 2,160 acres (according to the Call Decree, but now increased to 2541 in State Engineers' decree) had to be irrigated from Otter Creek. Otter Creek is a stream which varies only slightly throughout the season and usually would average a combined flow of 13 c.f.s. (R. 177) However because the lands are located along the stream, this water could be diverted and used over and over again and the combined quantity available for diversion and use at all the points of diversion would be considerably greater than this. (R. 220) For example, six c.f.s. placed on the Jackson Ranch might yield as much as 4½ c. f. s. to the stream in return flow. (R. 221) The parties obviously were able to irrigate the 2,140 acres covered by the Call Decree, for, in addition, from 1919 to the time of the State Engineer's survey they had increased their acreage from 1,960, allowed in the Call Decree to 2,186 acres at the time of the survey. (See decree in Civil 43, and acreage noted by State Engineer, R. 98)

We think this is of great importance to an analysis of the testimony of the witnesses. When more than half the land (1178 acres), (R. 98) is receiving a full water

right from the Woodruff Canal, the remaining land which must depend solely on Otter Creek water, has the entire flow of all three forks. Thus, some of the respondents admit that there is usually plenty of water for this land. (R. 81, 195) Since these admissions are from the respondents' own mouths, they probably are bound thereby, but even if not, the truth of this admission is conclusively demonstrated by the fact that they have been able to enlarge their irrigated acreage since the 1919 Call Decree. The Jackson Ranch admittedly is irrigating 355 acres, and the respondents were irrigating 2,186 acres (a total of 2,541 acres) as against only 2,160 allowed by the Call Decree. If the parties were short of water, they obviously would not have enlarged their acreage. Until the Woodruff Canal is turned off about the 1st of July (R. 193) we submit that the uncontradicted evidence concerning the quantity of stream flow and the limited land above the Woodruff Canal, when taken with the testimony from some of the respondents, that there was plenty of water for this land, strongly supports our position that Jackson was using the water for 355 acres until at least July 1st.

A. THE PARTIES USED THE WATER FOR FORTY YEARS WITHOUT ANY SERIOUS TROUBLE FOR THE FULL ACREAGE.

The Call Decree was entered in December of 1919. At that time the respondents were irrigating 1,960 acres, and Jackson was irrigating 380, but was cut back by that decree to 180 — making a total allowed of 2,160 acres. Thereafter Jackson continued to irrigate 355 acres and the respondents increased their acreage to 2,186 — mak-

ing a total of 2,541 (R. 98) Still, during the ensuing forty years, the parties had no further lawsuit. This present litigation does *not* arise out of a lawsuit filed by the parties themselves. The only reason we are now in court is because the State Engineer initiated a general adjudication suit, and the proposed decree caused the parties to file objections.

B. THE UNCONTRADICTED EVIDENCE IS TO THE EFFECT THAT JACKSONS WERE WATERING 355 ACRES FROM 1919 TO DATE.

In this regard we start out with the findings entered in Civil Case No. 43, where the trial court found that in 1919 Richard Jackson was irrigating 380 acres of land. (See Finding No. 8 on page 7 of the Findings) One of the sons of Richard Jackson testified that he examined the land the summer before the trial and that the appellants “weren’t irrigating quite as much (land) as my father did.” (R. 34) Another son Melvin Jackson testified that the land being irrigated now is the same as when his father had the place, except a piece on the north side of the place. (R. 60). One of the respondents also mentioned this slight reduction in acreage and estimated that it would be about 25 to 30 acres. (R. 146) His attention was directed to the fact that the 1919 Findings had determined that Jackson was irrigating 380 acres. He said that he didn’t know how much, but that 25 or 30 acres, “at least,” had been taken out of the irrigation since the 1919 decree, and that if Jackson were irrigating 380 acres in 1919, this would reduce it down to about 355 now. (R. 146)

The Deputy State Engineer Hubert Lambert testified that the State Engineer had made hydrographic surveys in about 1946 (R. 99, 100) and that the Jackson meadows appeared to have been irrigated, as contrasted with newly developed land (R. 99, 100) The proposed decree at pages 159 through 161 shows the State Engineer's proposed a determination for the Jackson Ranch to cover a total of 355 and a fraction acres. Hubert Lambert also testified that the acreage in the proposed determination was computed from aerial surveys and might be in error by as much as 5 per cent, but actual surveys were thereafter made by the State Engineer, and it was his impression that the actual surveys showed slightly more land under irrigation than the 355 shown in the proposed decree. (R. 99) Also the hydrographic survey maps were admitted in evidence as Exhibit B. Thus actual surveys showed that 355 acres were being irrigated.

The only other man who testified concerning the number of acres was James Jackson. He was asked:

“Q. Can you tell me roughly how many acres in the ranch were irrigated from these ditches.

“A. 355.”

There is, therefore, no dispute whatever in the evidence concerning the fact that Richard Jackson was irrigating 380 acres in 1919, that he thereafter took 25 to 30 acres out of cultivation (R. 146), and at the time of the proposed decree they were irrigating 355 acres.

The respondents themselves admitted from the witness stand that they knew the Jackson Ranch was irrigating the full acreage, notwithstanding the Call Decree. In

fact, their attorney stipulated that his clients knew that the water was being used. (R. 185) First Leonard Hellstrom was called by respondents. He owned one of the ranches at the time of the lawsuit which resulted in the Call Decree. (R. 74) He had owned this place about seven years. (R. 74) During that entire seven-year period he only had one occasion to go to the Jackson Ranch for water. (R. 76, 82) He testified that the land under the Woodruff Canal usually had plenty of water, and those users were not much concerned with Otter Creek. (R. 78) and that this was true of most of the low users. They had all the canal water they needed. (R. 79) Mr. Rex irrigated 700 acres mostly from the North fork, and Jackson could not interfere with the North fork. (R. 80) Hellstrom could not fix the date of his only trip to the Jackson Ranch, but said that it was sometime between the 1st of May and the middle of July. (R. 83)

The respondents next called Henry Thomas Nicholls, one of the respondents. He testified that he went to the Jackson Ranch all through the 1930s. He never tore the dams out but always went to get Mr. Jackson, and they divided it. (R. 112) He was asked if he did not know that the Jackson Ranch was bigger than 180 acres, and he answered:

“A. Oh, yes.

“Q. And you know that its always been irrigated all your life just as it is irrigated today, don't you?

“A. Just the same.

“Q. That there hasn't been any new land put under irrigation?

“A. That’s right.

“Q. And that if they were irrigating 355 acres in 1919, there’s never been a year since that they didn’t irrigate that much, has there?

“A. They irrigated it, that’s right.

“Q. The whole ranch?

“A. I couldn’t say as to that.”

He was then asked whether the Jacksons were not irrigating the same land as they were irrigating in 1919:

“A. Practically the same, as near as I know. I wasn’t up around there much.

“Q. And each and every year for the full 20 years between 1919 and 1940 they irrigated the same acreage they were irrigating in 1919, didn’t they?

“A. They irrigated at it, yes.”

He then stated that they didn’t cut the acreage down, but they cut the water down. (117)

“Q. If they were irrigating 380 acres in 1919 when the decree was entered, you know they’ve raised crops on that same acreage every year since, don’t you?

“A. I know they’ve raised crops, but on how many acres, I don’t know.”

He was then asked whether or not during the entire twenty-year period from 1920 to 1940, when he was water master, the Jacksons retired any land from irrigation:

“A. Not unless it was just some grain that they’d summer plow. They did that.

“Q. And then the next year when they put it back into grain they irrigated it?

“A. They did.” (R. 118)

He concluded his testimony as follows:

“I thought you just got through telling me you did know that they did not reduce their acreage?

“A. I said I didn’t know how many acres there was.

“Q. But you know whatever there was they didn’t reduce?

“A. I think they irrigated the same, as near as I know.

“Q. During that entire twenty year period?

“A. That’s right.” (R. 118)

The respondents then called William T. Rex. He was 83 years old, was a party to the 1919 suit, and had been familiar with the stream all of his life. (R. 121) He had testified that he got most of his water from the North fork (R. 123), and on cross-examination admitted that Mr. Jackson couldn’t interfere with that. (R. 128) He was then asked:

“Q. And you couldn’t interfere particularly with his (Jackson’s south and middle fork) because you couldn’t use that?

“A. That’s one reason why I suppose we didn’t go up there so much as some of the others.

“Q. And living there as neighbors to Mr. Jackson, you do know that notwithstanding your lawsuit he kept the same quantity of land under irrigation, didn’t he?

“A. Well, I guess that’s what he did. But I wouldn’t say that he did.”

He then argued about the correctness of the acreage and his attention was directed to the finding resulting in the Call Decree that Jackson was irrigating 380 acres, and he was asked whether Jackson quit irrigating any of it and he answered:

“A. No, I think not probably.

“Q. And you and all the other people knew that notwithstanding your suit he was continuing to irrigate the same acreage, didn’t you?

“A. Well, we knew he was trying to.

“Q. And you knew he was doing it, cropping it; isn’t that correct?

“A. I wouldn’t say that he was doing it profitably, because I know he was like a lot of us, the rest of us. He irrigated some that wasn’t very profitable when he got to harvesting the crops.

“Q. Well, without regard to whether it was profitable or not, you do know after the suit he did not retire some of his land but continued to irrigate the same acreage he was irrigating when you sued him?

“A. I suppose he did. I wouldn’t say what time of the year he did it.

“Q. And because you got your water from the north fork you weren’t particularly interested in whether he did or didn’t?

“A. Not too particular about it.” (R. 129)

Mr. Rex was then examined on re-direct and then on re-cross-examination testified as follows:

“Q. Mr. Rex, when Mr. Jackson would start out in the spring after this decree, he’d start out taking enough water from Otter Creek to water the full acreage that he had under the ditches, wouldn’t he?

“A. I suppose he would at that time, yes.

“Q. And then when the water got short so all of you didn’t have enough water for all your acreage, you’d go talk with him and he’d share with you. That’s the way it worked all the years you remember?

“A. As far as I know, I never had much trouble with him.” (R. 132)

Respondents next called Charles Rex, who is a respondent. He testified that he was appointed as a water master in about 1930, and that he cut Jackson down to about 1.5 c. f. s. when there was 12 c. f. s. in the stream. (R. 136) However, he further testified that he was not appointed until July (R. 137) By that time the Jacksons already had a hay crop made on their entire ranch. (R. 137) He also indicated that everything under the Jackson ditches appeared to be growing all right, and the crop “was made on it when you were appointed?”

“A. Fairly good.”

He again was asked about the date when he was appointed, and he answered:

“A. Well, I know it was after the 4th of July.” (R. 138)

The next witness called by respondents was Frank Jackson, who also is a respondent. (R. 140) Frank Jackson testified that he was of the impression that there had

been only a small reduction in acreage since the time of the Call Decree.

“A. I imagine 25 or 30 acres at least.

“Q. So that if the decree finding that he was irrigating 380 acres then was correct, that would reduce it down to about 355 now?

“A. That’s about correct.

“Q. And other than that reduction that you have described the Jackson farm has been irrigated in the same way and in the same acreage ever since the suit, hasn’t it?

“A. Well I wouldn’t want to say as to that.

“Q. You wouldn’t want to say either ‘yes’ or ‘no.’

“A. No sir, because I don’t know.”

The next witness was Ray Hoffman, who also is a respondent. He admitted that the Woodruff Canal water was usually adequate except on his place (R. 168) and that the lower group had a complete water right for the land under the canal from that source. (R. 168) At page 171, he admitted that the Jackson acreage was essentially unchanged since the Call Decree.

“Q. Now during all the time that you have been up this creek area and onto the Jackson ranch, you do know that the amount of land that the Jackson ranch has irrigated has always been pretty much the same in acreage, hasn’t it?

“A. Pretty much.

“Q. During all of the period of years there hasn’t been any big tract of land taken out of irrigation and retired because of lack of water?

“A. Not that I know of.

“Q. And each and every year they’ve matured crops on the land they do irrigate underneath their ditches, haven’t they?

“A. Some crops.

“Q. Well, they have matured crops of hay, haven’t they?

“A. Yes.”

“Q. And harvested them?

“A. Yes.

“Q. And the amount of hay that they have harvested has been pretty much consistently the same, hasn’t it?

“A. As near as I know.” (R. 171-2)

He testified that in the water distribution only 1 c. f. s. had been given to the Jacksons. (R. 173) He testified that in this area the farmers could irrigate about 60 to 70 acres with one second foot of water, and:

“Q. Is it your testimony that that’s all (60 to 70 acres) the Jacksons irrigated?

“A. No.

“Q. You know they irrigated lots more than that don’t you?

“A. Yes.

“Q. Well, then you must also know that they had more than a second foot, don’t you?

“A. They had at times more than a second foot.

“Q. Throughout all these years?

“A. At times during all those years probably.”

He then argued about whether they had irrigated their full acreage and was asked:

“Q. What do you mean then that they didn’t irrigate their full acreage?

“A. Well, there were years that we didn’t irrigate our full acreage, and I don’t know how they could have irrigated theirs in dry years with the same amount of water.” (R. 174, 175)

Then he testified again that he did not know of any land Jackson had taken out of irrigation, that he did know where their ditches were, and that the Jacksons had irrigated all of their lands under all of their ditches “some time of the year.”

“Q. By that you mean that sometimes of each year all of the lands under the ditches have had some water?

“A. I think so.” (R. 175)

Mrs. Argyle was called as a witness by respondents, but she had only been on the Jackson place once and this was before the 1919 decree. (R. 190)

The last respondent witness was Ade Thornock. He also was a water user and is a respondent. He testified that he bought the Warren Jackson place in 1933 (R. 194), and still operates it. From that date until the date of the trial he has never gone up to the Jackson Ranch. His answer was:

“No sir, I’ve never got up to the Jackson’s field. I go up to the divider every year.” (R. 195)

He was asked if he had observed whether he was getting his water during the irrigation season and he answered:

“There’s usually plenty of water right at that time.

“Q. Plenty of water. So you took your share, is that right? A. Yes, sir.”

On cross-examination he was again asked whether he had ever gone up to the Jackson field and he then indicated that he had been there once with Mr. George D. Clyde; (R. 197) and that he lived close enough to the Jackson field to know of their irrigation practices and to observe their ditches.

“Q. And if that has been surveyed and correctly reflects that there’s around 355 acres under their ditches, would you say that, without regard to what the acreage is, they do irrigate all of it during parts of every year?

“A. I imagine they do.

“Q. And have done so as long as you’ve been connected with the place?

“A. Yes, sir.” (R. 197)

These are the only witnesses called by the respondents. All but one of them are respondents and they all admit that during some parts of every year since 1919 the Jacksons have irrigated the entire 355 acres. They also all admit that the Jacksons have matured crops of hay and as will be particularized below, they admit that there was usually plenty of water for the land below the Woodruff Canal when it is on and plenty of water from Otter Creek for the land above the Woodruff canal also, at least until the Woodruff Canal is turned off.

**C. AT LEAST SOME OF RESPONDENTS
ADMIT THAT THERE HAS BEEN
PLENTY OF WATER.**

We have noted above that the parties have been able to expand their acreage from 2,160, allowed by the Call Decree, to 2,541, now irrigated as shown by the State Engineer's survey. This expansion of acreage certainly demonstrates the availability of water. Further, the stream itself does not vary much from day to day or month to month during the irrigation season. (R. 128, 177) Some of the respondents admit that at least while the Woodruff Canal was on they had plenty of water. The first witness called by respondents was Leonard Hellstrom. While he owned the land seven years, he only went after water from the Jacksons on one occasion during a "dry year." (R. 77, 82) The land under the Woodruff Canal had plenty of water, and for that land they were not much concerned with Otter Creek. His testimony on this specifically was as follows:

"Q. The canal water was adequate and you weren't much concerned about Otter Creek water for that ground. Now that's correct, isn't it?

"A. Yes.

"Q. Now that was true of nearly all of the parties that owned water down in that area, wasn't it? They all had canal water for a great deal of their land?

"A. Most of them, I think.

"Q. And that canal water has provided you most years with all the water you needed for the land under the canal?

"A. Yes, what was under the canal." (R. 78, 79)

The respondent Ray Hoffman also admitted that this

is true. At page 168 he was asked about 1,100 acres being watered from the Woodruff Canal,

“Q. And at times your Woodruff Canal water is a complete water right for the water under the canals?

“A. That’s right.”

This testimony comes from one of the respondents himself and from a witness called by the respondents, and there is no evidence in the record at all which contradicts it. Thus, the uncontradicted evidence is to the effect that the 1,178 acres of land under the Woodruff Canal is adequately watered from that source. Mrs. Argyle testified, however, that the canal water is turned off during the fore part of July. (R. 193)

When the 1,178 acres is being irrigated from the Woodruff Canal, the total remaining acreage (even as enlarged since the Call Decree) irrigated by respondents, is only 1,008 (R. 98) and of this, 700 acres is irrigated by Mr. Rex, mostly from the North fork (R. 123), which can not be diverted or interfered with by the Jackson ranch. (R. 128) William Rex did testify that while he used water mostly from the North fork, there was 60 acres where he commingled the water from all three forks. (R. 131) In any event, there would only be 300 to 350 acres of land above the Woodruff Canal, dependent on water from the middle and South forks, other than for the Jackson ranch. The parties fairly well recognized that Mr. Rex was entitled to the North fork water. (R. 123, 79) Because Jackson couldn’t interfere with it, Rex was not much concerned about the Jackson’s use of the water. (R. 128)

This very practical fact is repeated because it corroborates the admissions made by at least some of the respondents to the effect that there was usually plenty of Otter Creek water for the land above the Woodruff Canal, until the Woodruff Canal was turned off and the full 2,541 acres became dependent upon Otter Creek.

In this regard, the respondents' witness Hellstrom testified that in the seven years he owned his ranch he only went after Otter Creek water on a single occasion (a "dry year") (R. 77, 82) and he further admitted on cross-examination that the land above the Woodruff Canal most of the time had all the Otter Creek water it needed.

"Q. For the acreage below the confluence and for which you could only irrigate with Otter Creek water, most of the time you had all the water you needed for it, didn't you?

"A. Pretty much." (R. 81)

On the single occasion he went after the water, the date was somewhere between "the first of May and the middle of July, somewhere along in there. That's the time we irrigated." (R. 83)

Respondent Henry Thomas Nicholls indicated no serious problem, for he testified at R. 112 that he never tore out the Jackson dams, but merely got Mr. Jackson and they divided the stream, and he knew (R. 116-8) that Jackson was irrigating his full acreage.

The next witness, Respondent William Rex, was not so concerned about Jackson's use of the water, because

Rex depended on the North fork (R. 123), and he had no particular trouble with the Jacksons. (R. 128, 129, 132) He admits that Jackson used the water the same before as he did after the Call Decree.

The next witness, Respondent Charles Rex, only testified concerning one occasion, which was after July 4th (R. 136, 138) by which time Jackson had made a fairly good crop of hay on his land. (R. 137)

Respondent Aden Thornock testified that although Jacksons were watering all the land under the ditches during some parts of every year (R. 197), there is usually plenty of water at the respondents' own divider, and that although he had owned the place since 1933, he had never had occasion to go up to the Jackson ranch for water. (R. 195)

These admissions again come from the respondents themselves and we believe that they are legally bound by them. *Tebbs v. Peterson*, 122 Utah 214, 247 P. 2d 897. It is true that they did testify on direct examination that they were short of water — but without fixing the time of year when they were short. They also testified that they went up after the water on many occasions, but they are not definite as to time, and in any event, on cross-examination they all admitted that Jacksons irrigated their entire acreage, and the uncontradicted evidence, as noted above, is to the effect that when the Woodruff Canal water was on, it supplied a full water right for the acreage (1178 acres) under it, and the uncontradicted evidence also is to the effect that the relatively small acreage (300 - 350) above the Woodruff Canal and below

the North fork had plenty of water during this time. Not only is there no evidence to the contrary, but this fact is demonstrated almost conclusively by the fact that for 40 years Jackson has been permitted to irrigate 355 acres, and notwithstanding this the respondents have been able to increase their own acreage substantially. Obviously, when the Woodruff Canal is shut off, and the full 2,541 acres must be irrigated from Otter Creek, there would be a shortage. Since this occurred about July 1st (R. 193), this further makes more certain the completely indefinite testimony of the respondents as to when during the season they went after the water.

D. THE RESPONDENTS ADMIT THAT THEY WENT UP TO GET THE WATER FOR THE FIRST TIME AS LATE AS JULY 1st.

This July 1st date is pinpointed by two things. First, it is about this date when the Woodruff Canal goes off (R. 193) and secondly it is about July 1st when the people in this area start harvesting hay. (R. 133)

William T. Rex was asked on direct examination during what period of time the respondents were short of water and went up to get it.

“Well, it would be along in the summer time, along in May or June, the early part of July.”
(R. 130)

Respondent Frank Jackson was asked when the users went up to get the water, and he answered again on direct examination :

“Well, it would usually be from the first of June on up through July, into July. Usually fared pretty well up until that time.” (R. 142)

He indicated that they went after the water when it was short, and he had only gone up there twice (R. 141). The witness was then asked by the court:

“... You said that the earliest you ever heard of anyone going up the ditch to get the water was June 1st, and the latest about July 1st. What would you say would be a mean? A. Well, I said it was usually between June 1st and up through July.

“THE COURT: What would be the average? What would be an average of about the first time coming down through the years? June 15th? A. No, I think it was usually before that. The latter part of May or the 1st of June, forepart of June, just when we get short of water, when we needed water.”

Then on cross-examination by Mr. Clyde:

“Q. You say sometimes it would be as late as July 15th?

“A. That would be the last, up until then.”
(R. 150)

E. THE EVIDENCE ON INTERRUPTION

It should be noted that the Jackson Ranch was irrigated both from the South branch of Otter Creek and from the middle branch. On the middle branch, two ditches were used. (R. 19, 20) On the south branch, four ditches were used. (R. 20) There is not one single witness who testified either on direct examination or upon cross-examination that they at any time from 1919 through the

date of the trial had ever gone to all the ditches on both branches to take the water from the Jackson Ranch. In fact, many of the witnesses who did testify made very few trips up there themselves, and when they did, they only shut the water out of one ditch, or talked with Mr. Jackson and he adjusted one or more of the dams to turn some water down. In this regard, the facts are much like those itemized by the prevailing opinion of Mr. Justice Larsen in *Wellsville v. Lindsay Land & Livestock*, 104 Utah 448, at page 493.

We now turn to an examination, witness by witness, of the testimony on interruption. At the outset, it should be noted that four of the sons of Richard Jackson testified for the appellants. Each of them testified that the water was used to irrigate the same lands as are now being irrigated (355 acres) and that the lower users did not shut them off. James Jackson testified that his dad owned the Jackson place for fifty years prior to 1940 (R. 20); that the ditches were used from 1919 to 1940 to irrigate this acreage (R. 21); that the lower users did not shut off the water (R. 22); that the Jacksons claimed the absolute right to use the water; and that it was common knowledge that they were using it. (R. 22) He also testified that the claims filed in the General Adjudication suit were in accordance with the water used, and the parties stipulated that the hydrographic maps (Ex. B) represented the State's survey of the land. (R. 31) Len Jackson testified that the ditches now used are the same as those used by his father. (R. 35, 36, 40) He testified that only once had the dams been interfered with by the lower users. (R. 41,

42) The lower users took the dams out, the witness put them back in, and the lawsuit which resulted in the Call Decree was then filed. But from 1920 to 1940 the dams were not taken out by the lower user. (R. 41)

Melvin Jackson said he was there between 1918 and about 1926. He said that while he was there no one bothered the water. (R. 61) Alton Jackson testified to the same general effect, as to the whole period from 1920 to 1940. (R. 67-70)

None of these men at the time of the trial owned any interest whatever in the lands in question. The lands had been sold to the appellants, Keith Jessop, and Grant and Howard Lamborn. The Engineer's survey, as noted above, found 355 acres were being irrigated in 1946, which corroborates their testimony, and the respondents themselves admitted that Richard Jackson and his successors did not change their method of irrigation after the Call Decree. We turn, therefore, to the testimony of the witnesses called by the respondents.

The first witness was Leonard Hellstrom. He sold his place in 1922 (R. 73), but had owned it for about seven years prior thereto. (R. 74) He only personally went up to the Jackson Ranch once in the seven years while he owned the ranch (R. 76, 82), but Jackson was not there on the one trip made by Mr. Hellstrom. (R. 77) On cross-examination he again stated that he went there only once in seven years, and that was on a dry year. (R. 81, 82) He admits that he went only to the middle fork and took out only one dam. (R. 82) He did not know whether the Jackson field was completely irrigated. He didn't go to

find out (R. 82), and they didn't go look at the fields to see how well they were irrigated. (R. 82) He was asked to state the time when he went up on this one occasion, and he answered, "Somewhere right between the 1st of May and the middle of July."

The next witness called by respondents was Henry Thomas Nicholls. Mr. Nicholls was one of the respondents and is president of the respondent company. (R. 104) On direct examination he testified that practically all through the 1930's he went to the Jackson Ranch to get the water. (R. 105) He would talk to Mr. Jackson, and Mr. Jackson would go and "divide the water with us." He said that they divided the water according to the acreage set up in the Call Decree. (R. 106) He also testified that he was water master "through the 1930s' — the early 1930s'." (R. 107) He remembers of talking once to Alton Jackson, either in 1933, 1934, or 1935, "I couldn't say for sure, and at that time we divided out the water." He asked how the water was divided, and he said:

"Well, it was kind of hard to divide . . . It was a hard proposition to divide it right out, but that was why we brought an engineer with instruments. . . ." (R. 109)

He said the engineers set the division on an 180-acre basis and he kept it that way. (R. 111)

On page 112 he testified that he never did take the dams out alone:

"Well, I always went and talked to them. I never did tear the dams out alone. I always went and got them and they (referring to the Jacksons) helped me divide it."

On cross-examination the witness indicated that he was not on the stream much before 1930; that after that he took 11/12th of the water available at the Jackson field, without giving them credit for the water available from the North fork or for return flow. (R. 113) He also testified that Jacksons irrigated their whole ranch for the entire twenty-year period between 1920 and 1940. (R.117-8) His exact testimony on this is set out above at page 17 of this brief.

Respondents next called William T. Rex. He was 83 years old and has been familiar with the stream all of his life. He recalled the lawsuit in 1919, and had talked to Mr. Jackson about the water. (R. 121) He said when he would find the water short at his place he would go up, and Dick was using more than he was entitled to. Mr. Rex testified that:

“I don’t know that we ever took the dams out.”
(R. 122)

but they would talk to Jackson, and he would share the water. (R. 123)

On re-cross, Mr. Rex indicated that Mr. Jackson would start out in the spring after the 1919 decree and would take enough water from Otter Creek to water his full acreage, all that he had under the ditches. (R. 132) When the water got short, respondents would go up and talk with Jackson and he would share with them, and “as far as I know, I never had much trouble with him.” (R. 132) They went up “along in the summer, along in May, June, the early part of July.” (R. 130) Mr. Rex

indicated also that the people up there generally cut their first crop of hay along the 1st of July. (R. 133)

The next witness was Charles Rex. He was one of the owners. (R. 134) He said that in 1930 he was appointed water master and cut Mr. Jackson to 1.5 c. f. s. when twelve feet was in the stream. (R. 135) However, he was not appointed as water master until July of that year, (R. 136-7) and by that time the Jackson hay crop had been made. (R. 136-7) He indicated that a lot of the Jackson land was not irrigated after July of that year. (R. 138) He also indicated that on all of the Jackson land under the ditches, the crop which had been made before he was appointed water master "was fairly good." (R. 138)

The respondents' next witness was Respondent Frank Jackson. He testified that the lower users would go up to get the water. He was asked when, and he answered:

"Well, it would usually be from the 1st of June on up through July, into July. Usually fared pretty well up until that time." (R. 142)

He said that the water would get short and they would go after it. He indicated that he only went up twice. (R. 141) He thinks Len Jackson was there on one occasion. They went up both forks of the stream and went to only one dam on the middle fork and one dam on the south fork. (R. 144) He said they didn't have any way to measure it, but adjusted the stream. (R. 145) He admitted that Jackson irrigated all the land under his ditches. (R. 171-2)

His exact testimony on this is set forth on page 21 of this brief.

On cross-examination, he testified that when he went up to regulate the water with the engineers they only gave Jackson one c. f. s. (R. 173) He admitted that one c. f. s. would only irrigate 60 to 70 acres of land. Then he was asked:

“Q. Is it your testimony that that’s all the Jacksons irrigated?

“A. No.

“Q. You know they irrigated lots more than that, don’t you?

“A. Yes.

“Q. Well then you must also know that they had more than a second foot, don’t you?

“A. They had at times more than a second foot.

“Q. Throughout all these years?

“A. At times during all those years probably.”
(R. 174)

He then said that they may not have had it enough at times to raise crops on their full acreage, admitted that they irrigated all the acreage under their ditches and said that what he meant by this was that some years the lower users couldn’t irrigate all their acreage either. (R. 174-5)

Mrs. Argyle was called as a witness. She said that she saw the men go upstream to get water and more came down (R. 191), but she was only on the Jackson Ranch once (R. 190), and that was before the Call Decree.

Aden Thornock was called, but he testified that he had never gone up to the Jackson field, but only as far as respondents' own divider. (R. 195) He also said that there was usually plenty of water at the divider. (R. 195) He readily admitted that Jacksons had watered all of the land under their ditches, some parts of every year. (R. 197)

These admissions have come from people who mainly are parties to the lawsuit. They are bound by these admissions, and, of course, can not contradict them. Collectively, the respondents have admitted that the Jacksons have irrigated all of their land and matured crops on all of it.

The question then becomes one of whether there has been an interruption in the use which would stop the acquisition of title. The Utah law in this regard is quoted by the Utah Supreme Court in *Wellsville v. Lindsay Land & Livestock*, supra, 104 Utah 448, at page 489, as follows :

“A right to the use of water for irrigation of land may be acquired by prescription *without showing the water is actually kept running upon the land all the time*. Irrigation, as usually practiced, is required only at intervals during the season. *If the claimant takes the water and uses it at the time when it is necessary to do so and does this under claim of right, without molestation by others interested in the stream or ditch, and with their knowledge, actual or implied, it will be sufficient with respect to continuity of use, although there may be many days or weeks during which he does not use it at all*. The evidence leaves the question of the use of the water during the night time uncertain,

not showing clearly whether the continuous use spoken of was during the day only or both day and night for the entire irrigating season. The value of water for irrigation is too great in this state to allow a land owner to gain a right thereto for the entire twenty-four hours of each day by using the same for only a half or any other portion of the time less than the whole. *If he has used it continuously for a certain period each day long enough to gain a prescriptive right to such use he would have a right only for that period, and he could not lawfully object to the use by others of the flow during the intervening time of each day.*" (Emphasis added)

To the same effect see Kinney, on Irrigation and Water Rights, page 1890:

"As to what constitutes a continuity of user of a water right, ditch, or canal, or other works depends upon the nature and character of the right claimed. The adverse user only during the season when the water is needed constitutes a sufficient continuous user of either the water or the easement used in connection therewith, as the omission to use the water when it is not needed by the claimant does not break the continuity of the user as far as acquiring a right by prescription is concerned. Water for irrigation, for example, is not needed at all seasons of the year; and, again, it may not be needed every day of the irrigating season. In general, it may be said that the right to its use may be acquired adversely, as it may be acquired by appropriation by periods of time. . ."

The court then went on to hold that merely turning the water out of one of several ditches or off the field would not, as a matter of law, be an interruption and the holding of the trial court was reversed.

While the fact that the Jacksons have made their crop every year for the past forty years may not in and of itself be conclusive, and while isolated statements from the respondents on direct examination would indicate repeated interruptions, still their admissions on cross-examination, (a) that the land under the Woodruff Canal has an adequate water right; (b) that this canal is shut off about the 1st of July; (c) that of the remaining 1,008 acres (above the canal) William Rex waters 700 acres, mostly from the North fork, which (d) leaves only 308 to 368 of respondents' acres, to depend on water from the middle and South forks; and (e) with the location of the lands along the stream and the return flow, which can be used over and over again; and (f) the admission from the respondents that the Jacksons have always made their hay crop on the full 355 acres, we submit that the evidence overwhelmingly preponderates against the trial court's finding of an interruption by the 1st of June. The statement does come from Frank Jackson, but before the court asked him this question, he had already answered that they went up to get water when the water was short, and when asked what time of year this would be, he answered,

“Well it would usually be from the 1st of June on up through July, into July. Usually fared pretty well up until that time.” (R. 142)

We think that the fact that the amount of land above the Woodruff Canal being irrigated from the middle and South forks before the Woodruff Canal was shut off on July 1st was not more than approximately 308 acres by the respondents and 355 acres by the Jacksons when con-

sidered in the light of the quantity of water available conclusively corroborates the testimony from some of the respondents to the effect that they had plenty of water from Otter Creek (R. 81) and at the respondents' own dividers most of the time. (R. 195)

In other words, we must concede that there are statements on direct examination by the respondents which will support the trial court's finding, but their direct testimony is greatly weakened by admissions made on cross-examination, and these admissions, together with the uncontradicted evidence in regard to available water, irrigated acreage, etc., are so overwhelmingly in support of our contention that the Jackson Ranch has had the water, that the trial court's decision should not be permitted to stand.

Respectfully submitted,

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