SUPREME COURT OF THE UNITED STATES.

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No. 303, - October Term, 1913.

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| The San Joaquin and Kings River Canal and Irrigation Company, Incorporated, Appellant<br><br>vs.<br>The County of Stanislaus, in the State of California, et al. | Appeal from the Circuit Court of the United States for the Northern District of California. |

(April 27, 1914.)

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill to restrain the enforcement of orders passed by the Board of Supervisors of the three defendant Counties, Stanislaus, Fresno and Merced, establishing water rates to be charged by the plaintiff, the appellant; the ground of the bill being that the orders deprive the plaintiff of its property without due proceeds of the law. By a statute of March 12, 1885, the Boards are authorized to fix these rates for their several counties, but so that the returns to the parties furnishing the water shall be not less than six per cent upon the value of the 'canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water.' The rates when fixed are binding for one year and until established anew or abrogated. The bill concerns rates fixed in 1907, and the question before the Court has been narrowed to a single issue. If the plaintiff is entitled to six percent upon its tangible property alone it is agreed that the orders must stand. But if the plaintiff has water rights that are to be taken into account, the rates fixed will fall short of giving it what it is entitled to and must be set aside. The Circuit Court dismissed the bill 191 Fed. Rep. 875, and on this appeal figures are immaterial, the only question being whether the principle adopted is right.

It was suggested to be sure at the argument that it does not appear that the Plaintiff offered any evidence as to water rights at the hearing before the Supervisors, and therefore that it ought not to be allowed to complain now that nothing was allowed for them. But this evidently is an afterthought. In general, a party may wait until a law is passed or regulation is made and then insist upon his Constitutional rights. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 227, 229. This we understood to be the view of the California Courts as to these very boards. Spring Valley Water Works v. San Francisco, 82 Cal. 286, 315. San Diego Water Co., v. San Diego, 118 Cal. 558, 564. Moreover as the defendants contend that the plaintiff is entitled to no compensation for water rights, to offer evidence would have been idle form.

It is not disputed that the plaintiff has a right as against riparian proprietors to withdraw the water that it distributes through its canals. Whether the right was paid for, as the plaintiff says, or not, it has been confirmed by prescription and is now beyond attack. It is not disputed either that if the plaintiff were the owner of riparian lands to which its water was distributed it would have a property in the water that could not be taken without compensation. But it is said that as the plaintiff appropriates this water to distribution and sale it thereby dedicates it to public use under California law and so loses its private right in the same. It appears to us that when the cases cited for this proposition are pressed to the conclusion reached in the present case they are misapplied. No doubt it is true that such an appropriation and use of the water entitled those within reach of it to demand use of a reasonable share on payment. It well may be true that if the waters were taken for a superior use by eminent domain those whose lands were irrigated would be compensated for the loss. But even if the rate paid is not to be determined as upon a purchase of water from the plaintiff, still, at the lowest, the plaintiff has the sole right to furnish this water, the owner of the irrigated lands cannot get it except through the plaintiff's help,

and it would be unjust not to take that fact into account in fixing the rates. We are not called upon to decide what the rate shall be, or even the principle by which it shall be measured. But it is proper to add a few words.

The declaration in the Constitution of 1879 that water appropriated for sale is appropriated to a public use must be taken according to its subject matter. The use is not by the public at large, like that of the ocean for sailing, but by certain individuals for their private benefit respectively. Thayer v. California Development Co., 164 Cal. 117, 128. Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 161. The declaration therefore does not necessarily mean more than that the few within reach of the supply may demand it for a reasonable price. The roadbed of a railroad is devoted to a public use in a stricter sense, yet the title of the railroad remains, and the use through it may be demanded, must be paid for. In this case it is said that a part of the water was appropriated before the Constitution went into effect, and that a suit is now pending to condemn more as against a riparian proprietor, for which of course the plaintiff must pay. It seems unreasonable to suppose that the Constitution meant that if a party instead of using the water on his own land, as he may, sees fit to distribute it to others he loses the rights that he has bought or lawfully acquired. Recurring to the fact that in every instance only a few specified individuals get the right to a supply, and that it clearly appears from the latest statement of the Supreme Court of California, Palmer v. Railroad Commission, January 20, 1914, that the water when appropriated is private property, it is unreasonable to suppose that the constitutional declaration meant to compel a gift from the former owner to the users and that in dealing with water "appropriated for sale" it meant that there should be nothing to sell. See San Diego Water Co. v. San Diego, 118 Cal. 556, 567. Fresno Canal and Irrigation Co., v. Park, 129 Cal. 437, 443, et seq. Stanislaus Water Co. v. Bachman, 152 Cal. 716. Leavitt v. Lassen Irrigation Co., 157 Cal. 82

Decree reversed.

Mr. Justice Pitney did not sit in this case.

Post

In The Superior Court of the State of California, in and for the County of Kern.

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Dept. No. 3. No. 9010

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| Miller & Lux<br>VS<br>Kern County Land Company | OPINION ON OVER-RULING DEMURRER. |

The principal point presented in this matter and the only one argued by counsel on the demurrer, is one of transcendent importance to the People of this County and of this state. The question is :-

MAY A PRIVATE PERSON OR CORPORATION CONDEMN A RIGHT OF WAY ACROSS PRIVATE PROPERTY FOR A NECESSARY IRRIGATION DITCH WHEN SUCH IRRIGATION IS TO BE APPLIED TO ITS OWN INDIVIDIAL USE. THAT IS, NO ELEMENT OF COMMON USE BY A PORTION OF THE PUBLIC IS SOUGHT.

Prior to the passage of the act of 1911 (Stats. 1911. p. 1407) eminent domain proceedings could not be so employed (Thayer v. California Development Company 164 Cal. 117-126) The act refered to reads in part as follows:

"Irrigation in the State of California is hereby declared to be a public necessity and a public use, and the power of eminent domain may be exercised on behalf of such public use in accordance with the provisions of Title VII, Part III of the Code of Civil Procedure. . "

It is contended by defendants that the statute is not to be construed to mean that an individual user may condemn for his personal use without any dedication to the public, or, if it is so to be construed, that the act itself is unconstitutional. In view of the fact that for many years prior



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to 1911 condemnation proceedings were authorized by subd. 4 of sec. 1238 of the Code of Civil Prodecuse, . . . "for canals, ditches . . . . flumes, aqueducts and pipes for irrigation . . . supplying . . . farming neighborhoods with water, " it must be assumed that the legislature intended in passing the act of 1911 to broaden the purpose for which such proceedure may be had. And, in further view of the unlimited character of the language there employed, and the fact that such act was passed after the supreme court had repeatedly held that an individual could not invoke section 1238 C.C.P. for his personal use alone, it is my opinion that a reasonable construction of the statute includes the present purpose.

Is such an act constitutional?

It is admitted everywhere that the question of public use is ultimately a judicial one, that is, the legislature cannot make a use public by declaring it so, although its declaration will be respected by the courts, unless it is palpably without reasonable foundation. (San Mateo v. Coburn 130 Cal. 631; Lewis Eminent Domain 3d Ed. sec. 251.) We must inquire then judicially whether the adopted intepretation of the act of 1911 is constitutional.

Our constitution offers little aid to us. Art. I, sec.14 contains no authorization expressly for the proceeding sought, and it contains no difinition of the term "public use." That term is defined in two ways by courts of last resort --" One holding that there must be a use or right of use on the part of the public or some limited portion of it; the other holding that they (the words "public use") are equivalent to public benefit, utility or advantage" (See Lewis Eminent Domain 3d Ed. sec. 257 and cases cited.) The supreme court of this state has heretofore preferred the former definition, and if its former definitions of "public necessity" were to be applied to this



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act of 1911, it is hard to conceive how this interpretation of the act of 1911 can be sustained. But we like rather to think that the former definitions of these terms will no longer be applied to matters of irrigation. We like rather to think that the legislature was here acknowledging what courts must take judicial notice of, that in this state irrigation itself is a matter of such fundamental and general importance to this commonwealth in the promotion of public interest and in the development of the state's natural resources that the courts here will say as was said by the Supreme Court of the United States in Clark v. Nash 198 U.S. 361, that in this particular case the public interest is so great that the taking by a private user is a matter of public necessity and public use. That in this case, use by the general public is an inadequate test as to what constitutes a public use. (Strickley v. Highland Bay G. M. Co. 200 U. S. 527) See Lux v. Haggins 69 Cal. 255, in which the question is raised in the dictum of the court and expressly left undecided. (Weill Water Rights in Western States 3d Ed. Sec. 607-613)

It is recognized that this view is something of a departure from common law principles and from the condition of our law in California prior to 1911, but it is a departure supported by precedent in the other Western States where irrigation is of similar importance and a departure that as to these states in the matter of irrigation has found the approval of the Supreme Court of the United States: finally, it is a departure which in my opinion finds abundant justification in this state where great areas of dry lands abound, valueless, undeveloped, awaiting only irrigation to cause them to yield up wealth to the entire commonwealth.

Let the demurrer be over-ruled, with twenty days to answer.

Dated, May 23, 1914.

Milton T. Farmer, Judge.



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#9010

Miller & Lux

vs

Kern Co. Land Co.

OPINION ON OVER-RULING DEMURRER

(Endorsed)

Filed May 23, 1914

L. L. Miller, Clerk.

McFARLAND & IRVING

*Attorneys for* .....

SUITE 3-4-5 EVANS BUILDING

RIVERSIDE, CALIFORNIA

WALTER D. CLARK, PROMPT PRINTER

COPY

SUPREME COURT OF THE UNITED STATES

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Nos. 202-207. - October Term, 1916.

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| Utah Power & Light Company, Appellant,<br>202 vs.<br>The United States.<br><br>The United States, Appellant,<br>203 vs.<br>Utah Power & Light Company.<br><br>Beaver River Power Company, Appellant,<br>204 vs.<br>The United States.<br><br>The United States, Appellant,<br>205 vs.<br>Beaver River Power Company.<br><br>Lucien L. Nunn, et al., Appellants,<br>206 vs.<br>The United States.<br><br>The United States, Appellant,<br>207 vs.<br>Lucien L. Nunn, et al. | Appeals from the District Court of the United States for the District of Utah. |

(March 19, 1917.)

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

We are concerned here with three suits by the United States to enjoin the continued occupancy and use, without its permission, of certain of its lands in forest reservations in Utah as sites for works employed in generating and distributing electric power, and to secure compensation for such occupancy and use in the past. The reservations were created by executive orders and proclamations with the express sanction of Congress. Almost all the lands therein belong to the United States and before the reservations were created were public lands subject to disposal and acquisition under the

general land laws. The works in question consist of diversion dams, reservoirs, pipe lines, power houses, transmission lines and some subsidiary structures. In the aggregate these are used in collecting water from mountain streams, in conducting it for considerable distances to power houses where the force arising from its descent through the pipe lines is transmuted into electric energy, and in transmitting that energy to places beyond the reservations, where it is sold to whoever has occasion to use it for power, lighting or heating. In each case some part of the works is on private lands, but much the greater part is on lands of the United States. Part was constructed before and part after the reservation was created, but all after 1895 and nearly all after 1901. The entire works are conducted in each instance as a commercial enterprise, and not as an incident to or in aid of any other business in which the defendant is engaged.

In occupying and using the government lands as sites for these works the defendants have proceeded upon the assumption that they were entitled so to do without seeking or securing any grant or license from the Secretary of the Interior or the Secretary of Agriculture under the legislation of Congress, and, in truth, they have neither applied for nor received such a grant or license from either. But, notwithstanding this, they assert that they have acquired and are invested with rights to occupy and use permanently, for the purposes indicated, the government lands upon which the works are located.

The principal objects of the suits, as is said in one of the briefs, is to test the validity of these asserted rights and, if they be found invalid, to require the defendants to conform to the legislation of Congress or, at their option,

to remove from the government lands. The District Court ruled against the defendants upon the main question, following a decision on the Circuit Court of Appeals in another case, 209 Fed. 554, but refused the Government's prayer for pecuniary relief. Cross appeals were then taken directly to this court.

The first position taken by the defendants is that their claims must be tested by the laws of the State in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a State, when not used or needed for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution (Art. IV, Sec. 3, cl.2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the State may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them.

United States vs. McBratney, 104 U.S. 621, 624; Van Brocklin v. Tennessee, 117 U.S. 151, 168; Wisconsin R.R. Co. v. Price Co., 133 U.S.496, 504. From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable by various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. Wilcox v. Jackson, 13 Pet. 498, 516; Jourdan v. Barrett, 4 How. 169, 185; Gibson v. Chouteau, 13 Wall, 92, 99; Canfield v. United States, 167 U.S.518; Light v. United States, 220 U.S.523, 536-537. And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. "A different rule", as was said in Canfield v. United States, supra, " would place the public domain of the United States completely at the mercy of state legislation."

It results that state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress.

The next position taken by the defendants is that their claims are amply sustained by Secs. 2339 and 2340 of the Revised Statutes, originally enacted in 1866 and 1870. By them the right of way over the public lands was granted for ditches, canals and reservoirs used in diverting, storing and carrying water for "mining, agricultural, manufacturing and other purposes". The extent of the right of way in point of width or area was not stated and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record. Obviously this legislation was primitive. At that time works for generating and distributing electric power were unknown, and so were not in the mind of Congress. Afterwards when they came into use it was found that this legislation was at best poorly adapted to their needs. It was limited to ditches, canals and reservoirs, and did not cover power houses, transmission lines or the necessary subsidiary structures. In that situation Congress passed the Act of May 14, 1896, c. 179, 29 Stat. 120, which related exclusively to rights of way for electric power purposes, and read as follows:

> "That the Secretary of the Interior be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands, and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

We regard it as plain that this act superseded Secs. 2339 and 2340 in so far as they were applicable to such rights of way. It dealt specifically with that subject, covered

it fully, embodied in some new provisions and evidently was designed to be complete in itself. That it contained no express mention of ditches, canals and reservoirs is of no significance, for it was similarly silent respecting power houses, transmission lines and subsidiary structures. What was done was to provide for all in a general way without naming any of them.

As the works in question were constructed after Secs. 2339 and 2340 were thus superseded, the defendants' claims receive no support from those sections. No attempt was made to conform to the Act of 1896, and nothing is claimed under it.

Some reliance is placed upon Secs. 18-21 of the Act of March 3, 1891, c.561, 26 Stat. 1095, and the Act of May 11, 1898, c. 292, 30 Stat. 404, The first relate to rights of way for ditches, canals and reservoirs for the purpose of irrigation, and, differing from Secs. 2339 and 2340, call for the filing of maps of location which are to be effective and noted upon the public records when approved by the Secretary of the Interior. The second permits rights of way "approved" under the first to be used for certain additional purposes, including the development of power, "as subsidiary to the main purpose of irrigation." But here no maps of location have been filed or approved, the rights of way are not claimed merely for ditches, canals or reservoirs, and irrigation is neither the sole nor the main purpose for which any part of the asserted rights of way is used. So it is apparent that the reliance upon these acts is ill founded.

In the oral and written arguments counsel have given much attention to the Act of February 15, 1901, c.373,

31 Stat. 790. On the part of the Government it is insisted that the comprehensive terms of the Act and its legislative history (1 Report Secretary of the Interior, 1899, pp. 6-7; House Report, 1850, 56th Cong., 1st Sess.; Cong. Rec., 56th Cong., 1st Sess., 6762, ibid., 56th Cong., 2d Sess.,2075) conclusively show that it was adopted as a complete revision of the confused and fragmentary right of way provisions found in several earlier enactments, including those already noticed, but this need not be considered or decided now beyond observing that the Act obviously superseded and took the place of the law of May 14, 1896, supra. The Act empowers the Secretary of the Interior, "under general regulations to be fixed by him", to permit the use of rights of way through the public lands, forest reservations ( The forest reserves were measurably placed under the control of the Secretary of Agriculture by the Act of February 1, 1905, c.288, 33 Stat. 628.) etc., for any one or more of several purposes, including the generation and distribution of electric power, carefully defines the extent of such rights of way and embodies provisions not found in any of the earlier enactments. But the defendants can claim nothing under the Act. They have not conformed to its requirements and have not received any permission or license under it.

Another statute upon which the defendants rely is the Act of February 1, 1905, c. 288, 33 Stat. 628, But we think it does not help them. While providing for rights of way in forest reserves for ditches, canals, reservoirs and the like "for municipal or mining purposes, and for the purposes of milling and reduction of ores", it makes no provision for power houses, transmission lines or subsidiary structures such as the defendants have. And, in our opinion, the purposes

named do not include those for which the works in question are used. It is not enough that some of the electric energy is sold in adjacent or distant towns or to those who are engaged in mining or in milling or reducing ores. In an opinion rendered June 4, 1914, the Attorney General said of this Act: "The rights granted are described with particularity. The right of way for transmitting and distributing electrical power is not included expressly, nor is it so intimately related to any of the rights enumerated that a grant of the one must needs be implied as essential to the enjoyment of the other." 30 Op. A. G. 263. We regard this as the correct view.

In their answers some of the defendants assert that when the forest reservations were created an understanding and agreement was had between the defendants, or their predecessors, and some unmentioned officers or agents of the United States to the effect that the reservations would not be an obstacle to the construction of operation of the works in question; that all rights essential thereto would be allowed and granted under the Act of 1905; that consistently with this understanding and agreement and relying thereon the defendants, or their predecessors, completed the works and proceeded with the generation and distribution of electric energy, and that in consequence the United States is estopped to question the right of the defendants to maintain and operate the works. Of this it is enough to say that the United States is neither bound nor estopped by Acts of itsofficers or agents in entering into an agreement or arrangement to do or cause to be done what the law does not sanction or permit. Lee v. Munroe, 7 Cranch 366; Filer v. United States, 9 Wall. 45, 49; Hart v. United States, 95 U.S. 316; Pine River Logging Co. v. United States, 186 U.S. 279, 291.

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. United States v. Kirkpatrick, 9 Wheat. 720, 735; Steele v. United States, 113. U.S.128, 134; United States v. Beebe, 127 U. S. 338, 344; United States v. Insley, 130 U.S. 263, 265-266; United States v. Dalles Military Road Co., 140 U.S. 599, 632; United States v. Michigan, 190 U. S. 379, 405; State ex rel. v. Brewer, 64 Ala. 287, 298; State v. Brown, 67 Ill. 435, 438; Den v. Lunsford, 20 N.C.407; Humphrey v. Queen, 2 Can. Exch. 386, 390; Queen v. Black, 6 Can. Exch. 236, 253. And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it. Causey v. United States, 240 U.S.399, 402.

By their answers the defendants assert that some of the administrative regulations promulgated under the Act of 15 February, 1901 go beyond what is appropriate for the protection of the interest of the United States and are unconstitutional, unauthorized and unreasonable. The regulations now occupy many printed pages and the answers do not adequately show which regulations are assailed or the grounds upon which the invalidity of

particular ones is asserted. That Congress intends there shall be some administrative regulations on the subject is plainly shown in the Act, and that its discretion in the matter is not narrowly confined is shown by our decisions in United States v. Grimaud, 220 U.S. 506 and Light v. United States, ibid.523. If any of the regulations go beyond what Congress can authorize or beyond what it has authorized, those regulations are void and may be disregarded; but not so of such as are thought merely to be illiberal, inequitable or not conducive to the best results. In the nature of things it hardly can be that all are invalid, and this was conceded in argument. The defendants have not complied with any, or really offered to do so, but have proceeded upon the theory that the Act and all the regulations are without application to their situation. In this they have been mistaken, and so are occupying and using reserved lands of the United States without its permission and contrary to its laws. Not until they seek a license or permit under the Act and conform, or appropriately offer to conform, to all lawful regulations thereunder will they be in a position to complain that some of the regulations are invalid. As we interpret the decrees below, they enjoin the defendants from occupying and using the lands of the United States until and only until, they acquire rights to do so by complying with some applicable statute and the lawful regulations. Of course, we do not imply that any of the regulations are invalid but leave that question entirely open.

Much is said in the briefs about several congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local law, but these enactments do not require particular mention, for this is not a controversy over water rights but over rights of way through lands of the United States, which is a different matter

and is so treated in the right of way acts before mentioned. See Snyder v. Colorado Gold Dredging Co., 181 Fed. 62, 69.

As the defendants have been occupying andusing reserved landsof the United States without its permission and contrary to its laws, we think it is entitled to have appropriate compensation therefor included in the decree. The compensation should be measured by the reasonable value of the occupancy and use, considering its extent and duration, and not by the scale of charges named in the regulations as prayed in the bill. However much this scale of charges may bind one whose occupancy and use are under a license or permit granted under the statute, it cannot be taken as controlling what may be recovered from an occupant and user who has not accepted or ascented to the regulations in any way.

It follows that the decrees are right and must be affirmed, save as they deny the Government's right to compensation for the occupancy and use in the past, and in that respect they must be reversed.

It is so ordered.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO.

No. 62040. Dept.

MARY A. FLINN,
Plaintiff,
vs.
HENRY BLOSSOM,
Defendant.

PLAINTIFF'S OPENING BRIEF.

The plaintiff is compelled to come into court against her neighbor by double necessity. First, to conserve water for immediate domestic use; second, to prevent an adverse user, which if continued without protest, will ripen into a prescriptive right against her.

Defendant Blossom has forced the issue through command of his geographic advantage in having a plot of land higher on the stream and his economic advantage in being financially able to sink his well to greater depth than plaintiff can afford.

Plaintiff contends that defendant has wrongfully deprived her of a valuable, and in this country a vital water supply, which she has hitherto enjoyed and which she is entitled to receive.

Defendant seeks to justify himself on two grounds: First, he contends that his diversion of water from Los Coches Creek has not affected the plaintiff; second, that if it has it is damnum absque injuria and plaintiff must save herself as best she may. The first problem is one purely of fact; the second one chiefly of law.



DEFENDANT'S WELL HAS DRAINED THE PLAINTIFF'S.

Plaintiff gives a simple, but quite satisfactory demonstration of her claim that defendant is extracting and diverting water which would otherwise supply her well; the Flynn well has heretofore been full; Blossom sinks a well close by and pumps continuously; the Flynn well fails; Blossom stops his pump; the Flynn well rises; he starts again and the level of the Flynn well falls. When he stops for the winter it steadily rises again toward its original level. The Robertson well, across the road, behaved in like manner, but not to such marked extent.

Here is a sequence of cause and effect which certainly makes a prima facie showing of responsibility on the part of Blossom. Its sufficiency has been indicated in language used by our Supreme Court in deciding the case of Verdugo Canyon Water Co. v. Verdugo, 152 Cal., 670:

> " * * * pumping of that quantity from the well would materially reduce the surface stream, and that, taking the underground and surface flow as a whole, its amount would ultimately be reduced by an amount equal to the quantity pumped from the well, if none of it were returned to such stream. This, in the absence of extraordinary circumstances, not proven, and not to be presumed, is self evident. There were other circumstances also tending to prove that the pumping of Verdugo's well affected the flow of water below. There is no evidence at all indicating that it would not or did not materially reduce the flow. * * * This is the necessary effect of any diversion from a stream, whether flowing on the surface or beneath, whether in an unobstructed channel, or in the gravel and sand which partly fills the rocky gorge of its
> (669) original course. * * *
> The fact that there were fluctuations in the quantity flowing, before as well as after the pumping began, and the fact that dry seasons diminished the flow at the dam, do not disprove the fact that the taking out of water above also diminished it. From the evidence it is practically certain that the p umping of this well, as stated,
> (671) would materially reduce the underflow at the dam."

Verdugo Canyon Water Co. vs. Verdugo, 152 Cal., 670.

Again, in Hudson vs. Dailey, 156 Cal., 617, the court says:

> "These wells were sunk more than five years before the action was begun. The evidence shows that the plaintiff knew of such use and knew that the flow in the creek immediately decreased. By reasonable inquiry she could have ascertained that the decrease
> (630) was caused by the wells. * * *
> This was sufficient to charge her with notice that the tendency of the diversion of the flow at these wells would be to reduce the amount in the stream below and to start the
> (631) statute of limitations running."

Hudson vs. Dailey, 156 Cal.617.

Doubtless this showing shifts the burden to the defendant to demonstrate some phenomenon other than his own activity which has occasioned the behavior of the water in the plaintiff's well. His only explanation is that the season of 1929 was such a dry one that the water plane naturally receded beyond the depth of plaintiff's well. No evidence is introduced to give an accurate gage of comparative rainfall in that region. Some generalities are produced to the effect that the 1929 season was drier than several preceding years, but the only actual data is from the measurement of wells above and below those with which we are concerned.

Defendant's witnesses testify that wells above Flynn Springs showed a descending water plane from 1926 to 1929. They admitted a continuous and increasing drain on the underground water supply by pumping from many wells in the wider valley above the Springs.

They testify, also, that wells on Los Coches Creek, below those of Flynn and Blossom, were steadily receding, and the same was true in the neighboring Blossom Valley.

In fact they emphasize precisely the grievance which the plaintiff asserts: that excessive pumping is causing the



water planes to fall.

Fortunately, we have the history of three water locations which were in such a position as to reflect the natural situation unaffected by the artificial condition brought about by pumping. First, the springs at the head of Blossom Valley on the Fletcher property. These are shown to be above the irrigated area and should reflect the natural water conditions in the soil. The uncontradicted testimony is that they showed as much water in 1929 as in prior years.

Second, the Flynn well itself, which according to all testimony has flourished since it was dug in 1925 until it was sapped in 1928. Although the wells above Flynn Springs and in Blossom Valley were steadily falling in 1926 and 1927, the Flynn well showed no diminution. It was known as a remarkably good well and maintained its constant level until Blossom began to pump. It is hardly conceivable, and certainly the evidence does not disclose, that there was any natural cataclysm in 1928 which would cause this good well to become a dry hole in the sand.

Third, The stream of Los Coches Creek, where it appears on the surface at the location known as Flynn Springs. Here is a control open to casual observation, not only during the water-bearing life of the Flynn well, but through the so-called dry season of 1929. The May wells, some distance below, show a corresponding condition: namely, that whatever was happening to the water supply elsewhere, a short distance above the Flynn well, it was following its usual course. In 1928 the stream flowed, the May wells stood high in the ground - while the Flynn well furnished its ample and usual supply, until the time Blossom started to withdraw large quantities of water. In 1929 the stream flowed, the May wells stood high in the ground, while the Flynn well became completely dry.

Here again we have a very simple problem in logic, and if we did not know of the existence of the Blossom well we should

be busily examining the creek above the Flynn well, to discover what was diverting the water before it reached it. Not only would ordinary reason suggest such inquiry, but as the court said in Hudson vs. Daily, supra, the law requires that it be followed out. The newly developed Blossom well and the stream of water being pumped up the hill and over the hill, seems to be the end of the inquiry, and to offer an explanation satisfactory enough for the average man.

The average man has been observing two vessels, side by side. When water is taken from one it subsides in the other. When it is left undisturbed, it approaches a common level in both. He announces without any hesitation, that there is a communicating tube at the bottom of the two vessels.

He has then observed a vessel constantly replenished by a tube connected at the bottom. When the contents drain away suddenly, he declares that the hose has sprung a leak and the water is running off elsewhere.

This demonstration of what has occurred on Los Coches Creek seems so simple that we mistrust its force. So, we call in an experienced engineer, Thomas L. King, and request him to check up on the reasoning of the average man. His conclusion is the same, but he does not draw it solely from his observation of the cause and effect.

From all of the testimony in the case, from personal observation of the landscape, from consideration of the wells there and in the vicinity, and from his knowledge of similar conditions elsewhere, he draws us a picture of the underground conditions along Los Coches Creek: At the headwaters is a wide drainage basin with substratum of decomposed granite, waterbearing, but not a valley fill; water yielding, but more rapidly depleted.

At Flynn Springs is a convergence of the surface walls of the basin and an upthrust of the bottom. The effect is to gather



those descending waters, which have never been reached by wells, and to force them to the surface through the defile known as Flynn Springs.

For some distance below there exists what is properly a valley fill; no granite near the surface but sloping side walls at greater depth which form a trough or basin filled with detritus. This is the true waterbearing gravel and it underlies the creek-bed and extends on either side of it. The descent of the underground water is much impeded by the fill of sand and gravel and at a point below the Flynn well there is evidence that an upthrust of the bottom or convergence of the underground side walls occurs, which makes a further impedance of the flow and forms the lower edge of a so-called saucer.

The sands within this saucer are saturated by rainfall and are to some extent maintained by the overflow from the upper basin through Flynn Springs. The ordinary level in the sands has stood within a few feet of the surface at the upper boundary of the Flynn land and his present well has apparently found the point of easiest extraction of the water. It is also at an elevation where gravity will carry pumped water to the irrigable lands and where the water is closer to the surface than in earlier wells.

The defendant Blossom has put down his well at the only point where he owns land in the bottom. It is upstream from plaintiff's well about 200 feet. He went down almost 50 feet further than the Flynn well, and as the engineer demonstrated by his drawings, the effect of pumping from the deeper well is to exhaust the sands around the shallow well.

The learned Mr. Lippincot, called by the defendant as an expert, is of the opinion that the underground stream as it comes down Los Coches underground gorge is a torrent with "waterwheels", a flow of 100 gallons per minute, travelling at 15 or 20 miles per hour. With all deference to a gentleman whose incantations

can retard the speed of electric waves, we feel that his picture does not greatly disturb that drawn by Mr. King. In fact, he corroborated our principal contention that Los Coches is a defined stream with its own watershed, cut off from Blossom Valley by a wall of granite underground.

Defendant also called Mr. Rowe, an engineer. He testified that he had made observation of the premises and saw nothing to indicate a dyke or convergence of the bed rock. On cross-examination, he admitted he had not examined the stream bed below the Flynn well, so, naturally, his conclusion did not take into account the clumps of cat-tails and the cement-like outcropping in the bed of the stream.

It is significant that defendant employed another engineer, Mr. Greene, who made a more careful study of the situation. One continuance was obtained by the defendant, in order that he might attend as a witness, and opportunity was given for his production on other days of the trial. It is fair to assume that this expert would have corroborated the conclusions of Mr. King and that this was the reason for his failure to appear.

> C.C.P.1963. "All other presumptions are satisfactory if uncontradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind: * * *
> 5. That evidence willfully suppressed would be adverse if produced."

It is really of no great moment whether full and accurate knowledge of the underground conditions would show the water to be standing in an underground lake, or flowing in a defined and rapid stream, or moving slowly in a broad and diffused body. Whatever the peculiarity of the water it appears to be enticed into the defendant's well before it reaches that of plaintiff's.



In view of the evidence, we feel that the court must be satisfied that if the Blossom pump had been idle during the season of 1929 the Flynn well would have produced without any noticeable diminution. It must be found, then, that it is the operation of the Blossom well which deprives Flynn of water. The question still remains whether they have any legal cause for complaint.

DIVERSION BY BLOSSOM OUTSIDE OF WATERSHED IMPROPER.

On one point everyone agrees. We are governed by the rules affecting riparian water. Some of the water from the Blossom well has been used on the far side of the dividing knoll, and defendant, somewhat feebly, asserts a right to take it there. The authorities are clear to the effect that, there being a shortage of water for use in the Los Coches watershed, none may be taken outside of it.

> "With respect to other parties who take for use on lands outside the watershed of the basin, it is now established by said decisions that noone, not even the owner of overlying land, has the right to take water out of the watershed for any purpose, if such purpose will deprive of water any lands within the basin."

San Bernardino vs. Riverside, 186 Cal 7 (15).

To the same effect:

Anaheim etc. vs. Santa Ana, etc., 150 Cal. 237.

As has been stated by a recognized authority on waters, in the case of Donalson v. Leffering (56082) Superior Court, San Diego County:

> "Indeed, there is no reason in law why they need be actually streams at all, or anything more than percolating waters, provided they percolate in a defined general direction along depressions separated from each other by natural barriers, whether of rock or other material sufficiently impervious to prevent the waters percolating through one canyon valley or depression, from being confused with those percolating through

> another canyon valley or depression. What in a particular discussion is meant by the term 'watershed' must then have relation to the particular matter under discussion. In this case we are not investigating the water supply of the Sweetwater River as such, we are investigating the water supply of the particular wells here involved. The 'watershed' and the only 'watershed' with which we are here concerned is the drainage basin from which come the waters that feed these wells, and these natural barriers, be they near or far, that limit that drainage basin are the limit of the watershed that we are here concerned with. * * * The rule in California is that riparian land stops with the watershed."

It would seem, therefore, that judgment must be for the plaintiff on this point and defendant should be restrained from using any of this water on the Blossom Valley slope.

USE BY BLOSSOM UNREASONABLE.

It is our understanding that an upper riparian owner may use as much of the stream as he desires, so long as he does not deprive another of his correlative share; but if he takes more than his share, his use is unreasonable and it may be curtailed by injunction.

> "It is clear from the foregoing quotation, as well as from other authorities, that in this state the term 'reasonable use', as employed therein, does not mean that one of two or more persons having correlative rights in a common supply of water may take all that is reasonably beneficial to his land, regardless of the needs of the others, as the defendant contends, but only his reasonable share thereof, if there is not enough to supply the needs of all. 'Necessity is not the sole measure of right in such cases.' (Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 667.) 'There is a distinction between the English rule as modified by the modern American rule of reasonable use and the rule of correlative rights. Under the rule of reasonable use some of the authorities hold that a land owner has a right to make such a beneficial use of the water found percolating through his land to the extent that may be necessary for the improvement of his land, so long as it is used thereon, although in so doing he may drain the lands of his neighbors. Upon the other hand, the rule of correlative rights to these owners is the rule which abrogates the English rule as to these waters and holds that the rights of all land owners over a common basin, saturated strata, or underground reservoir, are coequal or correlative, and that one land



> owner can not extract more than his share of the water even for use on his own lands, where the rights of others are injured thereby.' (Kinney on Irrigation and Water Rights, 2d ed., Sec. 1192.) 'It is a question of reasonable use, and that applies both to the land of the person disturbing the percolation and to adjoining land.' (Katz v. Walkinshaw, 141 Cal. 116, 143.)"

Eckel v. Springfield Tunnel & Dev. Co., 54 Cal. App. Dec., 1311, 1315.

See also: San Bernardino vs. Riverside, 186 Cal. 15.

We will assume that it has been demonstrated to the satisfaction of the court that Blossom has intercepted water which would otherwise come to Flynn. The query then is raised whether Flynn is under obligation to go into competition with Blossom in the digging of wells and buying of pumping equipment. This question is not without difficulties and requires a consideration of riparian rights in general. These rights, as recognized by our courts, do not always accord with what may seem to be modern necessities nor sensible judgment. They are, however, vested property rights and as such are jealously guarded.

It will be noted here that defendant's lands do not overlie the valley fill and that his only right to take water from the stream and carry it across the highway to the hillside, is under the device of his ownership of a 25 foot strip which connects the main body of his land with the creek bottom. This has the appearance of strategem, to say the least; but we must concede that it is legitimate, and that defendant must be accorded his rights as a riparian owner. A court of equity should not, however, under such circumstances, incline in the least degree to extend these rights nor make their exercise burdensome upon others. The defendant is entitled to his pound of flesh, but to no jot of blood.

Let us concede to defendant his right to take his cor-

relative share of water from Los Coches Creek, but in the taking of it let him not wring the purse of his less opulent neighbors.

Plaintiff maintains that she is under no obligation to go to great, and to her prohibitive expense, to put down her well to a depth where she may - or may not - be able to recover the water which has heretofore been within easy reach.

It will not be disputed that the same principles govern riparian waters underground as those which flow above the surface. If Flynn and Blossom were using from a surface stream with the same relative effect, the question would be simple. If Blossom, being upstream, should divert the stream into another course from that where Flynn was wont to take it, Flynn would not be compelled to extend his ditch to some new point and there take his share of the water from some new channel.

> "But the riparian owners have a right to have the stream flow past their land in its usual course and this right, so far as it is of regular occurrence and benrficial to their land, is, as we have frequently said, a right of property and parcel of the land itself. (p. 101) * * * Their right thereto is to the usufruct of said flowing stream in the usual and ordinary course of its flow and this right is a vested right, inherent in the soil of their said lands and not a mere incident appurtenant thereto. * * * (103)."

<u>Herminghaus vs. Calif. Edison Co.,</u>
200 Cal., 81.

> "As such riparian owner, it has the right to have the stream continue to flow through its lands in the accustomed manner. * * * (p. 73.)"

<u>So. Calif. In. Co., vs. Wilshire</u>
144 Cal., 68.

Or, if instead of taking water from an underground reservoir, suppose both were taking it from behind a natural dam which held the surface water back and stored it at an elevation above the adjacent land. Each would be entitled to take from the reservoir, or overflowing stream at the natural level. Could



Blossom insert a pipe one foot below the level where it naturally flowed on to Flynn's land? If so, by using a large enough pipe he could dry up Flynn's intake. Then should Flynn put in a pipe a foot lower than Blossom and dry him up? The last drop would go to whichever one happened to have on his side of the stream the deepest point in the bed of the reservoir. At that stage, however, they could start to digging sumps and taking water out by means of pumps and we would find the parties in exactly the situation which they now occupy, where one says to the other, if you don't have water where you used to have it, dig deeper. It is to avoid just such endless competition as this that the rule entitles a riparian owner to have the water flow in its natural course. This applies to water under ground just as much as to water above ground.

> "In almost every case of a stream of this character, if excavations are allowed to be made in the permeable material underlying and adjoining the bed of the stream, the result inevitably is that the water collected in such excavations either comes from the stream by percolation from above, or is intercepted on its way to the stream below, with the consequence that in either event the stream is diminished by the amount of water which is gathered in the excavation. (p. 280) * * *
> The rights therein are no greater than would be if he had taken the water directly from the stream." (p. 282)

<u>McClintock vs. Hudson,</u>
141 Cal., 275.

> "It is obvious that the continued presence in the soil, sand and gravel composing the bed of the canyon, of a sufficient quantity of water to supply and support these surface streams in their natural state, is essential to their existence and preservation and that the parties have as clear a right to have this quantity remain underground for that purpose as they have to the stream upon the surface. (p.663.)
> The underground water thus undisposed of is not to be distinguished, so far as legal rights thereto are concerned, from a similar surplus remaining in a surface stream. * * * (p. 664.)

> With regard to the available unpartitioned underflow, he is entitled as a riparian owner to his reasonable share thereof and he may use it upon any of his riparian land in the tract." (p. 685.)

Verdugo Canyon Water Co. vs. Verdugo, 152 Cal., 655.

The natural level of Los Coches Creek, in the summer time, has always been six or eight feet below the surface at the point of Flynn's well. We maintain that he is entitled to have it remain there. If Blossom can take out his share of the water without materially lowering this level, he may do so. That is his pound of flesh; but he should not be allowed to compel Flynn to follow the level downward as he withdraws it. Flynn made some endeavor to do this, but could not keep up the pace and so falls back on what he considers to be his legal rights.

We do not find any decided case which specifically deals with such a situation. In the Herminghaus case, 200 Cal., 81, a position somewhat analogous to that of Blossom was taken by the defendant. It contended that by spending a little money on her water distributing system the plaintiff would have an adequate supply. The court said however, on page 106:

> "The fact that these plaintiffs might by artificial contrivances, through dams and ditches and reservoirs, involving large expenditures of money, so interrupt or so regulate the present natural flow of said river as to render a smaller quantum of its water sufficient to satisfy the beneficial uses which they are now making of such waters in their entirety, could not possibly operate to limit or lessen their riparian right to the usufruct of said waters in their natural course and under plaintiff's unique relation thereto. (p.106) * * *
>
> "As against appropriators, the plaintiffs were not obliged, by artificial appliances or otherwise, to limit their natural use and enjoyment of the waters of said river, nor can it be said, as supported by either reason or authority, that a lower riparian owner, as against an upper riparian owner attempting to impound a greater amount of the waters of the stream than that to which he would be entitled under his well defined riparian right, should have cast upon him the burden of limiting by artificial contrivances his natural use and enjoyment of said waters, in order that the upper riparian owner may make other and greater uses thereof than those to which he is lawfully and naturally entitled." (p. 108)



The right of an injured party is well recognized to procure an injunction against one who is taking more than his fair share.

> "An injunction always lies to restrain threatened permanent interference with water rights. (Angell on Water Courses, Sec. 445) and there should be no distinction in this regard between the rights of the owner of the fee in the percolating waters and that of the riparian water along the stream."

Bonetti vs. Luiz, 15 Cal.Ap., 7.

> "With regard to such land owners, these cases hold that each owner of land overlying the same general supply of water may take such water on his own land for any beneficial use thereon, so long as such taking works no unreasonable injury to other lands overlying such waters; that if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole and that each may apply to the courts to restrain an injurious and unreasonable taking by another and to have the respective rights adjudicated and the use regulated, so as to prevent unnecessary injury and to restrict each to his reasonable share. (p. 15.)

San Bernardino vs. Riverside, 186 Cal. 7.

Our Supreme Court has also enjoined the lowering of a water level by means of pumping:

> "The effect of the defendant's pumping for a period of a little over eighteen months was to lower the permanent water level as it stood when the pipes were idle, as much as seven feet. By reason thereof, the plaintiff is compelled to lift the water seven feet higher than before the defendant began its present appropriation. Perhaps in view of the extreme necessity for water and the great benefit derived therefrom, this additional burden upon the plaintiff may not be unreasonable, but if the judgment permitting this pumping by the defendant is affirmed without

modification, it will be final between the parties and the defendant will have a perpetual right to continue the drain upon the limited supply. (p. 437) * * *

"It should also be framed so as to prevent the lowering of the permanent level to such an extent that the plaintiff will be unable to obtain by his pumps sufficient water therefrom for use upon his lands. * * *

(Defendant shall not) be allowed to take therefrom a quantity that will reduce the water level of plaintiff's wells during the periods when the plaintiff is herein given the right to pump therefrom, to such an extent that the plaintiff, with pumps operating at the depth of his present pumps and with equal capacity, will be unable to obtain therefrom enough water."***(p.438).

ALLOTMENT OF CORRELATIVE SHARES.

What are the respective shares of plaintiff and defendant? The climatic demands are equal, the possible uses identical, the soil approximately alike, though plaintiff's is probably deeper and more porous, thus demanding more water. Probably the water available for these two should be apportioned to them in the ratio of their respective acreage within the watershed, that is, to Flynn 10.8 parts, to Blossom eight parts.

What quantity that would mean for each is a more difficult question. If Blossom wishes to rest on the opinion of his expert Lippincott, that there are 100 gallons a minute available, let Flynn be assured of 57 gallons (10.8 parts) and Blossom may have the other 43 gallons (8 parts). If we are to follow the estimate of Mr. King, which is that wells located at the point of these two cannot be expected to yield more than 36 gallons, we would ask to have Blossom's draft limited on this basis, that is, that he be enjoined against taking more than 15-1/2 gallons per minute (8 parts) which would leave 20-1/2 for Flynn (10.8 parts). Such order would be useless, however, unless it further provides that Blossom shall take his share at such point and in such manner as to permit the Flynns to take theirs from their present well, with a pump such as is now employed. (Burr vs. McLay, supra.)



Blossom may find difficulty in devising practical measures for extracting his share of the water without infringing upon that of Flynn. If so, that is the predicament into which he has gotten himself. His policy was to forge ahead boldly and take every drop of water which he could extract. He did this, without regard to others and others cannot now be expected to show too great regard to him.

DAMAGES TO FLYNN.

The same point of view is just with regard to damages which have been suffered by the Flynn property. Until he was haled into court, he ruthlessly dried up his neighbor's farm; even forcing them to haul water for domestic purposes. They dared not plant crops, their vines and some trees died and Henry Flynn was practically forced to abandon the farm as a place for making a livelihood. All of this because of the stubborn determination of Blossom that he would take all of the water until stopped by some stronger hand, and not only take it, but divert what he wanted entirely out of the watershed. Surely this is a case of such oppression as would warrant the imposition of treble damages.

At least it should incline the court to be extremely liberal in awarding compensation to the Plaintiff for the wrong which has been inflicted upon her. We feel that several hundred dollars will not be excessive payment for the inconvenience, extra labor, loss of vines and trees, and loss of profits which plaintiff has suffered.

It is, therefore, respectfully submitted that plaintiff should have judgment on all points involved in this action, namely:

(a) Injunction against diversion of any water from Los Coches Valley;

(b) Injunction against diversion of more than 15-1/2 gallons of water per minute;

(c) Injunction against lowering the level in plaintiff's well;

(d) Damages for detriment already suffered.

Respectfully submitted,

Harrison G. Sloane

Attorney for Plaintiff.



January 17, 1928.

Col. Ed. Fletcher,
Fletcher Building,
920 8th St.,
San Diego, California.

My dear Col. Fletcher:

I have your favor of the 11th inst. concerning the outcome of the criminal libel case.

I was very much surprised when I learned that the one verdict that was agreed upon was that of acquittal, nor can I understand the line of reasoning of the jurors who voted for acquittal on the other counts. I know nothing, of course, of any of the matters except what I heard in court, and I am frank to say that if the defendant can pring such matter as he did not deny appeared in his columns and escape the penalty of the law for criminal libel, then there would seem to be no limit whatever in what a person may publish against another.

You of course have heard it said a great many times that you never can tell what a jury will do, and this case certainly demonstrates the correctness of such a comment. It is difficult for me to understand the line of reasoning which the jurors who voted for acquittal followed in the case. There was practically no evidence to support any of the libelous charges. There might perchance have been difficulty in the minds of the jurors in dealing with the legal questions that arose in the count wherein Judge Jennings and Judge Andrews were involved, but aside from any legal question it is inconceiveable that any rational mind could have concluded that any of the material charges of fact contained in the articles were supported by the evidence. It is possible, of course, that inasmuch as the jury in this kind of a case is, under the Constitution, made the judgeof the law, that they may have concluded that even if the things charged by Sauer were untrue, they were not criminal libel.

Then again, I find not infrequently jurors will allow their sympathies or prejudices to dull or even override their reason. The fact that Sauer was an aged man may perchance have appealed to their sympathies.

On the whole, I do not recall ever having presided in a case where the evidence so overwhelmingly supported the charge and the jury

acquitted or disagreed, as in that case.

Of course I am not in condition to give an opinion as to what would seem to be the desirable course for either you or any of the others named in the articles. I have not heard whether the District Attorney expects to retry the case. It would seem to me that there would be a great many thoughtful people in San Diego who would be greatly concerned over such a situation, for I assume if Sauer can get away with this, he will continue his tactics and the same persons and others will be made to feel his lash.

I am indeed sorry for the pain and suffering that you and your family must feel over the situation. Not infrequently when it seems that human justice fails, I find some consolation in the old theological belief that everyone who does a wrong will some day receive punishment for the same.

I have just had word from Judge Marsh that he will be up here next Friday to hear a motion for a new trial in a case in which he presided in my department during my absence in San Diego. I shall be interested in getting his viewpoint of the Sauer case.

With kind personal regards, I remain

Very truly yours,

EDWIN F. HAHN

EFH:MP

Personal

# In The Municipal Court, City of San Diego

COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

No.....

(Keep Space Below Clear for Clerk's Filing Stamp)

MARSHAL'S FILING STAMP

25954

L. P. STOWERS,

Plaintiff

vs.

ED. FLETCHER, SR., ED. FLETCHER, JR., ED FLETCHER COMPANY, a Corporation, and DOES 1 to 10,

Defendants

**SUMMONS**

C. C. P. Sec. 407

**THE PEOPLE OF THE STATE OF CALIFORNIA SEND GREETING TO:**

ED. FLETCHER, SR., ED. FLETCHER, JR., ED FLETCHER COMPANY, a Corporation, and DOES 1 to 10,

, Defendants

The above named Plaintiff.... having brought action against you in the Municipal Court, of City of San Diego, County of San Diego, State of California, by filing therein a complaint (copy of which is required to be served herewith);

You are hereby directed to appear in an action brought against you by the above named plaintiff.... in the Municipal Court of the City of San Diego, County of San Diego, State of California, and to answer (IN WRITING) the complaint filed therein, and file said answer with the Clerk at his office, Room 12 County Court House, in said City, within ten days (exclusive of the day of service), after the service on you of this Summons, if served within the County in which the action is brought; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer (in writing) as above required, the said Plaintiff.... will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for the relief demanded in the Complaint, together with the costs of suit.

Given under my hand and seal of the Municipal Court of the City of San Diego, County of San Diego, State of California, this 12th day of July, 19 46

(SEAL)

STEWART H. CARSE

~~WM. H. FRAILEY~~,

ACTING Clerk of the Municipal Court, City of San Diego, County of San Diego, State of California.

J. J. Barrett,

Attorney..... for Plaintiff.....

By A. G. GANN, Deputy.

FORM 1 MUN. 1-46-5M PP

I hereby certify that I served the within Summons by delivering to and leaving with each of the following named defendants, a true copy thereof, together with a copy of the Complaint filed in said action, each personally in the.....County of San Diego, State of California, at the times set opposite their respective names.

| Names of Defendants Served: | Address: | Date of Service: |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

Fee for Service $....., Mileage $....., Total $.....

CHESTER R. CLEATOR,
Marshal of the Municipal Court of San Diego.

Dated....., 19..... By....., Deputy.

STATE OF CALIFORNIA,
County of San Diego, } ss.

....., being sworn, says: I am, and was at the time of the service of the summons herein a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; I personally served the within summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of San Diego, State of California, at the times set opposite their respective names, a copy of said summons attached to a copy of the complaint referred to in said summons.

| Names of Defendants Served: | Address: | Date of Service: |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

Fees for Service $....., Mileage $....., Notary $....., Total $.....

Subscribed and sworn to before me this.....day of....., 19.....

WM. H. FRAILEY,
Clerk of the Municipal Court, City of San Diego,
County of San Diego, State of California.

.....
Notary Public in and for the County of San Diego,
State of California.

By....., Deputy.

JASPER J. BARRETT
ATTORNEY AND COUNSELOR AT LAW
302 SOUTHERN TITLE & TRUST BUILDING
SAN DIEGO, CALIFORNIA

JASPER J. BARRETT
Attorney at Law
302 Southern Title Bldg.,
SAN DIEGO, CALIFORNIA.
Phone: Franklin 2833.

Served 7/15/46

ATTORNEY FOR PLAINTIFF.

IN THE MUNICIPAL COURT OF THE CITY OF SAN DIEGO
COUNTY OF SAN DIEGO, STATE OF CALIFORNIA.

No. 25954

| | |
|---|---|
| L. T. STOWERS,<br>Plaintiff,<br>vs.<br>ED. FLETCHER, SR.,<br>ED. FLETCHER, JR.,<br>ED FLETCHER COMPANY,<br>a Corporation, and<br>DOES No. 1 to 10,<br>Defendants. | COMPLAINT FOR MONEY JUDGMENT. |

The above named plaintiff complains of the above-named defendants, and for his first cause of action alleges:

I.

That at all the times herein mentioned the defendant, Ed Fletcher Company, was, and now is a corporation, duly organized and existing under and by virtue of the laws of the State of California.

II.

That the true names of the defendants, designated herein as Does No. 1 to 10, are unknown to the plaintiff, and as soon as their correct names are ascertained the plaintiff will move the above-entitled Court to amend this complaint by inserting the true names of such defendants therein.

III.

That at the special instance and request of the defendants, the plaintiff drilled several holes in a large rock or granite boulder for

JASPER J. BARRETT
ATTORNEY AND COUNSELOR AT LAW
302 SOUTHERN TITLE & TRUST BUILDING
SAN DIEGO, CALIFORNIA

the purpose of blasting such rock or boulder to pieces, in order to remove the same from a private roadway, which rock and roadway are on the real property owned by the defendant, Ed Fletcher Company, a corporation, in Grossmont Park Subdivision No. 3, in said San Diego County. That the plaintiff furnished the labor and materials necessary to drill the said holes in the rock or boulder, which labor and materials including the use of a compressor, were furnished by the plaintiff between the dates of May 10 and June 13, 1946, and were of the reasonable value of $466.15, which more particularly appears from an itemized statement of the said labor and materials so furnished, in doing and performing the said drilling of holes as aforesaid, which is Marked Exhibit "A", and is attached to and made a part of this complaint, to the same extent and effect as though it were set forth herein in haec verba.

IV.

That although the defendants promised to pay the plaintiff the said sum of $466.15, and although the plaintiff has demanded of the defendants the payment of the said sum of $466.15, the defendants have failed and refused, and still fail and refuse to pay the same, or any part thereof.

COUNT TWO.

That for a further, separate and second cause of action against the defendants, the plaintiff complains and alleges:

I.

Plaintiff refers to paragraphs Numbered I and II, set forth in his first cause of action herein alleged, and by this reference realleges such paragraphs to the same effect as though they were set forth at length herein.

II.

That on June 12, 1946, in said San Diego County, an account was stated between the plaintiff and the defendants, and upon such statement a balance of $466.15 was found to be due from the defendants to the plaintiff.



III.

That the defendants agreed to pay the plaintiff the said balance of $466.15.

IV.

That although the plaintiff has demanded of the defendants the payments of the said sum of $466.15, the defendants have failed and refused, and still fail and refuse to pay the same or any part thereof.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of $466.15, together with legal interest thereon from June 12, 1946, until paid, and for his costs herein incurred.

J.J. Barrett,
Attorney for Plaintiff.

State of California
County of San Diego, } ss.

L. T. STOWERS

being by me first duly sworn, deposes and says: That he is the plaintiff

in the above entitled action; that he has heard read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

Subscribed and Sworn to before me this 11th day of July 19 46

L. T. Stowers

J.J. Barrett,
Notary Public in and for the County of San Diego, State of California.

Receipt of a copy of the within paper is hereby admitted this _____ day of _____ 19____

[redacted]
Attorney for _____
San Diego, Cal.

Attorney for _____

EXHIBIT "A".

L. T. STOWERS furnished labor and materials required for the drilling of several holes in a large rock or granite boulder, located on land owned by Ed Fletcher Company, a corporation, in Grossmont Park, for the purpose of blasting said rock to pieces, as follows:

| | | | |
|---|---|---|---|
| 1946: | | | |
| May 11th | 3 1/2 | Hrs. & 3 bits | $16.75 |
| " 22 | 4 1/2 | Hrs. | 18.00 |
| " 23 | 8 | Hrs. | 32.00 |
| " 27 | 8 | Hrs. | 32.00 |
| " 28 | 7 | Hrs. | 28.00 |
| " 29 | 8 | Hrs. & 3 bits | 33.05 |
| " 31 | 8 | Hrs. | 32.00 |
| " 22 | " | Service & 25 Plug Bits | 4.50 |
| " 24 | " | Service & 25 " " | 3.50 |
| " 28 | " | Service " " " " | 3.40 |
| " 31 | " | Service " " " " | 4.50 |
| Total as per statement rendered | | | $207 .70 |
| June 3rd | 7½ | Hrs-1 Reamer & Ser. | 31. 50 |
| " 4th | 8 | Hrs-1 | 32.00 |
| " 4th | 3 | Bits & 35 | 1.05 |
| " 5th | 8 | Hrs. | 32.00 |
| " 6th | 8 | Hrs. | 32.00 |
| " 7th | 5 | Hrs. | 20.00 |
| " 10th | 8 | Hrs. | 32.00 |
| " 11th | 8 | Hrs. | 32.00 |
| " 12th | 8 | Hrs. | 32.00 |
| " 2nd To and Inc. | 6/12th | Drills & Ser. | 13.90 |
| Total account due for May & June- - - | | | $466.15 |

KNOW ALL MEN BY THESE PRESENTS, that the Cuyamaca Water Company of San Diego, California, party of the first part, and R. F. Ware, of Los Angeles, California, party of the second part, have made and entered into the following agreement, to-wit:

In consideration of the payments to be made as provided herein, the party of the second part hereby agrees to excavate a ditch in accordance with the specifications attached hereto and which are made a part of this contract from Station 0+00 to Station 85+10 and an additional amount equal to approximately three and three tenths miles, to be designated by the Engineer for the main pipe line survey of the Cuyamaca Water Company.

The party of the second part agrees to begin work within ten days of the signing of this contract and prosecute the same at an average rate of 800 feet per day. It is also expressly agreed that in the event that the average rate of progress per day during each week falls below the agreed rate, that the party of the first part shall have the option of ordering the immediate abrogation and annulment of this contract by written notice when the contractor shall immediately discontinue his operations and leave the work. Or as an alternative the party of the first part shall deduct from the prices hereinafter named the sum of two cents (2¢) per cubic yard for each ten per cent which the rate of progress may be short of the agreed rate which deduction shall be the ascertained and agreed damage which the party of the first part suffers by reason of the slow rate of progress.

The party of the first part agrees to pay seventy-five per cent (75%) of the contract prices hereinafter mentioned by the 10th and 25th of each month for the work completed on the 1st and 15th of each month and the balance of twenty-five per cent (25%) within thirty days after the completion and acceptance of this contract. The twenty-five per cent withheld by the Company will constitute a fund to insure the Company against all liens against the contractor and against liability for damage or accident which he may be responsible for, due to his operations. It is expressly agreed that the con-

tractor is responsible for all such damages due to his operations and in the event of such liability occurring in excess of the twenty-five per cent aforementioned, then the party of the first part will further withhold all sums which may be due the party of the second part upon knowledge of such liability and until the claims are satisfied. The party of the second part agrees to carry liability insurance covering this contract, and file with the Company the name of the Insurance Company.

The party of the second part hereby agrees to conform to all local ordinances of the County of San Diego and municipalities within which the trench is excavated.

The party of the first part agrees to pay for extra work as defined in specifications at cost of labor plus ten per cent provided such extra work is ordered in writing by the Company's engineer and provided that a claim for same is presented within the following week when such extra work shall have been executed. And it is expressly agreed that all work not so specified and claimed will be considered as fully paid at the contract prices given below.

The party of the second part expressly agrees to excavate a continuous ditch either by a ditching machine or by hand, including the work of blasting where necessary. It is agreed that the prices which the party of the first part will pay the party of the second part for the trench herein contracted for will be as follows:-

1. For all trench where machine can be used:

(a) Trench 0 to 3 feet deep nine (9) cents per lineal foot.

(b) Trench 3 to 4 feet deep eleven (11) cents per lineal foot.

(c) Trench 4 to 5 feet deep thirteen (13) cents per lineal foot.

(d) Trench 5 to 6 feet deep twenty-one (21) cents per lineal foot.

(e) Trench 6 to 7 feet deep twenty-seven and one-third (27 1/3) cents per lineal foot.

(f) Trench 7 to 8 feet deep thirty-two and one-half (32½) cents per lineal foot.



2. For all trench having to be excavated by hand, on account of being unable to use machine, three and one-third (3 1/3) cents per cubic foot.

IN WITNESS WHEREOF, the party of the first part and the party of the second part have hereunto subscribed these presents this sixteenth day of December, A. D. 1913.

CUYAMACA WATER COMPANY,

By Ed Fletcher,
Manager

Party of the first part.

R. F. Ware,

Party of the second part.

SOLON S. KIPP & W. E. STARKE
ATTORNEYS AT LAW
1130 BANK OF AMERICA BUILDING
SAN DIEGO, CALIFORNIA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

No. 134166

ARNOLD C. WESTON AND MILDRED WESTON,
Plaintiffs,
-vs-
J. S. HARVEY, C. F. TAYLOR; ED FLETCHER
MARY C. B. FLETCHER; L. E. RUSSELL; L. A.
RUSSELL; L. E. RUSSELL & CO., a Corporation;
HATTIE E. BORDEN; ISABELLA S. CHURCHILL;
ISABEL L. LESTER; FLORENCE E. CASEBEER;
DOCTOR H. W. HASTINGS; JOHN DOES, ONE TO
TWENTY, INCLUSIVE;
Defendants.

C O M P L A I N T

(Action to Quiet Title)

Plaintiffs above named complain of defendants above named, and for cause of action allege:

I.

That plaintiffs are the owners in fee and entitled to the possession of all that certain real property situate in the County of San Diego, State of California, bounded and described as follows, to-wit:

PARCEL 1.

The Southwest Quarter of the Northeast Quarter of Northeast Quarter of Section Thirty-four, Township Fourteen South, Range Three West, in the County of San Diego, State of California, according to United States Government Survey approved May 20, 1884.

Sec 34 T14S R3W

$64.18



SOLON S. KIPP & W. E. STARKE
ATTORNEYS AT LAW
1130 BANK OF AMERICA BUILDING
SAN DIEGO, CALIFORNIA

PARCEL 2:

Lot Thirteen of the Subdivision of Pueblo Lot 1207, in the City of San Diego, County of San Diego, State of California, according to Map No. 842, filed in the office of the County Recorder of San Diego County, on February 8, 1898.

PARCEL 3:

Lot Eighty of Tract No. 2, San Diego Eucalyptus Company's Lands, in the County of San Diego, State of California, according to Map thereof No. 1492, filed in the office of the County Recorder of San Diego County, November 8, 1912.

II.

That the defendants herein denominated as JOHN DOES, ONE TO TWENTY, INCLUSIVE, are sued by said fictitious names for the reason that the true names of said defendants are unknown to plaintiffs, and upon discovery of said defendants' true names, plaintiffs will request the amendment of all proceedings in this action by substituting the true names of said defendants herein;

III.

That the said defendants claim some right, title, interest, estate or lien in or to the above described real property adverse to the plaintiff, which said adverse claims are without right and are null and void, and said defendants have not any right, title, interest, estate or lien in or to the above described real property, or any part thereof;

WHEREFORE, plaintiffs demand judgment:

That the plaintiffs are the owners in fee, and entitled to the possession of the above described real property, and every part thereof; that the defendants, and every one of them, have not any right, title, interest, estate or lien in, on, to, or against said above described real property, or any part therepf; that the claims of the defendants, and every one of them, to any right, title, interest, estate or lien in, on, to, or against said above described real property, or any part thereof, adverse to the title of the

plaintiffs, are without right and are null and void, and that the defendants, and every one of them, be forever enjoined and debarred from asserting or claiming any right, title, interest, estate or lien in, on, to, or against the above described real property, or any part thereof adverse to the title of these plaintiffs, and that these plaintiffs have such other and further relief as to the Honorable Court may seem agreeable to equity, and for their costs and disbursements of suit.

SOLON S. KIPP & W. E. STARKE

BY: W. E. Starke
Attorneys for Plaintiffs

STATE OF CALIFORNIA )
) ss.
COUNTY OF SAN DIEGO )

W. E. STARKE, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiffs in the above entitled action; that he has his office in the said County of San Diego; that the plaintiffs are absent from the County of San Diego; that he has read the complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

W. E. STARKE

Subscribed and sworn to before me
this 24th day of June, 1946.

(SEAL) NADINE COLLINS
Notary Public in and for the County
of San Diego, State of California.

SOLON S. KIPP & W. E. STARKE
ATTORNEYS AT LAW
1130 BANK OF AMERICA BUILDING
SAN DIEGO, CALIFORNIA



# In the Superior Court of the State of California

IN AND FOR THE COUNTY OF SAN DIEGO

No. 134166

FOR FILE STAMP

ARNOLD C. WESTON AND MILDRED WESTON,
Plaintiffs
vs.
J. S. HARVEY, et al.,
Defendants

## SUMMONS

Action brought in the Superior Court of the State of California in and for the County of San Diego, and the Complaint filed in said County of San Diego, in the office of the Clerk of the Superior Court.

The People of the State of California Send Greeting: To J. S. HARVEY; C. F. TAYLOR; ED FLETCHER; MARY C. B. FLETCHER; L. E. RUSSELL; L. A. RUSSELL; L. E. RUSSELL & CO., a Corporation; HATTIE E. BORDEN; ISABELLA S. CHURCHILL; ISABEL L. LESTER; FLORENCE E. CASEBEER; DOCTOR H. W. HASTINGS; JOHN DOES, ONE TO TWENTY; INCLUSIVE

, Defendants.

**You Are Hereby Directed** to Appear and answer to a Complaint in an action entitled as above, brought against you in the Superior Court of the State of California, in and for the County of San Diego, within ten days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiffs will take judgement for any money or damages demanded in the Complaint, as arising upon contract or Plaintiffs will apply to the Court for any other relief demanded in the Complaint.

SEAL OF SUPERIOR COURT

Given under my hand and seal of the Superior Court of the County of San Diego, State of California, this 27 day of June, 1946

J. B. McLEES, Clerk.

By Geo. A. Wren
Deputy.

SOLON S. KIPP & W. E. STARKE
1130 Bank of America Bldg.
San Diego, California
Attorneys.

APPEARANCE: A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of appearance. The appearance must be in writing, accompanied by the necessary fee and filed with the Clerk.

FORM 11 CO. CLK. 2-46-10M PP

134163

No.....

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**IN AND FOR THE COUNTY OF SAN DIEGO**

.....
.....
Plaintiff....
vs.
.....
.....
Defendant.....

**SUMMONS**

STATE OF CALIFORNIA,
County of San Diego, } ss.

....., being duly sworn, deposes and says: That he is, and was at the time of service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served the within Summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of San Diego, State of California, at the times set opposite their respective names, a copy of said summons attached to a copy of the complaint referred to in said summons.

| Names of Defendants Served: | Time of Service: |
|---|---|
| ..... | ..... |
| ..... | ..... |
| ..... | ..... |
| ..... | ..... |

Fees for Service, $.....; Mileage, $.....; Total, $.....

Subscribed and sworn to before me
.....day of....., 19.....
.....
.....

.....

Ed Fletcher
869 Broadway

# Ed Fletcher Papers

## 1870-1955

## MSS.81

## Box: 55 Folder: 48

## Business Records - Water Companies - Cuyamaca Water Company - Miscellaneous legal

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