1970

Cache County Drainage District No. 5, A Quasi Corporation of the State of Utah v. W. R. Westover And Myrtha Westover, His Wife; Allen G. Wheeler And Delores G. Wheeler, His Wife; Soichi Iwomoto And Jane Doe Iwomoto; His Wife; Mi Chi Iwomoto And Jane Doe L\Vomoto, His Wife; And Iriel Iwomoto And Jane Doe Iwomoto : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

CACHE COUNTY DRAINAGE DISTRICT No. 5 a quasi corporation of the State of Utah,

Plaintiff and Respondent,

vs.

W. R. WESTOVER and MYRTHA WESTOVER, his wife; ALLEN G. WHEELER and DELORES G. WHEELER, his wife; SOICHI IWOMOTO and JANE DOE IWOMOTO, his wife; MICHI IWOMOTO and JANE DOE IWMOTO, his wife; and IRIEL IWOMOTO and JANE DOE IWOMOTO, his wife,

Defendants and Appellants.

Case No. 12151

RESPONDENT'S BRIEF

Walter G. Mann, of
MANN & HADFIELD
35 First Security Bank Building
Brigham City, Utah
Attorneys for Plaintiff-Respondent

L. Brent Hoggan, of
OLSON, HOGGAN AND SORENSON,
56 West Center
Logan, Utah
Attorneys for Defendants-Appellants.

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RESPONDENT'S BRIEF

STATEMENT OF NATURE OF CASE

Respondent adopts appellants' statement under this heading.

DISPOSITION IN LOWER COURT

Respondent adopts the statement made by appellants under this heading.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the trial court on its second count, sustained.

STATEMENT OF FACTS

The plaintiff is a quasi municipal corporation having been formed by a proclamation of the Cache County Commissioners in 1922 (T20L-26).

The Drainage District created by said proclamation included the N.E. ¼ of Section 12. T. 14. N.R.1.W.S. L.M., now owned by the appellants but for some unknown reason, that cannot now be discovered, there has never been an assessment for drainage purposes levied against said northeast quarter.

The balance of the land of the Drainage District lies to the north and east of said N.E. ¼. County Roads run north and south and east and west at the northeast corner of the northeast quarter. Also a large barrow pit on the north side of the northeast quarter and south side of the County Road was in existence in 1922, the year the district was organized, and the Drainage District used this barrow pit for one of its drains and it

carried the drainage water westward some mile or two to the Bear River.

This barrow pit did not function too efficiently (T33) and in wet years water would stand on the ground until June (T.28).

In 1945, Owen Rawlins, who owned property west of the northeast quarter of Section 12, started a drain from the brow of Bear River eastward through his property (T.87-90). Others to the east desired to hook on. They held a meeting, called themselves the Third Ward Drainage Company and extended the drain eastward and then northward through or near the middle of the northeast quarter of Section 12 towards the barrow pit drain of the respondent herein. (See plaintiff's exhibits 15 and 16 - red line representing drain). A Mr. Bergeson, who seemed to take charge of the Third Ward Drainage Company, collected certain monies from the people in this association (T91-L22) and then proceeded to try to collect from others. One was Harold Wood (Tr. 91-L25, whose property was immediately to the west of the northeast quarter of Section 12, who desired to draw the water from the barrow pit in front of his property. Mr. Bergeson also contacted Loraine Karren, who was the president of respondent drainage district in 1945 (T. 36-L37) and asked a payment of $500.00 at the time when the Third Ward Drainage District tapped the barrow pit in the County Road, which was refused. He admitted to Mr. Karren (T. 37-L29) that the State had paid them $500.00 to tap the

barrow pit also. Mr. Halgren, a witnes for the respondent, on cross examination, (T. 66 line 13) said that Bergeson told him in 1969 that the State paid said amount to take the water from the highway through this drain to the river. Russell H. Peterson, a witness for the respondent who lives on the north side of the County Road on the lands to the north of the northeast quarter of Section 12, testified Mr. Bergeson in 1946 (T.155 line 17) had asked him to contact two of his neighbors for donations for the construction of the drain, but they each and all refused.

The witnesses for the appellant admitted that right from the beginning of the use of the drain it has been (T. 138-line 15): "Just washing, making it wider."

Iriel Iwomoto, a defendant, questioned on cross-examination (T. 139-line 1):

> "Q. And these people then run it against your will during all of that time, making your ditches wider, and you never stopped them?
>
> A. Well, as long as use is use, it wasn't hurting us.
>
> Q. I thought you said it was making your ditch wider and you didn't like that.
>
> A. Yeah, but we didn't stop them.
>
> Q. That's what I say. You didn't stop them."
>
> A. That's right."

Mr. Bergeson, the president of the Third Ward Drainage group, who was one of the chief witnesses

for the appellant and who collected the money and paid the bills, talked about erosion (T. 111-line 21 to T. 112 - line 5):

> "Q. Had it eroded considerably when you put the pipe in?
>
> A. Not a tremendous amount. It had started, and of course when it once starts it can go fast.
>
> Q. Well, then it would start from the time you you started the flow of water on it, would it, if it was erosion, each bit would have its effect?
>
> A. I suppose so, naturally.
>
> Q. So that from the very beginning of the drain down here there was a wearing away or erosion right from the very beginning?
>
> A. That's a natural condition.
>
> Q. Sure. So that the water that come off from this highway and from this drainage district up above right from day one began to have its effect upon the use of that ditch?
>
> A. Right."

In 1969 during a wet spring the group known as the Third Ward Drainage Company stopped the water at their intake on the County Road and inside of the Westover property. Machines were used to fill the drain ditch with dirt (T45) which stopped all drainage from the barrow pit and water stood upon the surface of the ground (see picture exhibits 3 to 9) water logging the land and flooding basements. The water had been running continuously through this drain from the barrow pit from 1945 to the spring of 1969.

The barrow pit along the road had not been maintained as a drainage ditch since 1945. There was also testimony that the State of Utah in 1961 had made some grade changes (T.68) which caused water from the west of the entrance to the Third Ward Drainage Company ditch and barrow pit to flow from the west towards it. This water from the west did not come from respondent's drainage.

The water that stood on the ground in the spring of 1969 after it had flooded to a sufficient depth to go to the west was in places two to three feet deep (T.72) but prior to the stopping of the drain by the Third Ward Drainage Company was flowing freely through it (T.72).

POINTS RELIED ON

POINT I

RESPONDENT'S USE OF APPELLANTS' DRAINAGE DITCH WAS NOT PERMISSIVE. CAUSED DAMAGE TO APPELLANTS FROM THE VERY BEGINNING OF USE. SAID USE WAS ADVERSE AND RESPONDENT THEREFORE ACQUIRED A PRESCRIPTIVE RIGHT TO THE USE THEREOF.

POINT II

THE TRIER OF THE FACTS WAS THE COURT. IF THERE IS TESTIMONY IN THE

RECORD TO SUPPORT THE COURT'S DECISION, IT SHOULD NOT BE DISTURBED ON APPEAL.

ARGUMENT

POINT I

RESPONDENT'S USE OF APPELLANTS' DRAINAGE DITCH WAS NOT PERMISSIVE, CAUSED DAMAGE TO APPELLANTS FROM THE VERY BEGINNING OF USE. SAID USE WAS ADVERSE AND RESPONDENT THEREFORE ACQUIRED A PRESCRIPTIVE RIGHT TO THE USE THEREOF.

The court found, in its Memorandum Decision (R. 28-29):

> "This court is in agreement with the defendants' contention as to what the law is. However, further the defendants contend that the evidence is uncontroverted that the way in question was open by defendants for their own use and at their expense and that the use of the way by the plaintiff neither interferred with nor caused damage to the defendant. This court holds that there was damage and testimony from the defendant and the other witnesses of the defendants who are property owners who share in the use of the drainage ditch and who initiated its construction was that there was damage by way of erosion over the past years, especially on the bottom end of the ditch where it goes over a rather steep incline into the Bear River. Further

that it was necessary for repair of the ditch, and further evidence that the reason the ditch was shut off to the plaintiff was that the plaintiff was asked to contribute expense to maintain and repair the ditch because of the erosion caused by the drainage. That is what apparently initiated this whole action."

In the Findings of Fact of the court entered on the 20th day of May, 1970, the court found (R. 54):

> "4. That the use of said drain by the plaintiff after the construction of said drain has continuously, from the beginning of said use, caused damage by way of erosion over and above the erosion created by the owners thereof or their predecessors in interest and others for their own use. That said use by the plaintiff was not permissive and said use by plaintiff did interfere with and cause damage to the defendants right of way, during all of said time."

The chief witness of the appellant who was not a party to the law suit but who nevertheless sat at the council table of the appellants (T. 105) during all of the proceedings, Mr. Douglas A. Bergeson, said on cross-examination (T. 111-line 13):

> "Q. Now you said you put some pipe on this grass down here on this outlet on the river. When did you put that pipe in?
>
> A. Nineteen fifty-nine. Spring of 1959.
>
> Q. And did this run all the time then until 1959 before you had to put pipe in?
>
> A. It had, that's right.

Q. Had it eroded considerably when you put the pipe in?

A. Not a tremendous amount. It had started, and of course when it once starts it can go fast.

Q. Well ,then it would start from the time you started the flow of water on it, would it, if it was erosion, each bit would have its effect?

A. I suppose so, naturally.

Q. So that from the very beginning of the drain down here there was a wearing away or erosion right from the very beginning.

A. That's a natural condition."

A Mr. Iriel Iwomoto, one of the defendants and appellants on cross-examination (T. 138-line 11) said:

"Q. Has this drain, as it comes through your property, done you any harm?

A. It hasn't done any good.

Q. Well, has it done you any harm?

A. Just washing, making it wider.

Q. Has it been making it wider ever since it was first used from '45?

A. I'd imagine.

Q. So that right from the very beginning that these people started to use it, there began to be a wear and detriment to you people from the very beginning of the time they started to use it?

A. Well, that I wouldn't know.

Q. Well, you say it was making it wider all the time.

A. It does. This big flush run-off.

Q. And you didn't like that?

A. Well—

Q. Did you ever go up and stop it during any of that twenty-four years except in 1969?

A. No.

Q. And these people then run it against your will during all of that time, making your ditches wider, and you never stopped them?

A. Well, as long as use is use, it wasn't hurting us.

Q. I thought you said it was making your ditch wider and you didn't like that.

A. Yeah, but we didn't stop them.

Q. That's what I say. You didn't stop them.

A. That's right."

There is nothing whatsoever in the record showing where consent was ever given to the respondent to run its water through the drain but on the contrary right from the beginning a demand was made on the officers of the respondent corporation for a payment for the privilege (T. 36-37).

The court made a determination after hearing the matter that there was damage caused to the appellants from the use made by the respondent right from the very beginning of its use and the record amply supports him. The record is silent as to any consent having been given by appellants to respondent. The appellant on the other

hand builds his case on appeal on his conclusions shown at the bottom of Page 9 and the top of Page 10 of his brief wherein he concludes:

> "The evidence is uncontroverted that the way in question was opened by appellants and their predecessors in interest for their own use at their own expense, and that the use of the way by the respondent *neither interferred with nor caused damage to the appellants*".

He says no damage in the face of the judges memorandum of decision the last part of which says:

> " . . . and further evidence that the reason the ditch was shut off to the plaintiff was that the plaintiff was asked to contribute expense to maintain and repair the ditch because of the erosion caused by the drainage. This is what apparently initiated this whole thing."

Appellant even goes further in his brief on Page 10 and says:

> "Respondent's use of the drain caused no damage thereto. (T.139 lns. 1-4)"

This reference he makes is just a part of the full reference that the respondent has printed fully above starting with T. 138 Line 11. I cannot see how apellant can reach such a conclusion. The court didn't.

Consequently the appellant having built his entire case on a false premise to-wit: That the respondents use of the drain "caused no damage" and having furnished cases which he says are exceptions to the rule, which cases are also predicated upon the theory that the use

"caused no damage" must fail. He cannot get out of the general application of the law without first having a determination that the use made by this respondent "caused no damage." The court found just the opposite, that the appellants were damaged right from the very beginning of respondents use.

The requirements to create a prescriptive easement are set out by many authorities. In the authoritative treatise by Thompson on Real Property the following was stated: Vol. 2, 1961 Replacement, Section 335:

> "To establish an easement by prescription there must be an open, visible, continued and uninterrupetd use or enjoyment thereof under claim of right, adverse to and with the knowledge of the owner of the property. However, the owner of the servient land is charged with knowledge of user and acquiescence in it where the use is open, adverse, notorious, peasable and uninterrupted. A prescriptive easement does not rest upon consent, but upon use alone and in some states without the aid of any statute. (P.151) . . . To establish a right by prescription, it is necessary to prove three things: (1) The continued and uninterrupted use or enjoyment of the right for a full period of twenty years or whatever period of time is stated by statute; (2) The identity of the thing enjoyed; (3) That the use or enjoyment was adverse, or under claim of right (P.154) . . . The ordinary rule is that, where there has been an unmolested, open and continuous use of a way for twenty years or more with the knowledge and acquiescence of the owner of the servient estate, *the use will be presumed to have been adverse and under a claim of*

> *right,* and sufficient to create a title by prescription, unless contradicted or explained. (P.155). (underlining added)

The Utah Supreme Court has recently reaffirmed the same law for our State. In Richins vs. Struhs 17 Utah 2d, 356, 412 P2d 314 (1966), the court stated the requirements for obtaining a prescriptive easement:

> " . . . that the use meets the requirements of being open, notorious, continuous and adverse for more than twenty years and therefore has established a prescriptive right to continue to so use it."

It appears that the Utah requirements are the same as those listed in Thompson. The case of Richins vs. Struhs involved adjoining land owners who shared a common roadway and bridge over a creek to their summer homes. Their predecessors in interest were brothers-in-law and had jointly constructed the bridge and roadway, and the roadway, and the road and bridge had been so used for over 40 years. In 1960 the defendants purchased one of the lots and erected a fence blocking the others use of the driveway. The District Court ruled for the defendant, finding that the original use was permissive and created no prescriptive easement. However, the Supreme Court reversed that decision stating, on page 358 as follows:

> "The trial court appears to have been of the opinion that because the Whipples and the Joneses were relatives, and that they used the driveway harmoniously and without conflict, that the use was permissive and that therefore

no prescriptive right to use the driveway arose. The difficulty with this view is that it does not give effect to fundamental principles applicable to prescriptive rights. The origin and purpose of their recognition arises out of the general policy of the law of assuring the peace and good order of society by leaving a long established status quo at rest rather than disturbing it. In order to serve this purpose, when a claimant has shown that such a use has existed peaceably and without interference for the prescriptive period of 20 years, the law presumes that the use is adverse to the owner, and that it had a legitimate origin . . .

We think it pertinent to here acknowledge that in this, as in most situations of controversy, there is another side of the coin to be kept in mind and that we do not lose sight of certain propositions advocated by the plaintiff in regard to a permissive use where that in fact exists. The presumption above mentioned that a use is adverse which arises from its continuance for a long period of time is not absolute. It would not preclude the owner of the servient estate (Defendants herein) from proving that the use was by permission."

After noting that the presumption that the use was adverse can be overcome the court concluded that the defendant did not overcome that presumption, and held that there was a prescriptive easement for the plaintiff.

The facts of the case are remarkably parallel to those before the court in this instance. It would be difficult to design a more analogous situation. The evidence is unrebutted that plaintiff has used the canal which

passes through defendant's property for over twenty years; that no payment was ever made by plaintiff for such use; that no consent nor permission was ever given by defendant for the use by plaintiff; and that the use was adverse to the defendants continuously during the entire twenty four year period, constantly eroding and washing the lands and ditch banks of the defendants. The fact that there has been no open hostility between the parties over the years does not give rise to a presumption of a permissive use. As the court said in Richins vs. Struhs at page 359:

> "Even though it is sometimes referred to as a hostile use, it is not necessary that there be any open hostility manifest in the use of force or any policy of the law to encourage violence by rewarding it; and it generally does not make the protection or the acquisition of rights dependent upon it. The fact that the parties (predecessors) were friendly, or even cordial with each other, as they appear to have been, does not prevent a prescriptive right from coming into being."

The cases of Zollinger vs. Frank, 110 Utah 514, 175 P2d 174, and Lunt vs. Kitchens, 123 Utah 488, 260 P2d 535, are in complete harmony with the above 1966 statement of the Utah Supreme Court. In the 1953 decision of Lunt vs. Kitchens, the court states on page 537:

> "The question here involved is whether there is sufficient evidence of adverse user for a period of twenty years to sustain the trial court's finding of a prescriptive easement."

The court then favorably explained the history of the legal fiction of a lost grant theory, then defined the difference between "consent" and "acquiescence" referring to their earlier statement in Zollinger vs. Frank.

> "The distinction, we said, lies in whether the use was "against" the owner or "under" the owner, regardless of whether the use is described as peaceable, hostile, adverse to or as acquiesced in by the servient owner. Because of the presumption that the use of another's land is adverse to him, *the owner has the burden to show that the use was under his permission as distinguished from against it.* Cache Valley Banking Company vs. Cache County Poultry Growers Association . . . . " (underlining added)

The court then found that on the facts of that particular case there was no adverse use during the 20 year period and therefore no prescriptive easment arose. The court expressly concluded:

> "The use by the Kitchenses family added no burden to the driveway; they did not attempt to widen it, nor to interfere with the use by the Weidners."

That rule of law is still entirely valid and upon the facts of the instant case that law clearly requires a finding of a prescriptive easement for the plaintiff. The use of the canal by plaintiff over the years *did* widen the ditch and also eroded the land of the defendants. Defendants rely entirely upon their arguments that where a property owner opens the way for use of his own premises and another uses it without interferring with the

landowners use or causing damage, the presumption is that use was permissive. Plaintiff does not dispute that proposition of law. But the facts of this case do not allow such a finding—it is undisputed that defendants dug the drainage ditch a substantial distance for the benefit of the State of Utah and not for their own use or purpose and then requested plaintiff to also pay for using it. When asked to pay, Plaintiff and it's individual members all refused to comply and have been using the ditch adversely from that time forward.

The decision in Zollinger vs. Frank 110 U514, 175 P2d 714 in 1946 is directly in line with the cases already cited. There the plaintiff claimed a right of way by prescription across the north end of the defendants property for the purpose of traveling with equipment and vehicles. The plaintiff filed the action to restrain defendant from interferring with its alleged right of way. A lower court found that the plaintiff did have the claimed right of way by prescriptive easement and the Supreme Court affirmed. The first issue to which the court addressed itself was whether or not the use was adverse to the defendants' interest. The court there determined that in order to acquire a prescriptive easement the use must be "against" the owner as distinguished from "under" the owner. In finding that a prescriptive easement had been created, the court stated the rule more recently restated in Richins vs. Struhs:

> "The prevailing rule is that where a claimant has shown an open visible, continuous and unmolested use of land for the period of time suf-

> ficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of an easement by prescription, *has the burden of rebutting this presumption by showing that the use was permitted.* . . . We think the better rule is described as the prevailing rule in the above quotation." (underlining added)

The court next dealt with the issue of whether or not a conveyance of the servient estate during the prescriptive period, without mention of the user of the roadway, interrupted the running of the prescriptive period. The court, on page 717, cited numerous cases and authorities and concluded:

> "The conveyance of the servient estate in and of itself during the prescriptive period does not interrupt the running of that time. However, the change of ownership of the servient estate during the prescriptive period may become important in determining whether the servient estate owner knew or should have known during the entire prescriptiveperiod that the claimant was using the claimed right of way."

The court there found that the owner was on notice by the continued use by the plaintiff just as in our case where the subsequent purchasers of the land, the named defendants, must be charged with notice that the plaintiff's water was flowing through the drainage ditch eroding their lands at the time they acquired their lands and for many years since.

There is no evidence of express or even implied con-

sent given to respondent and the burden is entirely upon appellants to show that permission was given. There was no evidence presented at the trial to show permission was ever given. On the other hand substantial and multiplicitous evidence was presented which showed an original lack of permission and continuous adverse use which use caused damage.

POINT II

THE TRIER OF THE FACTS WAS THE COURT. IF THERE IS TESTIMONY IN THE RECORD TO SUPPORT THE COURT'S DECISION, IT SHOULD NOT BE DISTURBED ON APPEAL.

The court, after listening to the testimony and observing the witnesses, found that the appellants ditch was damaged from the use made by the respondent. It also found that the damage to the ditch commenced from the very beginning of the use. It also concluded that the respondents had met the requirements of obtaining a right or easement by prescription.

This court in substance held in the matter of Newton vs. State Road Commission, 463 P2d, 565, 23 Utah 2d 350, where there has been a full trial of the issues and court has made findings and entered judgment thereon, Supreme Court will review the evidence and reasonable inferrences that may fairly be drawn therefrom in light most favorable to the findings and judgment. See Mem-

mott vs. U. S. Fuel Co., 22 Utah 2d 356, 453 P2d 155; Smith vs. Gallogos, 16 Utah 2d 344, 400 P2D 570.

CONCLUSION

The appellant having based his appeal on the theory that the use made by respondents in appellants drainage ditch *was a use that did not interfere with the landowners use or cause him damage.* The trier of the facts having found other wise from the evidence presented, appellant must fail in his appeal. He cannot from the evidence make his case come within the exceptions set out in the cases cited by him. Respondent sincerely requests this court to sustain the decision of the lower court.

Respectfully submitted,

Walter G. Mann, of
MANN & HADFIELD
35 First Security Bank Building
Brigham City, Utah
Attorneys for Plaintiff-Respondent