

purpose taken from Waterfall and possibly from Strong's canyon. In 1862, the plaintiff Stowell succeeded in interest all the settlers who has settled upon these lands and probably during that year or the next year the plaintiffs went across the ravine through which Waterfall creek flowed and on to the high ridge or ground where Strong's canyon creek flowed from the mountains and well up toward the mouth of the canyon, and constructed a ditch from Strong's Canyon Creek carrying it north and a little west, and across the bed of Waterfall Canyon Creek, onto their lands, and from that time have used water through that ditch up to the time the pipes were put in as hereafter stated. The plaintiffs also went into Waterfall Canyon and constructed a board flume of considerable length to take the waters from up in the canyon and carry them over the loose stony ground below, where it usually sinks to firmer ground below, and conducted water down through said ditch and irrigated the land in that manner. They continued to improve and irrigate their lands and to reduce their lands to cultivation from that time. A portion of the lands of the plaintiff, situated in the bed or ravine of Waterfall Canyon Creek, are soft and porous and the result of spreading waters thereon through open ditches was that springs sprung up in the lower part of their ground, and near the junction of the two creeks which during the irrigation season would flow quite an amount of water and thereby augment the volume of water in Canfield creek.

This use of the waters of these creeks seems to have been known by the defendants and their successors in interest and the use by the plaintiffs was recognized, and from 1862 and up to 1880, and perhaps some time after that, all the parties hereto seemed to recognize each others right to the use of water. They held annual meetings, at which a water master was elected to look after their joint interests. In the meantime other parties had settled near these various creeks and had made appropriations therefrom subject to the prior rights of the parties to this case, and in the meetings they recognized two classes of claims upon this creek, one as prior rights or primary rights and others as secondary rights. They seem never to have determined who the first appropriators were and to have them rated in the order of their appropriations except to make two classes of them, one of the original or primary appropriators and one of secondary appropriators, and in these meetings the plaintiffs and their predecessors in interest were recognized as belonging to the class designated as primary appropriators. At one meeting held about 1880, a resolution was passed to have two water masters, one representing the first and one representing the secondary appropriators, thereby recognizing that the primary appropriators, as they termed them, were entitled to equal rights; and at the same meeting, as watermaster for the primary appro-

priators, the person representing the plaintiffs was elected watermaster, thereby designating him as one of the parties who held a primary or original right.

In 1882 the plaintiffs entered into a contract with Ogden City to which it was agreed between them and the city, that the city should put in enclosed iron pipes to convey water from Strong's Canyon creek and from Waterfall Canyon creek, to and upon the lands of the plaintiff and extending from there on to the city reservoir, and that during the irrigating season the plaintiffs should have the use of said pipes to convey the water upon their lands for irrigating purposes, and that during that portion of the year when it was needed for irrigating purposes, that they, the city, might take one half of the flow of water of Strong's Canyon creek and all of the flow of Waterfall Canyon creek, and turn it in on their reservoir. These pipes were at once put in and water thereafter conveyed through them. The immediate result of conveying these waters through these closed pipes was to dry upon the springs on the low grounds of the plaintiffs and thereby incidentally diminish the flow of water in Canfield creek.

The plaintiffs claim that during all the time from 1862 through the ditches before mentioned they had actually and as a matter of fact diverted and taken the waters of Waterfall Canyon Creek and one-half of Strong's Canyon Creek upon their lands and they therefore claimed that they had been in the uninterrupted and peaceable possession of one-half of Strong's Creek and the whole of Waterfall Creek for the statutory period of seven years, and that therefore it belongs to them.

On the part of the defendants it is claimed that they are the prior appropriators and that they have the prior right, that the plaintiff's right is a secondary right; and they claim further that the waters which were diverted from both of the creeks above being spread upon the plaintiff's land caused the springs on the low grounds on the lower parts of their land to flow and thereby augment their supply of water; and that the change in the use is detrimental to them and is improper. The defendants also claim that the change in the manner of the use and the contract by which the plaintiff allowed the city to put in its pipes have forfeited all rights that the plaintiffs have; that is, that the pipes which are now put in belong to the city and the water diverted through them also belongs to the city and that the plaintiffs have lost all control over it. It will be seen that by the contract between the plaintiffs and the city the plaintiffs retain a beneficial interest in them; that by its terms they were entitled to the use of these pipes as conduits for their water. It was contended by counsel for the defendants that if the city should see fit during the irrigation season to take water down to their reservoir that the plaintiffs' only recourse would be to an action for damages,

and that the water would belong to the city. I cannot agree to this view. I think the contract is such that the plaintiffs could enjoin the city from so diverting the water, and that the plaintiffs retain by that contract their right to whatever water they had before. They only changed the manner of taking from the streams, and took it in a way which caused less loss. Therefore I do not think that the plaintiffs have lost their right, whatever they may have had, by this change. As to the amount of water which the plaintiffs have claimed and used during the irrigating season, and as to what amount of water had been turned from Strong's canyon creek into their ditch, the testimony is very conflicting. It showed that the parties had tried to accommodate each other; that watermasters had tried to satisfy all persons complaining to them. As a matter of fact it does appear that for a great portion of the time at least one-half of the waters of Strong's Canyon was diverted into plaintiff's ditch. But in this there was no regularity. In the seasons of low water sometimes the whole volume of water was turned into the plaintiff's ditch for a time, and then turned down the stream for the defendant's use. But in all the transactions, as before stated, the plaintiffs seem to have been recognized as having a right as an original appropriator. And this commenced very soon after 1862 and so continued without interruption until 1882.

It must, therefore, I think, be determined that the plaintiffs have a right in the waters of these streams, equal in time of appropriation to the defendants; but the question remains as to what the amount of that appropriation was.

The plaintiffs, as before stated, have undertaken to establish their title to the waters of Waterfall and one-half of Strong's Canyon Creeks by evidence that they have actually had and used it.

In order to constitute a title by user, especially as against persons who are as well prior appropriators, it must be shown that the use was open, notorious and adverse; that is, it must be shown that the party made claim to his rights openly, and that the other party, knowing and understanding what the claim was, acquiesced in it or at least permitted the user. In determining what the amount in this case is, we must have recourse to all the circumstances of the case. In the first place the point of division of Strong's Canyon Creek was high up in the mountains and at a point remote from the parties interested. The testimony shows it was seldom visited by any but the watermaster. The watermaster, it is true, represented all the parties. He represented the plaintiffs as well as the defendants; and the mere fact that the watermaster had yielded to the complaints of the plaintiffs and turned water down to them, even though it may have continued for many years unless it could be shown that it was brought actually to the attention and notice