

1961

John Hardley v. Max Swapp et al : Brief of Plaintiff and Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

McKay and Burton; Attorneys for Plaintiff and Appellant;

Recommended Citation

Brief of Appellant, *Yardley v. Swapp*, No. 9379 (Utah Supreme Court, 1961).
https://digitalcommons.law.byu.edu/uofu_sc1/3853

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN YARDLEY,
Plaintiff and Appellant,

—VS.—

MAX SWAPP, Executor of the Estate of
Melvin Swapp, deceased; DUNCAN FIND-
LAY; JAMES C. LITTLE and SARAH
D. LITTLE, his wife; MARY M. LITTLE;
KAY LITTLE, a single man; VAL
LITTLE and VIVIAN H. LITTLE, his
wife; EMMA LITTLE; NIELS LITTLE,
a single man, and FAY ALVEY,
Defendants and Respondents.

FILED
21 1931

Clerk, Supreme Court, Utah

Case No.
9379

BRIEF OF PLAINTIFF AND APPELLANT

McKAY AND BURTON
720 Newhouse Building
Salt Lake City, Utah

*Attorneys for John Yardley,
Plaintiff and Appellant*

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS	1
POINTS RELIED UPON.....	6
ARGUMENT	6
I. THE COURT ERRED IN GRANTING THE DEFENDANTS' MOTION TO DISMISS AT THE CONCLUSION OF THE PLAINTIFF'S CASE FOR THE FOLLOWING REASONS:	6
(A) THE PROVISIONS OF THE "COX DECREE" GIVING ALL OF THE FLOW OF MINNIE AND CASTLE CREEKS TO THE PLAINTIFF AND THREE OTHER PERSONS ESTABLISHED A PRIMA FACIE RIGHT IN PLAINTIFF TO AT LEAST ONE-FOURTH OF THE TOTAL FLOW OF SAID STREAMS.	7
(B) THE PROVISIONS OF THE "COX DECREE" SPECIFYING A WATER RIGHT TO THE PLAINTIFF IN MINNIE AND CASTLE CREEKS REQUIRED THE COURT TO PROCEED TO DEFINE AND CLARIFY THAT RIGHT IF THE SAME BE MORE OR LESS THAN ONE-FOURTH OF THE TOTAL FLOW OF THE STREAMS.....	9
(C) NO ENLARGEMENT OF DEFENDANTS' RIGHTS CAN BE RECOGNIZED AFTER THE ENTRY OF THE "COX DECREE" IN NOVEMBER, 1936	11
SUMMARY	20

CASES CITED

Deseret Livestock Co. v. Hooppiana, 66 Uah 25, 239 P. 479	17
Duchense County v. Humpherys, 106 Utah 332, 148 P. (2d) 338	17
Jensen v. Birch Creek Ranch, 76 Utah 356, 289 P. 1097.....	17
Martin v. Stevens, 121 Utah 484, 243 P. (2d) 747.....	12
McIllwain v. Bills, 242 P. (2d) 707 (Okl.).....	8
Richlands Irr. Co. v. Westview Irr. Co., 96 Utah 403, 80 P. (2d) 458	3, 7
Rinio v. Kester, 41 P. (2d) 405, 407 (Mont.).....	8
Sanguin v. Wallace, 234 P. (2d) 394 (Okl.)	8
Smith v. Sanders, 189 P. (2d) 701.....	17
Wellsville East Field Irrigation Co. v. Lindsay Land & Live- stock Co., 104 Utah 448, 137 P. (2d) 634.....	17
Wrathall v. Johnson, 86 Utah 50, 40 P. (2d) 755.....	17

TEXT AUTHORITIES CITED

26 C.J.S., Declaratory Judgments, Section 43, p. 126.....	10
68 C.J.S., Partnership, Section 72, p. 507.....	8
86 C.J.S., Tenancy in Common, Section 11, p. 373.....	8

STATUTES CITED

Revised Statutes of Utah, 1933, Section 78-1-5.....	8
U.C.A., 1953, Chapter 33 of Title 78.....	10

IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN YARDLEY,
Plaintiff and Appellant,

—vs.—

MAX SWAPP, Executor of the Estate of
Melvin Swapp, deceased; DUNCAN FIND-
LAY; JAMES C. LITTLE and SARAH
D. LITTLE, his wife; MARY M. LITTLE;
KAY LITTLE, a single man; VAL
LITTLE and VIVIAN H. LITTLE, his
wife; EMMA LITTLE; NIELS LITTLE,
a single man, and FAY ALVEY,
Defendants and Respondents.

Case No.
9379

BRIEF OF PLAINTIFF AND APPELLANT

STATEMENT OF FACTS

For convenience the parties will be referred to in this brief as they were designated in the trial court. The appellant, John Yardley, will be referred to either by name or as the “plaintiff” and the defendants will each be referred to by name or as the “defendants” or “defendant” as the case may be. Page references to the transcript of the trial proceedings will be referred to as (T.).

This is an appeal brought by the plaintiff from an order entered below, at the conclusion of the plaintiff's case, whereby the trial court granted the defendants' motion dismissing with prejudice the plaintiff's complaint and the counterclaim of defendants.

This case involves a controversy between the parties over the division of the water of natural streams in Garfield County, Utah, one of which streams is known as "Minnie or Little Creek" and the other known as "Castle Creek." These two streams converge and become one stream, which is contributory to and sometimes referred to as the head waters of the South Fork of the Sevier River.

The defendant Duncan Findlay is a far-upstream owner of lands on Castle Creek (T. 51, Ex. 2). None of his lands can be watered from Minnie Creek (T. 293). The Swapps are owners of lands on Castle Creek just below Duncan Findlay, which lands are watered solely from Castle Creek (T. 6, 52, Ex. 2). In addition the Swapps are far-upstream owners of lands on Minnie Creek, which lands do not receive any water from Castle Creek (T. 6, 55, Ex. 2). The Littles own lands on both Castle Creek and Minnie Creek (Ex. 2). Part of Littles' land can only be watered from Castle Creek. (T. 53, 181, 259). Another part of the Littles' property is watered from the co-mingled waters of Minnie Creek and Castle Creek (T. 54). The plaintiff John Yardley owns lands on Minnie Creek down stream from the point where the

two streams converge (T. 65, Ex. 2). These lands are watered from the combined streams which at plaintiff's diversion is known as Minnie Creek (T. 65).

The right to the use of the waters of the two streams heretofore mentioned has been adjudicated by the District Court of the Sixth Judicial District of the State of Utah. The first of such decrees was known as the "Morse Decree" (T. 299, Ex. 8), which was entered in the year 1906 and provides as follows:

"XL
 "Castle or Minnie Creek
 "Garfield County
 "Martin Cutler, S. M. Anderson, William
 Greenhalgh, Josiah Hoyte, E. Englestead, James
 Little, jointly, all of the waters thereof."

The latest decree known as the "Cox Decree" (T. 300, Ex. 9) was entered the 30th day of November, 1936, by Judge LeRoy H. Cox, Case No. 843, in the District Court of Millard County, State of Utah, in the case entitled *Richlands Irrigation Company, a corporation, v. Westview Irrigation Company, a corporation*. The Decree at page 18 thereof reads as follows:

"Blanche Showalter, M. C. Swapp, James A. Little and John Yardley: All of the waters of Castle and Minnie or Little Creeks, and out of spring areas tributary to said creeks during the entire year."

The following is undisputed: That the right owned

by Josiah Hoyte mentioned in the "Morse Decree" was succeeded by Blanche Showalter mentioned in the "Cox Decree"; and that right is now owned by the defendant Duncan Findlay; that the Littles who are the present defendants are the successors to the right owned by James Little mentioned in the "Morse Decree" and James A. Little mentioned in the "Cox Decree"; that the Swapps are the successors to the rights owned by Martin Cutler and William Greenhalgh who are mentioned in the "Morse Decree"; and that rights owned by S. M. Anderson and E. Englestead as mentioned in the "Morse Decree" were succeeded to by John Yardley mentioned in the "Cox Decree" and are now owned by the plaintiff John Yardley (T. 5).

The plaintiff John Yardley is the down-stream user and since 1950 has been deprived of his share of the water of the two streams (T. 78, et. seq.). In 1956 he commenced an action against the defendants in which action the following relief was sought:

"WHEREFORE, plaintiff prays judgment against the defendants quieting title of plaintiff to the use of said waters, adjudging the plaintiff to be entitled to one-half of the flow of the waters of Minnie Creek and two-fifths of the flow of the waters of Castle Creek and enjoining the defendants from in any manner interfering with the rights of the plaintiff; that the Court by its judgment clarify and specify with specific verbiage the provisions of the Cox Decree mentioned in this complaint, and that the Court by its Decree make provision for the use of the waters on

turns or rotation, and that the court clarify, interpret and make certain the rights of the parties and the provisions of the Cox Decree aforesaid; that plaintiff have and recover his costs; that plaintiff have and recover judgment for damages in the sum of \$5,000 for his damages incurred herein; and that the Court grant such other and further relief as to the Court shall seem just.”

Following the filing of the complaint, considerable effort was made by the plaintiff to amicably settle the matter, but in 1957-58 the situation became so serious that he had to take some of his cattle off of his property because of lack of water (T. 95, 99). In 1957 because of being deprived of his water, he lost the feed for his cattle for approximately fifty days (T. 98). In 1958 because of the same difficulty, for seventy-five days he was unable to use his property (T. 100).

When he was first deprived of his water in the year 1949 or 1950 or perhaps 1951 efforts were made to work out a peaceful settlement of the problem. With the help of the State Engineer a program was worked out whereby the parties took the water on turns (T. 140-141, 147-149).

At the conclusion of the plaintiff's case the defendants moved to dismiss the plaintiff's complaint and agreed that their counterclaim should be dismissed if the motion were granted. The trial court granted the defendants' motion to dismiss and thereupon dismissed the plaintiff's complaint and defendants' counterclaim.

POINTS RELIED UPON

POINT NO. I

THE COURT ERRED IN GRANTING THE DEFENDANTS' MOTION TO DISMISS AT THE CONCLUSION OF THE PLAINTIFF'S CASE FOR THE FOLLOWING REASONS:

- (A) THE PROVISIONS OF THE "COX DECREE" GIVING ALL OF THE FLOW OF MINNIE AND CASTLE CREEKS TO THE PLAINTIFF AND THREE OTHER PERSONS ESTABLISHED A PRIMA FACIE RIGHT IN PLAINTIFF TO AT LEAST ONE-FOURTH OF THE TOTAL FLOW OF SAID STREAMS.
- (B) THE PROVISIONS OF THE "COX DECREE" SPECIFYING A WATER RIGHT TO THE PLAINTIFF IN MINNIE AND CASTLE CREEKS REQUIRED THE COURT TO PROCEED TO DEFINE AND CLARIFY THAT RIGHT IF THE SAME BE MORE OR LESS THAN ONE-FOURTH OF THE TOTAL FLOW OF THE STREAMS.
- (C) NO ENLARGEMENT OF DEFENDANTS' RIGHT CAN BE RECOGNIZED AFTER THE ENTRY OF THE "COX DECREE" IN NOVEMBER, 1936.

ARGUMENT

POINT NO. I

THE COURT ERRED IN GRANTING THE DEFENDANTS' MOTION TO DISMISS AT THE CONCLUSION OF THE PLAINTIFF'S CASE FOR THE FOLLOWING REASONS:

- (A) THE PROVISIONS OF THE "COX DECREE" GIVING ALL OF THE FLOW OF MINNIE AND CASTLE CREEKS TO THE PLAINTIFF AND THREE OTHER PERSONS ESTABLISHED A PRIMA FACIE RIGHT IN PLAINTIFF TO AT LEAST ONE-FOURTH OF THE TOTAL FLOW OF SAID STREAMS.

The latest known decree concerning Minnie Creek and Castle Creek in Garfield County, Utah, is the "Cox Decree" which was entered the 30th day of November, 1936, by Judge LeRoy H. Cox in the District Court of Millard County, State of Utah, in the case entitled *Richlands Irrigation Company, a corporation v. Westview Irrigation Company, a corporation*, case No. 843. The Decree at page 18 thereof reads as follows:

"Blanche Showalter, M. C. Swapp, James A. Little and John Yardley: all of the waters of Castle and Minnie or Little Creeks, and use of spring areas tributary to said creeks during the entire year."

The Decree was introduced and received in evidence (T. 240, 300, Ex. 9). It awards equally to the four persons named therein the combined waters of Castle and Minnie Creeks making each of said persons the owners of an undivided 1/4th interest therein.

The Decree is analogous to the situation where property is granted or conveyed to two or more individuals, in which event the presumption is that the property is owned equally by the grantees as tenants in common.

“... where a transfer or conveyance is shown to have been made to two or more individuals it is presumed to vest the subject matter thereof in them as tenants in common.” 86 C.J.S., Tenancy in Common, Sec. 11, p. 373.

“A deed of realty to partners individually, if unexplained, vests in them equal undivided interests as tenants in common;...” 68 C.J.S., Partnership, Sec. 72, p. 507. See also *Rinio v. Kester*, 41 P. (2d) 405, 407, (Mont. 1935) and *Sanguin v. Wallace*, 234 P. (2d) 394 (Okl. 1951).

It is presumed, from the absence of a contrary showing, that realty conveyed to two or more grantees is owned in co-tenancy. See *McIllwain v. Bills*, 242 P. (2d) 707, (Okl. 1952).

Section 78-1-5, Revised Statutes of Utah, 1933, annotated, which was in effect when the “Cox Decree” was entered, provides as follows:

“Grant to Two or More—Tenancy in Common Presumed.

“Every interest in real estate granted to two or more persons in their own right shall be a tenancy in common, unless expressly declared in the grant to be otherwise.”

It is therefore the contention of the plaintiff John Yardley that by introducing the “Cox Decree” in evidence, he has made out a prima facie case for an equal division of the two streams among the four persons named in the “Cox Decree” or their successors, to-wit:

Findlay, Swapp, Little and the plaintiff himself, John Yardley. At the conclusion of the plaintiff's case the burden of going forward to show that the rights of the parties named are something other than equal rested upon the defendants.

- (B) THE PROVISIONS OF THE "COX DECREE" SPECIFYING A WATER RIGHT TO THE PLAINTIFF IN MINNIE AND CASTLE CREEKS REQUIRED THE COURT TO PROCEED TO DEFINE AND CLARIFY THAT RIGHT IF THE SAME BE MORE OR LESS THAN ONE-FOURTH OF THE TOTAL FLOW OF THE STREAMS.

The "Cox Decree" adjudicating that four persons were the owners of all of the flow of two streams requires definition and determination of the particular rights among the four water users. Two of the users cannot and never have used the waters of both streams on their lands. There is a need to determine how much, therefore, of the flow of the one stream that they use can be taken by them and at what times.

There is a need to define the number of acres to be irrigated under the water right. There is a need to define the point or points of diversion of the various users. There is a need to define the time and the quantity of water which each user would be entitled to take from the various streams at any time. There is a need for this Court to determine for the benefit of the District Court on re-trial whether the time to be used in determining and fixing the rights of the parties would be the use

made of the waters in 1936 when the "Cox Decree" was entered or 1906 when the "Morse Decree" was entered. There is a need for the Court to define the point of measurement of the flows of the streams to determine how the total flow is to be measured and apportioned between the four parties concerned. There is a need to determine the rights of the parties during high water time and low water time.

Unless such definition is made, the plaintiff, at no time, can determine whether one party is taking more than his share of the water especially as the evidence clearly shows a practice that has developed in the last 2 or 3 years by the defendant Findlay in constructing a seires of dams, thereby diverting all of the flow of Castle Creek and irrigating a corrsponding increase of acreage.

In the prayer of his complaint, the plaintiff, among other things, requested:

"That the Court by its Judgment clarify and specify with specific verbiage the provisions of the Cox Decree mentioned in this complaint..."

To this extent the plaintiff's action is in the nature of one seeking a declaratory judgment, and such a declaratory action having for its objective the clarification of a judgment or decree is entirely proper. See Chapter 33 of Title 78, U.C.A. 1953, and 26 C.J.S., Declaratory Judgments, Sec. 43, p. 126.

The latter text authority states the following:

“It has been held that a court can entertain a declaratory action in order to determine the significance and effect of a judgment or decree, that a real and substantial controversy over the effect of a judgment presents a ground for relief under the declaratory judgment act, that a court will not, by virtue of the declaratory judgment act, advise the parties as to the meaning and effect of a decree until there arises an actual controversy which is at present justiciable, and that a declaratory action is maintainable for the purpose of construing a judgment where the parties do not know how to proceed thereunder or how the judgment affects them, or where difficult questions have risen.”

Therefore, if the above mentioned provisions of the “Cox Decree” do not mean, as they seem to provide, that each party has an equal share of the waters of the two streams as co-tenants, then in view of the dispute between the parties as to their right, the trial court should have clarified the meaning of the “Cox Decree.” The Decree having been introduced in evidence, the presumption was in favor of the plaintiff as already pointed out in Point No. 1. If any additional evidence were needed, it was incumbent on the defendants to carry the burden of going forward.

(C) NO ENLARGEMENT OF DEFENDANTS’ RIGHT CAN BE RECOGNIZED AFTER THE ENTRY OF THE “COX DECREE” IN NOVEMBER, 1936.

With respect to the water from the two streams that

in 1936 was being beneficially appropriated, the court's attention is invited to the transcript of the trial proceedings. In this connection the plaintiff is, of course, entitled to have the evidence considered in a light most favorable to him. In appraising the dismissal granted against him, the plaintiff is entitled to have the Supreme Court review all of the evidence together with every logical inference which may fairly be drawn therefrom in the light most favorable to him. *Martin v. Stevens*, 121 Utah 484, 243 P. (2d) 747. With respect to how the water was being appropriated in 1936, John Yardley testified as follows:

T. 51

“Q. How many acres, if you know, in or about the year 1936 are being irrigated on the Showalter [Findlay] property?

A. Well, I don't think there was over about 40 acres there.”

T. 51-52

“Q. Now were you familiar with what is now known as the Swapp property?

A. Yes, I'm familiar with the Swapp property.

* * *

Q. Do you have any judgment as to the number of acres, if any, that were being irrigated by Mr. Swapp?

A. I don't think he was irrigating over fifty or sixty acres. I doubt whether there was that much he was irrigating.

Q. What we want is your best judgment. Fifty or sixty, is that your best judgment?

A. Yes, sir."

T. 53-54

"Q. Now as to the Little Ranch, are you familiar with the Little property?

A. Yes, pretty familiar.

Q. And calling your attention to the year 1936, can you describe for us the lands that the Littles were irrigating from Castle Creek?

A. Well, there was a little meadow that they irrigated right on the east of where the lane goes up now, on the north, on the north, and he and the Littles and Swapp were having trouble over it, sometimes Swapp would have it and sometimes Little would have that water on that ditch and then down right by the road there, they had another ditch that took out and went around the road there and watered a little corner of meadow there and then ran back into the ditch that comes out of the spring on Minnie Creek.

Q. Now was there any irrigation by the Littles in the vicinity of their home in 1936?

A. No.

Q. Out of Castle Creek?

A. No.

Q. How many acres of land were being irrigated by the Littles out of Castle Creek in the year, in or about the year 1936?

A. Well, they would intermingle the two streams together and all —

Q. I want the lands first that were irrigated only from Castle Creek?

A. Well, there maybe would be ten or fifteen acres in Castle Creek up above the road now and two or three acres in a little corner right there by the road, above the Minnie Creek.

* * *

Q. Now I want to direct your attention to the Little property on Minnie Creek, can you tell us if you know whether they were irrigating any lands from Minnie Creek or from the combined flow of Minnie and Castle Creek?

A. They would have to mingle those two streams together when they used that water out of Castle Creek. It would have to go into the Minnie Creek ditch.

Q. Now what lands were being irrigated?

A. The meadow lands on the west side of the Minnie Creek.

Q. Do you know whether in or about the years 1936 the Littles were irrigating any land to the east of Minnie Creek?

A. They were irrigating a little along the east side thereon Little Creek.

Q. Do you have a judgment as to the total number of acres of land that the Littles were irrigating in or about the year 1936 from the combined Minnie Creek and Castle Creek?

A. Well, I've never measured that and I wouldn't actually know. It ain't too big of a strip. I would think maybe fifty acres down through there."

T. 54-55

“Q. Now are you familiar with the practice, if any, that Mr. Swapp was making of the waters of Minnie Creek, solely of Minnie Creek?

A. Well, I never ever remember of Swapp using any water on Minnie Creek only just what come out of the south end out of that big wash along the road there. It came down right down through his field there.

Q. Now do you have any judgment as to whether Mr. Swapp was irrigating any land out of Minnie Creek in or about the year 1936?

A. Well, he could have been irrigating a little right under the ditches of Little, a little onto those ditches, he could have been irrigating a little.

Q. What would be the area that he would have been irrigating a little?

A. Well, it would all be under the Little ditch. They were the only ones who had the ditch there.

Q. That wouldn't help us. Do you have any judgment, is what I mean?

A. I don't think over four or five acres of land.”

The plaintiff, John Yardley, testified that his acreage had been acquired from Sawyer and Anderson (T. 56). When asked how many acres he irrigated in 1936 on the Sawyer and Anderson property, he stated the same to be 125 acres (T. 65). In 1936 through 1949 he testified that he irrigated 140 acres (T. 65).

Mr. Yardley further testified that Bowers, who was

the predecessor of Showalter (named in the Cox Decree) who was the predecessor of the defendant Findlay irrigated about 40 acres from the waters of Castle Creek (T. 73).

Of the combined waters of Castle and Minnie Creeks used by John Yardley about 60 per cent comes from Castle Creek and 40 per cent from Minnie Creek (T. 86). For the acreage watered by the Littles from the combined waters of the two streams the ratio would be the same.

There is no doubt as to Mr. Yardley's familiarity with the area in question. He is now 70 years of age, having been born in Beaver (T. 44). He came to the Panguitch area in 1907 (T. 44). Except for two years (spring of 1916 to the fall of 1918) he has been in the vicinity of Castle and Minnie Creeks in each and every summer from 1909 until the present time (T. 46).

In tabular form the acreage irrigated and source of the water appropriated by the persons named in the "Cox Decree" in 1936 was as follows:

<i>Name</i>	<i>Source</i>	<i>Acreage</i>
Showalter (Findlay)	Castle Creek	40 acres (T. 51)
Swapp	Castle Creek	50-60 acres (T. 52)
Swapp	Minnie Creek	5 acres (T. 55)
Little	Castle Creek	18 acres (T. 53)
Little	Castle and Minnie Creeks	50 acres (T. 54)
Total Defendants' Acreage		173 acres
Yardley	Minnie and Castle Creeks	125 acres (T. 65)

Without a proper filing, there could be no extension of these rights since 1936. Since 1903 no one in the State of Utah could effect an appropriation of public water without following the perscribed statutory provisions requiring the filing of an application with the State Engineer. See *Deseret Livestock Co. v. Hooppiana*, 66 Utah 25, 239 P. 479, 1925; *Jensen v. Birch Creek Ranch*, 76 Utah 356, 289 P. 1097, 1930; *Wrathall v. Johnson*, 86 Utah 50, 40 P. (2d) 755, 1935; *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P. (2d) 634, 1943; *Duchesne County v. Humpherys*, 106 Utah 332, 148 P. (2d) 338, 1944; *Smith v. Sanders*, 189 P. (2d) 701, 1948.

Nor could any of the parties since 1939 expand their rights by adverse possession. See *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P. (2d) 634, 1943.

None of the parties claim to have made any filing on water since the entry of the "Cox Decree" nor has any claim been made to the expansion of the rights then vested by adverse possession (T. 233-234).

In spite of the foregoing well established principle, however, the picture since 1936 has materially changed. The evidence shows that defendants are now watering acreage as follows:

<i>Name</i>	<i>Source</i>	<i>Acreage</i>
Findlay (Showalter)	Castle Creek	160 acres (T. 300)
Swapp	Castle Creek	80 acres (T. 302)
Swapp	Minnie Creek	40 acres (T. 302)
Little	Castle Creek	70 acres (T. 183)
Little	Castle and Minnie Creeks	120 acres (T. 196)
Total Defendants'		
Acreage		470 acres

A comparison of the two foregoing tables shows what the defendants have done since 1936 by way of increasing their irrigated acreage — all at the expense of John Yardley's rights.

Ever since the defendant Findlay succeeded to the Showalter property, there has been trouble. From that time until the present there has been continual expansion and development by the defendants and particularly on the part of the defendant Findlay resulting in their appropriation of more water until Yardley has barely been able to put water on his property. In 1951, Findlay was observed by Yardley to have made a lot of new ditches (T. 75). At the time of the trial John Yardley testified that a bulldozer had constructed a ditch on the southeast side of Castle Creek running almost down from Findlay's property to Swapp's fence — "It starts right at the bottom end of the reservoir and goes right around the edge of the valley, clear down around and then comes back to the main channel and then it goes back on around to the southeast and then back kind of to the north again." (T. 76) It is quite a big ditch and would carry from 5 to 6 second feet (T. 77). There are also new

ditches that have been made since 1951 on the southeast side of Castle Creek (T. 77). In 1950 and 1951 there was a substantial change in the amount of water available to Yardley that caused Yardley to go up on Castle Creek (T. 78). The upper users were taking all of the water (T. 78). At this time the water commissioner for the State of Utah entered the picture and the water was placed on turns (T. 82, 149). Starting with the year 1952, Findlay, Swapp and Little had used practically all of the water, and they irrigated other lands that they hadn't irrigated before (T. 90). Findlay irrigated a lot more land than Bowers or Showalter did (T. 91). Findlay has placed four dams across the channel of Castle Creek (T. 91). The first time Yardley went down through the Swapp property when Greenhalgh had the property, there was quite a straight channel there, but if you were to go down there today, there isn't much of a channel (T. 92). Swapp has dammed off the channel there with a bulldozer. He has a dam there (T. 92). Yardley estimated that the dam is 5 or 6 feet high and about a bulldozer wide (T. 92). Kay Little said that since 1946 Swapp has watered more intensively — used more water on the same land (T. 175). With respect to the Swapp property, Little counts three new ditches (T. 61). Findlay admits that he has placed dams across the Castle Creek Channel on his property. In 1956 and 1957 he put in the lowest dam — it has 13,000 yards of dirt in it and is about 300 feet in length. At the highest point it is 13 or 14 feet. It inundates perhaps as many as 10 acres (T. 285). He admits that he has constructed three other dams (T. 286).

The third dam has about 4,000 yards of dirt in it, that is the dam itself, and is about 13 or 14 feet in height (T. 286). When asked as to how many acres he had under cultivation that were irrigated from Castle Creek, Findlay stated that on his deposition he indicated the amount to be 130 acres. At the trial he boastfully admitted, "... after looking at it yesterday I decided I was small, it is more than that." It was then 160 acres (T. 300).

The water grabbing on the part of the upper users has had a disastrous effect on John Yardley. The lack of water has effected the poundage of his cattle adversely to the extent of 50 to 150 pounds per head (T. 93). In 1958 he had to take some of the cattle off his property and likewise in 1957 (T. 94). Ordinarily the 140 acres should carry from 200 to 250 cattle (T. 95). In 1957 because of lack of feed resulting from not being able to get his water, he had to remove his cattle from his land for a period of 50 to 60 days. (T. 95-96, 98). In 1958 he found the same difficulty. Not being able to get his water destroyed his feed. He had to remove 200 head of cattle on June 1st of that year and was not able to use his land for 75 days (T. 100).

SUMMARY

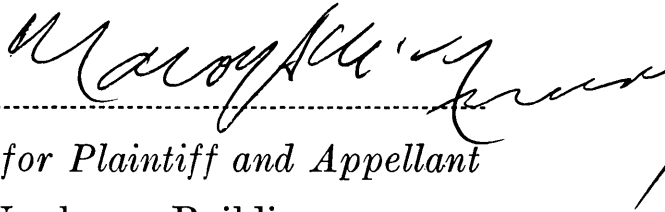
For the reasons set forth above, the Motion to Dismiss should be set aside and the Trial Court ordered to

proceed with the trial of the case in accordance with instructions from this court consistent with the foregoing.

Respectfully submitted,

McKAY AND BURTON

By

A handwritten signature in cursive script, appearing to read "Mary McKay", written over a horizontal dotted line.

Attorneys for Plaintiff and Appellant

720 Newhouse Building

Salt Lake City, Utah