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

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 and Cross Appellants,

vs.

GRANT LAMBORN, HOWARD L. LAMBORN and KEITH JESSOP,

Appellants.

Case No. 9285

RESPONDENT'S BRIEF

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Appellants.

Case No. 9285

RESPONDENT'S BRIEF

The Appellants are attempting to extend their use to irrigate 355 acres to July 1st and Respondents have cross appealed, contending the trial court erred in finding the appellants had acquired any rights to adverse use and that appellants use is limited to the irrigation of 180 acres as decreed by Judge Call.

It is the Respondent's position Appellants have not acquired any rights in excess of those granted to the Appellants' predecessor in interest by the Judge Call decree of 1919, and the trial court erred in finding that Appellants' predecessor in interest had between 1919 and 1939 acquired by adverse use the right, to June 1st of each year, to use sufficient water to irrigate 355 acres of land, or 175 acres in addition to that granted by the decree.

Respondents rely on two propositions for reversal: (1) The trial court having found interruptions in the use of the water as of June 1st they are entitled to a finding, as a matter of law, that no adverse rights were acquired and (2) a person cannot acquire adverse rights while subject to an injunction.

The use of the word "Respondents" herein shall include a reference to Respondents and/or their predecessors in interest, and Respondents as cross-appellants.

FACTS

We shall hereafter set forth facts in addition to those indicated by the Appellants and shall note wherein we disagree.

The respondents and appellants agree they are bound by the provisions of Judge Call's Decree of 1919, except appellants claim they have

adversed the defendants for additional water up to the first of July. (R. 8-9)

Otter Creek is a natural water course consisting of the north, middle and south forks which flows from a westerly to an easterly direction, within Rich County, through the lands of the appellants and respondents; the lands of the appellants are located above the lands of the respondents and the water first reaches the lands of the appellants (Findings of Fact, Case No. 43).

The Call Decree awarded to the respondents sufficient water to irrigate 1960 acres with seepage and overflow rights:

“ . . . are the owners of and entitled at all times during the irrigation season of each and every year, to-wit, from April 1st to November 1st, to divert and use the flow of the waters from the south, middle and north forks of Otter Creek in Rich County, Utah, a sufficient quantity of water to irrigate 1960 acres for the irrigation of their lands, the watering of stock, and for domestic use, and in addition are the owners of, and entitled to their respective share and proportion of all seepage and underflow of water which drains into said Otter Creek, and from the various branches thereof, by such irrigation, on a basis which 1960 acres bears to the total of 2140 acres.” (P 1 of Call’s Decree, Case No. 43)

And Richard Jackson and his successors in interest were enjoined, during April 1st and November 1st

of each and every year, from diverting or using more water than was necessary to irrigate 180 acres of land plus his respective share of seepage, overflow and domestic rights. (P 2, Call Decree, Case No. 43).

The Call Decree was silent as to priority. However, Judge Jones decreed the rights of the appellants and respondents were equal and he modified the Call Decree to provide for water duty of three acre feet of water per acre per year (Case No. 299, page 21-24).

Mr. Neville, the Engineer, did not accept the appointment to administer the stream and Judge Call on October 1, 1920 revoked his appointment and appointed Jesse J. Read in his place (Case No. 43). This appointment was agreeable to and concurred in by Richard Jackson, the appellants' predecessor in interest (R 118-119). It does not appear that Mr. Read acted, however, until 1927 (R 159).

The provisions of the State Engineer's proposed Decree was arrived at in ignorance of Judge Call's Decree, although it had been filed with his office, it had been stored in the basement of the State Capitol Building. The members of his office were unacquainted with its provisions (R 202, 216). The proposed Decree would have awarded 10 c.f.s. of water, with a priority of 1870, to appellants to

irrigate 355 acres, April 1st to October 1st of each year and the balance of the stream 3.5 c.f.s. was to be awarded to the respondents to irrigate their 2190 acres of land, notwithstanding that after July 1st all of respondents land must be irrigated from Otter Creek. The creek has a constant flow of 13.5 c.f.s. The State Engineer fixed a duty of 1 c.f.s. to 60 acres (R 207, 210-212, 135-136, 177).

Any attempt by appellant's predecessors in interest to use water in addition to that awarded by the Call Decree was several times each year, with the knowledge of the appellants' predecessors in interest (the Jacksons) interrupted by the respondents, and they not only went upstream and took their water but they employed engineers, water masters and built diversion dams to insure their receiving that portion of the water awarded them by Judge Call (R 105-109, 153-155, 130, 150, 142-143, 193, 121-123-124-125, 157-158-159, 129-130, 111-112, 134-136, 163-164, 160-161, 182, 172-173, 169).

Sometime prior to 1919 wooden weirs were placed in the Creek at the Jackson property to divide the water between the Jacksons and the lower users, the respondents. The weirs became obsolete and the division was made by the use of earth dams until 1927 when they were rebuilt by Jesse J. Read. (R 108-110, 159). As rebuilt they were in use until

1930 when they were replaced (R 130-135).

We admit appellants' predecessors in interest claim they had irrigated their lands between 1919 and 1939 as they had prior to the entry of the Call Decree. In so doing, however, they did not limit their claim to July 1st, in the Court below, but insisted the adverse period extended over the irrigation period from April 1st to November 1st of each year. They urged the trial Court to approve the proposed decree of the State Engineer which would have granted them the right to irrigate 355 acres from April 1st to October 1st of each year. (Findings of Fact, Counterclaim of Richard Jackson in Case No. 43, State Engineer's proposed Decree pages 159-161, R 2). Appellants in their statement of points on appeal No. 2 allege:

“The Court erred in failing to hold that the respondents and appellants and their predecessors in interest have at all times since the Call Decree entered in December, 1919 openly, notoriously, *continuously* and adversely used the water of Otter Creek *through the irrigation season* to mature crops on their 355 acres of land.” (page 35, Case No. 299) Emphasis added.

The use of the word “respondents” in the designation was undoubtedly inadvertently included.

The appellants and respondents use of Otter Creek was continuous and not intermittent (R 38-

41-48, 62, 15-18, 111, 112, 113-114, 180, 129-132-135-137, 159-161, 134-137).

Although, the Jacksons continued to use the same irrigation system or ditches as prior to 1919, they were attempting to spread the water decreed over the 355 acre tract, except such times as they were wrongfully using the respondents water. They did not cut the acreage but the water used (R 117, 129-130, 132, 174-175, 197).

We agree that some of the respondents testified they had adequate water except for dry years until the Woodruff Canal water was turned off on July 1st, for their land below the canal. This does not apply to all of the respondents and particularly this is not true as to the lands lying above the Canal.

CROSS APPEAL

POINT RELIED ON

THE COURT ERRED IN HOLDING THAT THE APPELLANTS AND THEIR PREDECESSORS IN INTEREST HAVE AT ALL TIMES SINCE THE CALL DECREE ENTERED IN DECEMBER OF 1919, OPENLY, NOTORIOUSLY, CONTINUOUSLY AND ADVERSELY USED THE WATERS OF OTTER CREEK ON THEIR 355 ACRES OF LAND FROM APRIL 1ST TO JUNE 1ST OF EACH IRRIGATION SEASON. (P. 39, CASE 299)

ARGUMENT

THE TRIAL COURT HAVING FOUND INTERRUPTIONS AS OF JUNE 1ST RESPON-

DENTS ARE ENTITLED TO A FINDING AS A MATTER OF LAW, THAT NO ADVERSE RIGHTS WERE ACQUIRED IRRESPECTIVE OF WHETHER THE USE WAS FOR THE IRRIGATION SEASON OR TO JULY 1ST.

The respondents and appellants agree they are bound by Judge Call's Decree except that since its entry appellants claim they have acquired a right by adverse use to irrigate 355 acres of land to July 1st. They did not claim this limitation before the trial court but on the contrary insisted that the usage extended throughout the irrigation season, as they urged: (1) the Court to approve the State Engineer's proposed decree that would have confirmed their right to irrigate 355 acres for the irrigation season (R 2, Proposed decree 158-159). (2) They attempted to establish that they had used the water during the period 1919 to 1939 in the same manner as they had used it prior to the entry of the decree in 1919 and in those proceedings they claimed the use from April 1st to November 1st. (See counterclaim Richard Jackson Case No. 43) and (3) In their points relied on for this appeal, they assigned as error the trial court's failure to decree their rights to irrigate 355 acres for the irrigation season (p. 35 Case No. 299).

Appellants are now retreating from their position before the trial court, realizing that interrup-

tions whether they are of June 1st or July 1st is effective to interrupt the adverse period, where they claim a use for the irrigation season.

As pointed out the trial court found interruptions in the uses as of June 1st and in this respect appellants agree there is evidence to support the finding.

This Court in *Wellsville East Field Irrigation Co. vs. Lindsay Land and Livestock Co.*, 104 Utah, 48, 137, Pac. 2d, 643, the decision relied on by the appellants, laid down the rule that an interruption during the period of use interrupts the running of the adverse period, and the trial court having found interruptions as of June 1st the respondents are entitled as a matter of law to a finding and decree that the appellants did not acquire any rights by adverse use.

Appellants maintain that the facts in *Wellsville East Field Irrigation Co. vs. Lindsay Land and Livestock Co.*, supra, are similar to this case. This is not so, for in that case there was no interruption during the period of adverse use. Nichols the adversary, used the water approximately two days of each ten days on one tract from June to September, inclusive and on the other tract he watered it four times a season. After irrigating the land he would shut the water off. There was no evidence that an interruption occurred during this limited period of

use. On one occasion when he was seen using the water, he was requested to cooperate and use it sparingly to which he agreed stating he would use it proportionately as did the others and that he would turn it off when he finished irrigating. The Irrigation Company did not interfere with his use. Nichols situation was clearly one of rotation with the other users on a fixed rotation schedule, while here the use of the water by appellants predecessors in interest was continuous. They continuously used approximately 1/12 of the stream during the irrigation season and 11/12 of the stream was continuously used by the respondents as their proportionate share as determined by the Call Decree and when appellants predecessors in interest were using the water in excess of that awarded them this use was also continuous. They merely increased the amount of water over that awarded by the Court. Each year the respondents on several occasions with the knowledge and help of the appellants predecessors in interest during the claimed adverse period recaptured their water.

CONTINUOUS USE

The appellants relied on the testimony of Lem Jackson in claiming intermittent use (R 38-41). However, he did not testify to this but rather that the use was continuous; that they irrigated daily from Otter Creek and that one or more dams were

always in place and that the water was always running in one of their irrigation ditches; that although he was not on the ditches all the time he was irrigating continuously (R 38-41, 48) and their witness Melvin Jackson testified that the dams diverting the water on to appellants property were never out until after haying time (R 61-62).

In attempting to establish adverse use the sons of Richard Jackson testified they used the water from 1919 to 1939 in the same manner as they had used it prior to the entry of the Call decree. In the pleadings in that case Civil No. 43 the appellant Richard Jackson alleged that he had *continuously* used sufficient water from Otter Creek to irrigate 380.22 acres of land during the period April 1st to November 1st of each year. (See paragraph 2 of counterclaim Case No. 43). That appellants claimed the use was continuous before the trial court is apparent from paragraph 2 of their "statement of points relied on appeal" for therein they stated the Court erred in failing to hold that appellants had continuously and adversely used the water of Otter Creek through the irrigation season (Page 35, Case No. 299).

That the use was continuous and not intermittent is, also, supported by the fact that weirs were used for dividing the water at the Jackson ranch and that the Jacksons and respondents divided $1/12$

to the Jacksons and 11/12 to the respondents or their proportionate share of the water (R 106-13, 134, 159-160, 165-169).

INTERRUPTIONS

As a result of Richard Jackson, one of appellants' predecessors in interest, attempt to enlarge his rights in the use of Otter Creek, criminal and civil actions and Judge Call's decree followed. Thereafter, as they had prior to the entry of the decree, the respondents were vigilant in interrupting the Jacksons use of their water. They not only went upstream each year to the Jackson property, recaptured their water, with the Jackson's knowledge, and diverted it downstream; but they employed water masters, engineers and constructed diversion dams to accomplish this purpose.

It was not merely a matter of respondents once a year recapturing their water but it was a continuous operation beginning as some testified in early May and not later than the first of June and continuing thereafter until the middle of July. (R 193, 153-155, 130, 150, 142-143, 123-124, 157).

William T. Rex, who irrigated from all three forks (R 131) testified that one of the respondents in at least every five year period, talked with the Jacksons, at the Jackson property and turned the water down (R 123-125). He said:

Q. And when it got lower, what did you do?

A. Why, somebody would go up and talk to Jackson, get them to let loose a bit and come down.

Q. Then you'd get more water down there?

A. Yes, sir.

Q. Now was that done, would you say, frequently after 1919 up to 1940?

A. I think so, yes.

Q. About how often?

A. Maybe every week sometime maybe twice a month or something like that somebody would go up.

And Frank Jackson, a respondent, testified that several times each year, between 1919 and 1940, beginning not later than June 1st and extending through the middle of July, one of the respondents would go up to the Jacksons and turn their water down.

A. We'd have to try and locate it, bring some more down.

Q. Now would you say that that happened from the time the decree was entered up until say 1940?

A. Yes, sir.

Q. And about how often would you say they'd go up during that period of time?

A. Well, some years it would be quite regular. Probably once or twice a week, maybe more than that. Other times, according to the

amount of water we got down to our diversion, it would be less (R 19-28 page 142).

When you consider the foregoing testimony, it explains and clarifies the witnesses statements the interruptions occurred in May up to and into the middle of July.

As to the date of interruptions, the respondent Mrs. Argyle testified the respondents required their water the first of May of each year (R 192) and that they recaptured it the forepart of May of each year (R 193). She said:

A. Well, they tried to get it around the first of May when Mr. Jackson and Thornock and Hoffman could go up to the divider or splitter, we called it.

Q. And would you say that that happened, that you got the water that early from—how often would you say from 1919 to 1929?

A. Well, it would be the fore part of May always.

Q. The fore part of May always?

A. Yes.

Q. Each year?

A. Yes, sir.

Q. And you know that of your own knowledge?

A. Yes, sir.

Mr. Hoffman who acquired his property in 1922 (R 153) said each year from 1923 through

the 1940's in the spring, someone went upstream and recaptured the respondents water from the Jacksons (R 153-157).

A. Each succeeding year we went up, some of us. Not always the same men, but we went up each year, put in the dams and brought our water down to irrigate our ground with.

and again he said:

Q. And about how often, over what period of years did you have to go up there in order to secure your water?

A. Oh, we went — I went every year from 1923 until on up into the 1940's.

Q. Until the forties?

A. Yes.

and that they divided the water allowing Richard Jackson sufficient water to irrigate 180 acres:

Q. Do you recall in what proportions that the water was divided?

A. It was divided giving Richard Jackson 180 acres.

Q. 180 acres?

A. Yes, sir.

Mr. Hellstrom, who sold out to Mr. Hoffman in 1922, testified they went upstream retaking their water between the first of May and the middle of July (R 83). He said:

A. It would be somewhere right between

May and — the first of May and the middle of July, somewhere along in there. That's the time we irrigate.

William Rex testified they went up in May, June and the early part of July for their water (R 130). He said:

Q. Do you know during what period of time that you was short of water and went up to get water, about what time of the year?

A. Well, it would be along in the summertime, along in May or June, the early part of July.

Q. And when it would get short you'd go up and talk to Dick about it, is that right?

A. Yes, sir, that's right.

The respondent Frank Jackson said they went up yearly between 1919 and 1940 and retook their water from the first of June through July (R 142, 150). He said:

A. Well, they went up to try to get more water down.

Q. Now, after they had been up there, did you observe whether or not there was more water came down?

A. Well, most times there was.

Q. There was. Do you recall about what time of the year that would be?

A. Well, it would usually be from the first of June on up through July, into July. Usually fared pretty well up until that time.

Q. And then it was —

A. The water would get short.

Q. And when it would get short —

A. We'd have to try and locate it, bring some more down.

Q. Now would you say that that happened from the time the decree was entered up until say 1940?

A. Yes, sir.

Q. And about how often would you say they'd go up during that period of time?

A. Well, some years it would be quite regular. Probably once or twice a week, maybe more than that. Other times, according to the amount of water we got down to our diversion, it would be less. (R 142)

The respondent Mr. Nichols testified that although he could not recall the dates or the years that they went up almost every year and retook their water (R 111-112). He said:

Q. Between 1919 and 1940.

A. Yes, I guess there was. We was up there almost every year, but I just couldn't recall the dates or even the years, because we were up there almost every year. Someone was —

Q. Now, "every year", you're speaking of what period of time?

A. Well, I wasn't there during the years of from the middle of 1920 until I believe it was in either '23 or '24.

Q. But other years you were there?

A. Other years I was there.

Q. Other years you have personally gone up the ditch for your water?

A. That's correct.

Q. On all of those occasions, Mr. Nichols, were you successful in having the water turned down?

A. I was.

Q. And on all of those occasions how was that achieved by you?

A. By getting it turned down?

Q. Yes.

A. Well, I always went and talked to them. I never did tear the dams out alone. I always went and got them and they helped me divide it.

Q. Whom do you speak of as "them"?

A. Well, whoever was on the Jackson place.

Q. Irrigating for the Jacksons?

A. That's right.

The respondents witnesses Nichols, William Rex, Charles Rex, Frank Jackson, and Hoffman testified that when they went upstream to the Jacksons for the purpose of recapturing their water, that they took, often with the Jacksons help, 11/12 of the stream and left 1/12 for the Jacksons use. (R 105-109, 110-115, 125, 129-130, 134, 136-137, 144-147, 149, 156, 161, 164-166, 169-170, 194-196.)

The respondents not only recaptured their water but in so doing appellants predecessors in interest had knowledge that they were doing so. This knowledge was brought home to the Jacksons in several ways: (1) The Jacksons use was interrupted while they were in actual use of the respondents water and the taking of the water would diminish their flow. (2) By the tearing out of dams. (3) They discussed the retaking of their water with Richard Jackson (4) and he and his sons and the respondents and the Jacksons together divided the water 1/12 to the Jacksons and 11/12 to the respondents, their proportionate share of the Creek. (R 105, 109, 110-115, 118-119, 121-125, 129-130, 134-137, 143-145, 147-149, 156-157, 163-164, 169-170, 180, 194-196.)

That the respondents were diligent in protecting their rights is further borne out by the fact that they hired water masters and engineers to reconstruct their weirs and assist in the measurement of the water. The first of these people were hired in 1927 and they consisted of the following: Mr. German and Jesse Read in 1927 (R 157-159), Mr. Schaub in 1930 (R 147-148, 159-160), George D. Clyde in 1933 through 1937 (R 160-161, 182), Mr. Cox followed Gov. Clyde (R 140, 162-163). Also see (R 134, 135, 157, 159, 160, 150, 161-163, 165, 169, 118-119.)

The foregoing evidence overwhelmingly sus-

tains the trial court's findings that timely interruptions occurred during the period claimed. The Court having found timely interruptions, it should be held that appellants had not adversely affected the respondents, in any manner whatsoever, and this is supported by *Wellsville East Field Irrigation Co. vs. Lindsay Land and Livestock Co.*, supra.

In Justice Larson's concurring and dissenting opinion, he said:

"I concur in the opinion, except as to the part thereof holding that the claim of Lindsay Land & Livestock Company must fail as to the water used by Nichols. The opinion holds that Nichols, predecessor in interest of Lindsay Land & Livestock Co. had used these waters adversely, ever since the Kimball Decree, but there had never been a seven-year period without an interruption of the user, and lays down the rule that a mere showing that the water had once been turned out of the ditch of the adverse user tolled the running of the seven-year period. From that holding I emphatically dissent. It is decidedly too broad for conditions prevailing in regard to the uses made of the water under the record in this case. Furthermore, it is not in accord with the authorities.

The rule as stated may be correct where the claimed right involves of necessity a constant, continuous possession and use. But here irrigation water is generally not used continuously on the same lands. Irrigation is a rotating process. The land is watered and then the water is shut off for a period of time;

then turned on for another soaking, and again shut off. The uncontradicted evidence is that Nichols used the water approximately two days each ten days on one tract, from June to September, inclusive, and on the other tract during July, August and September. After irrigating the land he would shut the water off. Much of the time he did not have any water on the land. The witnesses who testified to turning water off from Nichols' ditches testified in most cases they did not see Nichols. Many times they did not even go down to see if the water was being used, or was flowing upon his land. On at least one occasion when they saw Nichols using the water, they asked him to cooperate and use it sparingly because the stream was so small. He answered that he was willing to cooperate and get along with as little proportionately as did the other users, and he would turn it off when he was through. With that they left him to turn it off when he finished his irrigating.

When water is claimed only for limited periods of time, or in limited quantities, or for limited purposes, interruptions in usage must be such as to make an interruption of such right as is claimed; must be such as to molest or interfere with the use to the extent it is claimed or asserted; to the extent of the beneficial use claimed or usable. For example where one claims a right to and usage of water on Monday from 6:00 o'clock a.m. to 12:00 o'clock noon to irrigate an acre of strawberries, shutting off the flow on Tuesday after the patch is watered is not an interference with, or interruption of the use. Of course, when a constant continuous flow is

claimed, any interruption in the flow is an interruption in the use. * * *”

Justice Larson’s opinion sustains our position, however, we believe that the minority opinion as to interruptions written by Judge Wolf, then Chief Justice, and concurred in by Justice McDonough, is a sounder view and we call the court’s attention to Pages 641-643, Pacific Reporter. This also supports our position.

We believe that the foregoing answers the position taken by the appellants in their brief. However, we would like briefly to point out that the appellants predecessors in interest did not use the water after the Call Decree without difficulties, as problems over the use of water required the respondents to employ engineers to assist them in measuring reconstructing weirs and dividing the water. Notwithstanding the appellants predecessors in interest, the Jacksons in using the water assisted in dividing it, and made no claims, so the respondents testified, that they had a right to use the water in excess of that decreed by Judge Call. (R 114-115, 129-130, 136, 139, 156, 163-164)

We agree there is evidence that some of the respondents testified, except for dry years, that they had adequate water for their lands above the Woodruff Canal until the Canal Water was turned off on July 1st. However, this was not the case as

to others and it should be particularly kept in mind that over 1100 acres of the respondents land receives no water from the Canal.

We agree, also, there is evidence that appellants predecessors in interest continued to irrigate 355 acres and used the same ditches as were used prior to 1919. However, an analysis of the evidence shows that although they did not cut their acreage, but the amount of water was definitely reduced; they merely spread the available water over the area. Mr. Nichols testified appellants predecessors in interest irrigated “. . . at it”. (R 112) and that although they didn't cut the acreage down that they cut the water down (R 117) and Mr. William Rex said he didn't see how they could irrigate the 355 acres as he was at times short of water (R 130) and in this respect Ray Hoffman testified that the Jacksons had irrigated all of their lands under all of their ditches sometime of the year. (174-175)

Irrespective of whether the Court believes the Jacksons substantially irrigated 355 acres and that some of respondents do not require all of their water from Otter Creek before July 1st is immaterial, as the only questions are whether Richard Jackson could acquire an adverse right and if so whether the respondents timely recaptured their water and interrupted the Jackson in its use so as to destroy

the running of the adverse period.

ADVERSE INTERESTS CANNOT BE ACQUIRED IN VIOLATION OF AN INJUNCTION

The appellants action is dependent on whether Richard Jackson acquired an adverse interest between 1919 and 1939. This he could not do for adverse rights cannot be acquired in violation of a court's injunction.

The appellants title is derived from James Jackson who acquired the property from his father Richard Jackson in 1940 (R 20-21). The Judge Call decree of 1919 perpetually enjoined Richard Jackson and his successors in interest from using or diverting any more water than was necessary to irrigate 180 acres of land plus seepage, overflow and stock watering rights. (Page 2 of Decree, Case No. 43)

IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED that defendant, Richard Jackson, and all persons claiming by, through, or under him, be, and they are hereby perpetually enjoined during the time from the 1st day of April to the 1st day of November, of each and every year, from diverting and using more than is necessary to irrigate 180 acres of his land, plus his respective share of seepage and underflow, as herein provided, and computed on the basis which 180 acres bears to the total acreage of 2140 acres.

An act done in violation of an injunction is unavailable for the purpose intended.

“* * * An act done in violation of injunction, being unlawful, is to be deemed ineffectual and unavailable as to the purpose intended as though it had not been done * * *”.
28 Am. Jur. P 834, Sec. 322.

and in *Farnsworth vs. Fowler*, 31 Tenn. (1 Swan) 1, 55 Am. Dec. 718, the Court said:

“As to the effect of the writ we may observe that it is directed to the defendant, and its action is upon him in personam, and it renders it unlawful in him to do the thing prohibited or to fail or omit to do the thing commanded. The act being unlawful, it is deemed ineffectual and unavailable, as to the purpose intended as though it had not been done; * * *”

In *Langford vs. Griffin*, 17 S.W. 2d 296 the Supreme Court of Arkansas held that a person could not acquire adverse interests while subject to an injunction. Davis the appellees predecessor in interest was perpetually enjoined in 1896 from enclosing or obstructing an alley. In 1898 Davis conveyed his property to his mother Emma Davis for life with reversion to him at her death. She died early in the year 1927. In August of that year Davis conveyed to appellee by warranty deed. The appellee claimed adverse right beginning 1902 through 1907 relying on the possession of John M. Davis' and his mother. The Court said:

“Under the facts detailed above appellee's claim of title to the alley is necessarily a claim of title thereto by adverse possession of

himself, John M. David, and John M. Davis' mother, Emma Davis. His deed from John M. Davis in 1897 was for lot 6 and did not embrace the alley. If he obtained possession of the alley from John M. Davis and John M. Davis succeeded his mother in possession thereof and the two of them inclosed the alley in 1902 under an agreement between John M. Davis and A. M. McKennon, who owned lot 8 on the south side of the alley, it was all in violation of the decree rendered against John M. Davis in favor of A. P. May in 1896, permanently enjoining him from entering into possession of the alley. It is argued that neither appellee nor Emma Davis were parties to the injunction suit and were not and are not bound by the decree rendered therein. In this contention appellee is mistaken, for the decree was binding upon John M. Davis and all persons in privity of estate with him. Appellee's claim of title to the alley is based upon his privity in estate thereto with John M. Davis, else he has no claim at all. As John M. Davis was enjoined from obstructing or entering into possession of the alley, the continuity of appellee's possession was necessarily broken. In the face of the decree he could not acquire title by continuous, adverse possession through John M. Davis."

CONCLUSION

1. The respondents submit that Richard Jackson, the appellants predecessor in interest did not acquire and could not acquire an adverse use to the water claimed for the reason that any acts of his

would be ineffectual in the face of the prohibition in the Judge Call decree.

2. That the trial court having found interruptions as of June 1st, the respondents are entitled as a matter of law to a finding that the appellants predecessor in interest, acquired no rights by adverse use and this is so, whether the use is claimed for the irrigation season, or to July 1, and

3. In any event the evidence sustains the findings of the trial court of interruptions as of June 1st and the evidence does not warrant the Court to extend the adverse use to July 1st.

Respectfully submitted,

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