

their duty to their stockholders (*Green v. Canaan*, 29 Conn. 157; *Williams v. Railroad Co.*, 39 Conn. 509). The appellant cites the case of *Illinois Cent. R. Co. v. City of Chicago* (Ill. Sup.) 30 N. E. 1036, where the court said:

"It is plain that, under the act of congress donating lands for the construction of a railroad and the charter of the railroad company, the strip of land—the right of way—is devoted to a certain specified purpose, and cannot be diverted from that purpose."

The language so quoted from the decision in that case must be considered in the light of the question then before the court. It was a case of a special assessment against the right of way of the Illinois Central Railroad to pay for the improvement of a street, upon the theory that the right of way was benefited by the street improvement. The court held that the right of way granted by congress for a special purpose was not chargeable with such an assessment; that the strip so devoted to public use was not land which could be laid off into lots and blocks, and sold by the railroad company for its own advantage, or used as private property is used by individuals; and that, therefore, its value, for the purpose for which it was dedicated, was not capable of being enhanced by the improvement of an adjacent street. This is far from holding that a railroad company may not, in recognition of public interests, and for the promotion of the public welfare, dedicate to the public an easement over its right of way which does not interfere with its own use of the same for a railroad. The decree is affirmed, with costs to the appellees.

HEWITT v. STORY et al.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1894.)

No. 102.

IRRIGATION—ABANDONMENT OF WATER RIGHTS—IRRIGATING DITCHES.

R. and others, in 1869, located a ditch appropriating, for the purpose of irrigating their lands, the waste water of the A. river, remaining after the N. F. and S. F. ditches, previously located, had been supplied. Such ditch was called the "B. R. Ditch." The water appropriated by it being insufficient for their lands, the owners of the B. R. ditch purchased shares in the S. F. ditch, and diverted the water so acquired through the B. R. ditch. Subsequently, by their consent, other owners of shares in the S. F. ditch diverted their water through the B. R. ditch, and in and after 1874 all the water belonging to the owners of the S. F. ditch was taken by them through the B. R. ditch, with the consent of the owners thereof, on condition of contributing to the expense of enlarging and repairing that ditch. Subsequently, the route of the B. R. ditch was twice changed, and the water belonging to the owners of the S. F. ditch was for more than five years conducted through such changed B. R. ditch, and all the water received through such ditch was allotted according to the interests of the owners of such S. F. ditch, who took complete possession, use, and control of the B. R. ditch, adversely to any right or claim under the original location. Complainant and his predecessors in title, the owners of the land originally supplied by the B. R. ditch and the locators of such ditch, knew of and acquiesced in such use, and shared in the water only according to their shares in the S. F. ditch, without objection to such use, and contributed to the alteration and repair of the B. R. ditch only in proportion to their shares in the S. F. ditch. In 1887 complainant

brought suit to establish a right to a specific quantity of the water of the A. river, in virtue of the appropriation by the B. R. ditch. *Held*, that the use of the waste water in the B. R. ditch was abandoned through nonuser on the part of complainant and his predecessors in title. Knowles, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of California.

This was a suit in equity by Isaac L. Hewitt against Warren Story and 66 others to establish a right to certain waters for irrigation purposes. A motion to dismiss was denied (39 Fed. 158), and the cause was next heard on objections by certain of the defendants to the amended bill of complaint. The objections were disallowed. 39 Fed. 719. Subsequently, on further hearing, the bill was dismissed (51 Fed. 101), and complainant now appeals.

This is a suit in equity. The bill of complaint alleges the wrongful and unlawful diversion of certain waters by the appellees, 67 in number, including certain corporations, companies, associations, and individuals, using and claiming water by appropriation from the Santa Ana river, in San Bernardino county, Cal. It prays for a decree entitling appellant to a specific quantity of water, and for an injunction, etc. The bill was filed in January, 1887. Appellant claims to be the owner in possession, and entitled to the possession and use, of 333 $\frac{1}{8}$ inches, under a 4-inch pressure, of the waters of the Santa Ana river, which he alleges were appropriated by his predecessors in interest through and by means of a certain ditch known as the "Berry Roberts Waste-Water Ditch." The Santa Ana river is an unnavigable stream of running water, flowing through sundry wild cañons and ravines in the San Bernardino mountains, and emerging therefrom into the San Bernardino valley through the mouth of a steep ravine near the eastern boundary of the valley; and the waters thereof have been and are held and owned, for many miles above and below the entrance to the Berry Roberts ditch, exclusively by right of appropriation, and used generally for the purpose of irrigation. Long prior to the location of the Berry Roberts ditch, two appropriations had been made of the waters of the Santa Ana river,—one by means of the North Fork ditch, owned by the North Fork Water Company, a corporation, which taps the river near the point where it debouches from the mountains into the valley; the other by means of the South Fork ditch, owned by an association of individuals designated in the bill of complaint as the South Fork & Sunnyside Division of the Santa Ana River, which takes water from the river some distance lower down. The owners of these ditches have, at all times since acquiring their water rights, kept these ditches in repair. Prior to 1860 there were but few people using the water from the ditches, but, before the Berry Roberts ditch was located, the number had been largely increased. The ditches have since been enlarged, and many thousands of dollars have been expended thereon. The actual extent of the appropriation by the North Fork and South Fork ditches, prior to the location of the Berry Roberts ditch, is not clearly defined, and, under the views hereinafter expressed, the precise amount of water which each ditch is entitled to need not be determined. Subsequent to the location of the Berry Roberts ditch, two appropriations of water from the Santa Ana river nearer its head have been made: One, the Brown and Judson ditch, owned by the Redlands Water Company, a corporation, which was located in the spring of 1881, and conveys water to the town of Redlands for irrigation and domestic purposes. Every year since its construction, extensions and improvements, involving large expenditures of money, have been made. The other, the Bear Valley dam and reservoir, owned by the Bear Valley Land & Water Company, a corporation, was located in June, 1883. This corporation, in the spring of 1883, bought three or four thousand acres of land situated in the lower portion of Bear valley, and constructed a dam at the point where the lower edge of the valley adjoins the head of Bear cañon, for