

1949

James C. Whittaker v. Richard H. Spencer : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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UTAH SUPREME COURT

BRIEF

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INDEX

TOPICS	Page
I. STATEMENT OF THE FACTS.....	1
II. ARGUMENT.....	13
I. Price's Affidavit	13
II. Whittaker's Right Not Lost.....	15
III. Appellants Are Estopped.....	17
(a) By Mortgage	17
(b) By Disclaimers	19
(c) By Record and Judgment.....	20
IV. Res Adjudicata	24
V. Hadlock's Mortgage not Void; Not Uncertain.....	29
VI. The Judgment is Correct.....	46
VII. Costs Properly Allowed.....	47
STATUTES	
Section 100-1-4, Utah Code Annotated, 1943.....	15
78-1-13	18
78-1-11	18
Compiled Laws, Utah, 1888, Vol. II, page 135.....	41
Section 100-1-2, Code.....	41
104-44-2	48
104-44-4	48

TEXTS

21 C.J. 1067, Section 26.....	17
21 C.J. 1068, Section 27.....	17
15 C.J. 1230, Section 40.....	16
21 C.J. 1063, Section 21.....	20
34 C.J. 511, Section 815.....	21
34 C.J. 859, Section 1262.....	21
34 C.J. 944, Section 1345.....	22
34 C.J. 962, Section 1368.....	22
34 C.J. 984, Section 1405.....	23
34 C.J. 742, Section 1154.....	25
67 C.J. 1038, Section 479.....	31
1039, Section 481.....	31
1040, Section 481.....	31
1041, Section 486.....	31
1079, Section 557.....	31
36 Am. Juris., Section 42.....	32
11 C.J. 464, Section 84 (2).....	39

CASES

Elliott v. Whitmore, 8 Utah 254, 30 P. 984.....	42
Hammond v. Johnson, 94 Utah 20, 66 P. (2d) 894.....	15
Jacobsen v. Christiansen, 18 Utah 149, 55 P. 562.....	38
Logan City v. Utah Power & Light Co., 86 U. 340, 16 P. (2d) 1079.....	26
Middle Cut Ditch Co. v. Henry, 15 Mont. 558, 39 P. 1054.....	43
Nephi Irrig. Co. v. Vickers, 15 U. 374, 49 P. 301.....	42
Payton v. Browning, (N.M.), 290 Pac 253.....	33
Smith v. Phillips, 6 U. 376, 23 P. 932.....	42
Sharp v. Whitmore, 51 U. 14, 168 P. 273.....	43
Wick v. Rea, 54 Wash. 424, 427, 103 Pac. 462.....	21

IN THE SUPREME COURT of the State of Utah

JAMES C. WHITTAKER,

Plaintiff,

vs.

RICHARD H. SPENCER, (in whose
name RICHARD LEO SPENCER, as
Administrator has been substituted,
JOHN EDISON SPENCER, ELIZA-
BETH A. TIBBS, VORD SPENCER,
IRWIN M. PRICE, SIMON HUGEN-
TOBLER, (in whose place Que Jensen
has been substituted, INDIANOLA
IRRIGATION COMPANY and the
STATE OF UTAH,

Defendants.

Case No.
7181

BRIEF OF RESPONDENT JAMES C. WHITTAKER

STATEMENT OF THE FACTS

The controlling facts so far as they relate to the plaintiff's side of the case are not in dispute. They are for the most part matters of record. If the mortgage under which plaintiff claims is valid, the record shows beyond all question that the plaintiff has a perfectly good title to the 60 acres of primary or class A water right in Thistle creek and its tributaries which he claims. It also shows that both appellants are estopped by mort-

gage, by their disclaimers and by judgment to raise the question of the validity of the mortgage and that the validity of the mortgage is a matter which has been determined by the judgment of the court in case No. 2888.

The plaintiff's title is based upon a mortgage which was given by Richard H. Spencer to W. H. Hadlock, the state bank commissioner, and which was foreclosed in case No. 2888. This mortgage is plaintiff's Exhibit E. (Tr. 26, 37).

The waters of Thistle creek were appropriated by diversion and beneficial use many years ago. There was a decree rendered in the district court at Provo in Territorial days which settled the rights of the appropriators as of that time. Then in 1920 there was another decree rendered in the district court in Sanpete county, Utah, again adjudicating those same water rights. This decree is copied in the complaint and also in the findings of facts. The case in which that decree was rendered bears the number 1406. (See Findings of Facts.)

It was decreed in case No. 1406 that Richard H. Spencer was then the owner of the right to the use of 448 acres of primary or class A right out of a total of 1728 such rights on the stream, and that his water right had not then been conveyed to the Indianola Irrigation Company, a corporation, as many of these rights had been, and that there were no stock certificates outstanding for the Richard H. Spencer rights. (See Findings of Facts.)

The evidence shows that there were only 1728 acres of land under irrigation in Thistle Valley; and in case No. 1406 the court decreed that these 1728 acres of primary or class A rights embraced all the waters of the stream. But there were also class B rights, which, however, can be used only from the beginning of the irrigation season to June 15, while the high waters are flowing in the stream. (Tr. 165, 166, 167, 168, 169, 170, 171, 172, 173, 174)

The evidence also shows that it has always been customary for the water users to take all the water they need or can use for their lands while the stream is high; but as the flow diminishes they use fewer ditches, combine the stream flow, and take their water in turns. It has been customary ever since the organization of the Indianola Irrigation Company, in 1918, for the water master of the corporation each year to make out tickets for all the water users, both those who had conveyed their rights to the corporation taking stock certificates as evidence of their rights as well as those who had not so conveyed their rights and had no stock certificates in the corporation, showing when each owner's turns commenced and ended. (Tr. 165-175)

The evidence also shows that no land owner was obliged to use his water right on any particular land. On the contrary, he had the right to and did irrigate any land from any ditch according to his own desires, transferring from land to land and from ditch to ditch at will. (Tr. 165-175, 177, 789, 159)

Many years ago Richard H. Spencer acquired from their Indian owners four tracts of land or farms. They are:

- (1) The Jim Ownup or Old Jim land, being SE $\frac{1}{4}$ of Section 8, containing 160 acres.
- (2) The Wapitch farm, being S $\frac{1}{2}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 5, containing 160 acres.
- (3) The Wansitz farm, being S $\frac{1}{2}$ NW $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$, Section 5, containing 160 acres.
- (4) The Ponawats farm, being Lot 4 of Section 5 and Lot 1 of Section 6, containing 77 acres.
- (5) Richard H. Spencer also owned a city lot in Indianola containing 3 acres.

It appears from the testimony of Lyman H. Seely that when the decree was entered in case No. 1406 Richard H. Spencer was allowed water rights of the primary or Class A description for these lands as follows:

160 acres on the Jim Ownup farm.

70 acres on the Wapitch farm.

160 acres on the Wansitz farm.

55 acres on the Ponawats farm.

3 acres on the lot in town.

448 acres.

(Tr. 360-365)

But it should be remembered that he had the right to use this water upon any of his land and that he did in fact sometimes use it all on one tract or another and that when the stream was at low flow he combined his

water into one or two ditches and used it wherever on any of the land as needed. The evidence also shows that the 3 acres allocated to the city lot had been used on the Wapitch land and had never been used on the lot in town. Seely also testified that in the decree in No. 1406 Spencer had been allocated only 55 acres for the Ponawats farm, that this farm had used 80 acres of water right but before that decree was entered Spencer had sold and conveyed 25 acres of that water right to one Wall, so that when the decree was made Spencer was allocated only 55 acres of primary right for the 77 acres in the Ponawats farm. (Tr. 360-365)

The evidence concerning Richard H. Spencer's mortgages and deeds of transfer of his 448 acres of primary or Class A rights comes from the records in the office of the county recorder. The deeds and mortgages with which the plaintiff is concerned, with their dates and the dates of record, are as follows:

First: The Hugentobler mortgage.

This mortgage is dated January 5, 1922; it is recorded as of January 12, 1922. It runs from Richard H. Spencer and his wife to Simon Hugentobler. It covers the land in the Ponawats farm and 55 acres of primary or class A water right in Thistle creek.

The mortgage itself does not state whether or not the water right mortgaged is water right used for the irrigation of the mortgaged land. In fact, so far as the terms of the mortgage are concerned, it cannot be de-

terminated whether or not there is any of the land which has ever been irrigated.

Second: The Federal Building and Loan Association mortgage.

This mortgage is dated November 9, 1926. It was recorded November 9, 1926. It runs from Richard H. Spencer to the Federal Building and Loan Association. It covers the Jim Ownup 160 acres of land in Section 8 and parts of the Wapitch lands in Section 5, and 285 acres of primary water rights. It also appears in connection with this transaction that Richard H. Spencer purported to assign to Federal Building and Loan Association 285 shares of Class A stock in the Indianola Irrigation Company. But it must be remembered that at this time Richard H. Spencer owned no shares of stock in that corporation representing any of the water rights with this action is concerned, namely the 448 acres of right decreed to him in case No. 1406, and that there was then no certificate outstanding for any of those rights.

Third: The Hadlock mortgage.

This mortgage is dated October 16, 1931, and was recorded October 21, 1931. It is executed by Richard H. Spencer and others and runs to W. H. Hadlock, the state bank commissioner. It is witnessed and notarized by Will L. Hoyt. It is in the statutory form of mortgages in use in this state. It covers 280 acres of land in Section 3, with the water right used thereon, and contains this special paragraph relative to the water right which the plaintiff now claims:

“Together with all rights of every kind and nature, however evidenced, to the use of water, ditches, and canals for the irrigation of said premises to which the mortgagors or said premises are now or may hereafter become entitled; whether represented by certificates of stock or otherwise, and together with sixty (60) shares or acres of water right owned by R. H. Spencer in the waters of Indianola Creek, Thistle Creek and Rock Creeks in addition to waters now used for the irrigation of the above described lands.”
(Tr. 26)

The astonishing suggestion is advanced by counsel for appellants that this mortgage might have been intended by the parties to be a second mortgage on Richard H. Spencer's 60 acres of primary water right. But it is to be noted that there is nothing whatever in the instrument itself nor is there any evidence in the record to support such suggestion.

The evidence shows, without dispute or conflict that the only water right which the bank commissioner obtained as security by this mortgage is the 60 acres belonging to Richard H. Spencer. The water right which had been decreed in connection with the land in Section 3 was then owned by one of the other mortgagors, there was a stock certificate in the Indianola Irrigation Company then outstanding to represent the same, and the bank commissioner did not receive possession of said certificate; but it was later pledged to a bank in Spanish Fork, the pledge was foreclosed, and the stock at the time of the trial was owned by Tanner. (Tr. 390, 393)

The total number of acres or shares of the primary or class A water rights covered by the three mortgages above mentioned is 400, leaving, as of October 16, 1931, the date of the Hadlock mortgage, 48 acres out of Richard H. Spencer's 448 acres still in his name and free from mortgage or other lien.

Now, please bear in mind that not until November 25, 1931, had Richard H. Spencer conveyed any of his 448 acres to the Indianola Irrigation Company; and not until that day did he have any certificate of stock in that corporation to represent any of his water right. Also please bear in mind the fact that all of the mortgages above mentioned were executed and recorded prior to the date of any other instrument involved in this action affecting the 448 acres of primary water right of Richard H. Spencer's.

Fourth: The deed to Indianola Irrigation Company.

There is a dispute concerning the date of the execution of this deed. Appellants claim it was signed on June 1, 1918, or June 21, 1918. The evidence shows that it was signed by Richard H. Spencer and his wife on November 25, 1931, which is the date when they signed the separate slip of paper which is attached to the instrument. The court found as a fact in case No. 2888 and also in this case that Richard H. Spencer signed that slip of paper on November 25, 1931.

But be the fact as it may as to when they executed this deed, the fact is beyond all question that it was not recorded until April 4, 1936.

So that the three mortgages above mentioned take priority over this deed.

This deed purports to convey to the Indianola Irrigation Company 160 acres of primary water right; and upon the basis of this deed the irrigation company issued a certificate for 160 shares of its class A stock, which was afterward surrendered to the corporation and cancelled and in lieu thereof certificates 72 and 73 were issued.

Fifth: The Federal Building and Loan mortgage is foreclosed.

The next step involving Spencer's 448 acres of water rights which is important is the foreclosure of the Federal Building and Loan Association mortgage. This was done in case No. 2730.

Federal became the purchaser at the foreclosure sale of the land and water rights described in its mortgage. Federal afterward conveyed the title to 285 acres of the primary water right to the Indianola Irrigation Company and received in lieu thereof a certificate for 285 shares of its class A stock, now represented by certificates No. 84 and No. 86.

Sixth: Hugentobler and Hadlock mortgages foreclosed.

The Hugentobler and Hadlock mortgages were foreclosed in case No. 2888. In that case all of the defendants in this action, except Irwin M. Price, were parties defendant.

At the time the judgment and decree of foreclosure was entered in that case certificates No. 72 and No. 73 were outstanding, and, as the court found, were then in the possession of Richard H. Spencer.

The decree in that case foreclosed all of the defendants in the action of all their rights in and to the water rights covered by the Hugentobler and Hadlock mortgages; and in that case the court found as a fact that the water rights which were included in the Hugentobler and Hadlock mortgages were a part of the same water right which Richard H. Spencer had deeded to the Indianola Irrigation Company on November 25, 1931, and which were the water rights which supported certificates 72 and 73.

The court, however, did not do as it should have done, namely, order 72 and 73 to be surrendered up and cancelled and a new certificate issued to whoever had a right to the 45 shares remaining after deducting the 55 acres for Hugentobler and the 60 acres for Hadlock from the 160 acres; but the court did reserve for future determination what to do about those certificates.

At the foreclosure sale in case No. 2888 Hugentobler became the purchaser of the lands and water rights covered by his mortgage. This is the land and water right now owned by Que Jensen. At the sale Hadlock became the purchaser of the land and water right covered by his mortgage. This is the water right now owned by the plaintiff.

Hugentobler and Hadlock received their sheriff's deeds on the foreclosure sale in the late fall of 1937, after the irrigation season.

Thereafter, beginning with the irrigation season of 1938 and coming right down to the time this case was tried, whenever the bank commissioner and his successor in title attempted to make use of the water right, in the turns assigned by the water master for their use, the Spencers interfered with their dams and took the water themselves, claiming the right to do so because they said Irwin M. Price owned certificates No. 72 and No. 73 and they had some arrangement with him permitting them to use the water represented by those certificates. (Tr. 209-211)

Since Irwin M. Price was not a party to case No. 2888, it was imposible to reach him in that case, so the plaintiff brought this action, naming him as one of the defendants and also bringing in all of the defendants in that action to settle the rights which had been brought into dispute again by this claim now asserted by Richard H. and John Edison Spencer that Price was the owner of the stock certificates.

Of course neither Hugentobler nor Hadlock ever claimed any interest in certificates No. 72 and 73. They claimed adversely to those certificates. They claimed and still claim that when their mortgages were foreclosed the water rights which underlay those certificates were taken away from the Indianola Irrigation Company, leaving that corporation in the unhappy situation of having cer-

tificates for 115 shares of its class A stock outstanding with no foundation in water rights to support them.

In this action Richard H. Spencer and John Edison Spencer disclaimed all interest in all the water rights mentioned and described in the plaintiff's complaint. Both signed the disclaimer personally and verified the same before their attorney Lewis Larson. That disclaimer still stands in the records of this action and it is still binding upon those defendants.

At the time Richard H. Spencer and John Edison Spencer filed their disclaimer, there was also filed by Mr. Larson an answer on behalf of the defendant Irwin M. Price, which includes a disclaimer and an affirmative defense. This answer is not signed by Price nor is it verified by him. There is no evidence in the record which indicates that Price ever knew that this answer had been filed in his behalf, but there is evidence suggesting the contrary.

We hasten to disclaim any intention to impugn the good faith of Mr. Larson in filing this answer and state that we feel that he did so in the belief that Richard H. and John Edison were authorized by Price to represent him in retaining Mr. Larson to represent him in this action.

In his affirmative defense to the plaintiff's complaint Irwin M. Price is made to allege:

“That he does claim 160 shares of the Primary water of Indianola Irrigation Company, con-

veyed to the Indianola Irrigation Company by R. H. Spencer, and appropriated by said R. H. Spencer and his predecessors in interest upon that particular tract of land described as follows; to-wit:

The south half of the northwest quarter, and the north half of the southwest quarter of Section 5, in Township 12 South, Range 4 East of Salt Lake Meridian, containing 160 acres, in Sanpete County, State of Utah, which said water was heretofore, in about the year 1931, conveyed by deed from R. H. Spencer to the Indianola Irrigation Company, for which certificate of said Indianola Irrigation Company, No. 57, was issued to said R. H. Spencer, and which certificate was thereafter split and issued in the form of two certificates known as certificates No. 72 and 73 of the Indianola Irrigation Company, and which waters so evidenced, were appropriated by said R. H. Spencer and his predecessors in interest, upon said described lands in Section 5, more than sixty years next prior to the commencement of this action, and this defendant has never diverted, or attempted to divert or authorized any one to divert any waters other than those waters so appropriated, which said waters at the time of said diversion, were owned and are now owned by this defendant."

This answer is signed by Lewis Larson as attorney for Irwin M. Price and was verified by Mr. Larson on April 22, 1942.

ARGUMENT

I.

The Price Affidavit

Inasmuch as the only right which Richard H. Spen-

cer and John Edison Spencer have ever claimed to the Hugentobler and Whittaker water rights, since the execution of the sheriff's deeds thereon in the foreclosure sale in case No. 2888, is based upon their claim that Irwin M. Price was the owner of certificates 72 and 73 and they had an understanding with him for the use of the water right represented by those certificates, it is no wonder their camp was thrown into confusion and consternation upon the filing of the Irwin M. Price affidavit.

The utter falsehood of their claim was exposed by that affidavit. Having themselves disclaimed all interest in all the water rights described in the plaintiff's complaint, and having taken Hugentobler's and Hadlock's water turns under the claim that Price owned 72 and 73, and they had rented the water from him, they stood exposed to shame as trespassers and water thieves, with no semblance of rights upon which to justify their conduct over all the years since 1938 during which they have taken the water when it was Hadlock's and Whittaker's turns.

The Price affidavit was not produced by the plaintiff. It came into the case from the administrator in his cross action against John Edison and Mrs. Tibbs.

If it had not been for the false claim which they caused to be set up in the answer of Irwin M. Price to our complaint, this case would have been summarily disposed of years ago; for plaintiff would have been entitled to judgment on the pleadings against all of the

defendants, Tibbs and some of the others being in default, Indianola Irrigation Company taking about the same position that plaintiff maintained, and Richard H. Spencer and John Edison Spencer having disclaimed.

We feel that a great wrong has been done to all parties concerned by the way Richard H. Spencer and John Edison Spencer have been permitted to trifle with the court and with the rights of others by hiding their actions behind the screen of the claim which they asserted in behalf of Irwin M. Price.

It was therefore no little satisfaction to us when, without any help from our side, their nefarious conduct stood exposed by the filing of the Price affidavit.

We simply could not help recollecting the old saw, that when thieves fall out just men get their dues.

II.

Whittaker's Right has not been Lost by Nonuser, nor by Adverse Possession.

Appellants John Edison Spencer and Elizabeth A. Tibbs in their brief at page 82 make the claim that the Whittaker right has been acquired by John Edison Spencer by adverse use and lost to plaintiff under Section 100-1-4, Code, and the doctrine of *Hammond v. Johnson*, 94 Utah 20, 66 Pac. (2d) 894.

In answer to such claim we point out the facts bearing upon the subject. Hadlock was not authorized to use the 60 acres of water right until his mortgage was fore-

closed and the sheriff's deed was issued on the foreclosure sale after the period of redemption had expired. During all that period the mortgagor had the right to the use of the water right. The sheriff's deed is dated December 9, 1937, recorded December 16, 1937, which was after the irrigation season for that year. So that Hadlock was not entitled to use the water until the beginning of the irrigation season of 1938.

There seems to have been no trouble over the use of the water in 1938. But when Hadlock and Whittaker took it in 1939, 1940 and 1941, in the turns assigned for its use, Richard H. Spencer and John Edison interfered with their use of it and took the water away from them. This action was filed in July of 1941 to quiet title to the right and the right has been in litigation ever since that time.

The foregoing facts do not sustain the claim that plaintiff has lost his right by not using it, for he did all he could do to make use of it and was prevented by the wrongful acts of those defendants. Not being willing to resort to the use of force to keep the water in his ditches when it was his turn to make use of it against these two trespassers, the plaintiff took the only course open to him to protect his right, namely, he filed his action in the district court to quiet his title and get an injunction against the defendants to restrain them from interfering with his use.

The facts refute the claim of abandonment and adverse title.

III.

**Appellants are estopped to claim
that the Hadlock mortgage is void.**

(a) They are estopped by the mortgage itself. Richard H. Spencer executed that mortgage. Appellant Richard Leo Spencer, as administrator of the estate of Richard H. Spencer, deceased, stands in no better position than did his intestate. Since Richard H. Spencer is estopped by the mortgage to say that it is void for uncertainty, so is his administrator estopped.

The rule of law under which this estoppel is claimed is the same with respect to a mortgage as to a deed.

In 21 C. J. 1067, Section 26, the rule is stated in this language:

“A person who assumes to convey an estate by deed is estopped, as against the grantee, to assert anything in derogation of the deed. He will not be heard, for the purpose of defeating the title of the grantee, to say that at the time of the conveyance he had no title, or that none passed by the deed, nor can he deny to the deed its full operation and effect as a conveyance.”

As to mortgages: 21 C. J. 1068, Section 27:

“Conforming to the general rule a mortgagor is estopped to assert anything in derogation of the rights which the instrument purports to convey....”

The general rule above stated must of necessity be the rule here because of the implied covenants in the mortgage.

The Hadlock mortgage is in the statutory form of mortgages in use in this state.

Section 78-1-13, Code, reads in part:

“Such a mortgage when executed as required by law shall have the effect of a conveyance of the land therein described . . . to the mortgagee, his heirs, assigns and legal representatives, as security for the payment of the indebtedness therein set forth, with covenants from the mortgagor of general warranty of title. . . .”

What are the covenants of general warranty of title mentioned in this statute?

The answer, we suggest, is found in Section 78-1-11, Code, relative to warranty deeds. In this section it is provided:

“Such deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named together with all appurtenances, rights and privileges there unto belonging, with covenants from the grantor, his heirs and personal representatives, that he is lawfully seised of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs and assigns in the quiet possession thereof; and that the grantor, his heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs and assigns against all lawful claims whatsoever.”

That such are the covenants of general warranty of title see also the definitions of “covenants of warranty”

in Bouvier's Law Dictionary; and 15 C. J. 1230, Section 40, under the title "Covenants," where it is said that in the United States the usual covenants of title are the covenants of seizen, or right to convey, against incumbrances, for quiet enjoyment, and of warranty.

It would indeed be a sad state of affairs if Richard H. Spencer, or his administrator, or any one claiming under him by a conveyance executed subsequent to the date of the Hadlock mortgage, were to be permitted to come in at this late date and say that the mortgage is void and the mortgagee got no title to the water right by the foreclosure of the mortgage and the purchase at the sheriff's sale.

Richard H. Spencer received the consideration for which he executed that mortgage. There would be no equity or justice in permitting his administrator or his children John Edison and Mrs. Tibbs to come in now and get the water right on the claim that the mortgage is void for uncertainty in the description, the only uncertainty claimed being that the description of the land to which the right was appurtenant is not included in the mortgage.

In equity and good conscience the appellants ought to be estopped.

(b) The administrator and John Edison are estopped by the disclaimers which were filed in answer to the complaint of the plaintiff in this action; and we think this goes for Mrs. Tibbs also because she is claim-

ing under her father. Richard H. Spencer's disclaimer has never been repudiated by any pleading filed in this action. John Edison's disclaimer has never been repudiated by him by any direct action on his part; he never did ask the lower court to permit him to withdraw that disclaimer or to be relieved from its binding effect. But he was permitted over our objection to file certain answers which are inconsistent with the disclaimer.

To disclaim means to disavow, to renunciate. In a pleading it means a renunciation by the defendant of all claim to the subject of the demand made by the plaintiff. (Bouvier's Law Dictionary.)

John Edison and Richard H. having renounced and disavowed by their verified pleading filed in this action all claims to the subject of the demand made by the plaintiff, namely, the 60 acres of water right which is the subject of this action, they are now estopped to assert that the Hadlock mortgage is void and that they own this same water right.

(c) Appellants are all estopped by the record and the judgment in case No. 2888 to assert that the Hadlock mortgage is void for uncertainty in the description of the water right.

The law on which we stand here is found in 21 C. J. 1063, Section 21, stated as follows:

“It is a well established rule that the records of a court of justice import absolute verity, and no one, whether or not a party to the proceeding

in which it was made, may in a collateral proceeding impeach it by adducing evidence in denial of the facts of which is purports to be a memorial."

See also 34 C. J. 511, Section 815, from which we quote:

"A judgment by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open contradiction or impeachment, in respect to its *validity*, verity, or *binding effect*, by parties or privies, in any collateral action or proceeding, except for fraud in its procurement. . . ."

"The reason for the rule that judgments of a court of record cannot be called in question in a collateral proceeding is one of necessity. The basic reason for the rule is founded on the consideration that the regular and orderly way of trying the validity of judgments is by an appeal or other appropriate proceeding in the case itself, or under the statute permitting a vacation of judgments for certain enumerated reasons." Quoted from *Wick v. Rea*, 54 Wash. 424, 427, 103 Pac. 462.

Also see 34 C. J. 859, Section 1262, from which we quote:

"In an action for the recovery of real property, or to try title, or to foreclose a mortgage or other lien, or for trespass, defendant must set up all the titles or claims to the property which he holds or can make available in his behalf; failure to assert any title or claim in such action will preclude him from setting it up afterward. . . ."

See also: 34 C. J. 944, Section 1345, from which we quote:

“When the existence and VALIDITY of a deed or other contract is adjudicated, either being put in issue and tried, OR IN THE SENSE OF BEING NECESSARILY DETERMINED BY A JUDGMENT ENFORCING THE CONTRACT, or refusing to set it aside, the question is conclusively settled by the judgment for the purposes of all further litigation between the same parties; and this rule applies, even though the issue was not raised in the action, since in that case the judgment necessarily implies a finding that the cause of action was valid and enforceable. . . .”

The existence and validity of the Hadlock mortgage were tendered as issues in case No. 2888. John Edison Spencer and Elizabeth A. Tibbs were parties to that action; so was Richard H. Spencer a party, and all of them were served with summons and Richard H. and John Edison were actually present at the trial of that case.

If they had any idea that the Hadlock mortgage was void for the uncertainty in the description in the water right, they had an opportunity to assert that defense. That was the proper time for them to assert it, for then the plaintiff could have asked for a reformation of the mortgage if the court had held that the ~~reformation was~~ *reformation* was faulty. They had their day in court on that issue.

We cite still another statement from 34 C. J. 962, this time from Section 1368:

“The judgment in a mortgage foreclosure suit is conclusive of all questions actually tried and determined or necessarily involved, including title to the premises if that was in issue and passed upon. The general rules as to persons concluded by judgment are applicable to judgments in foreclosure proceedings....”

The general rule is found in Section 1405, same volume:

“To constitute a judgment an estoppel there must be a substantial identity of parties as well as of subject matter; that is, it is necessary that the parties as between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered, in the same capacities and in the same antagonistic relation, or else they must be in privity with the parties in such former action....”

In that action Hadlock was plaintiff and John Edison and Mrs. Tibbs was defendant and Richard H. Spencer, the intestate who is now represented by the administrator, was a defendant. The plaintiff stands in this case as plaintiff in the shoes of Hadlock. So that all the conditions for an estoppel are here present.

The court in No. 2888 found by implication that the Hadlock mortgage was a valid instrument and foreclosed it. It found that the mortgage covered the 60 acres of water right which is the subject of this action. The court also found as a fact in that case that the Hugentobler 55 acres and the Hadlock 60 acres of water right were part of the same water right was con-

vayed by Richard H. Spencer to the Indianola Irrigation Company on November 25, 1931, and which supported certificates 72 and 73.

So that we now say that all of the appellants in this action are estopped and in good conscience and equity they ought to be estopped to assert now that the Hadlock mortgage is void and to assert that the Hadlock mortgage covered any other water right than that which was conveyed to the irrigation company for the stock now represented in 72 and 73. The record and the judgment in case No. 2888 are conclusive against them.

Counsel in the brief accuses us of attempting in this action to relitigate case No. 2888, which is a surprising thing to say; because it is he and not us who has raised the issue in this case of the validity of the mortgage. We are only trying in this action to secure the benefits of the judgment in that case, to enforce it. We stand on the mortgage as written, we stand on the judgment as rendered. We ask for no reformation of the mortgage, for it needs no reformation.

IV.

The issue of the validity of the Hadlock mortgage is res adjudicata.

In case No. 2888 Hadlock, the state bank commissioner, pleaded his mortgage and prayed for its foreclosure. The defendants in that action, who included Richard H. Spencer and John Edison Spencer and Elizabeth A. Tibbs, were all served with summons in this state. After issues had been framed on the pleadings, a trial

was had to the court. The court found that the mortgage had been executed as alleged, that the defendants were in default, and the mortgage was foreclosed by the judgment of the court; and the court further found that the water rights which were included in the Hugentobler and Hadlock mortgages were part of the same water rights which were included in the deed to Indianola Irrigation Company and upon which rested the validity of certificates 72 and 73. The court in that case foreclosed the right of all of the defendants in that action, including the defendants Richard H. Spencer, John Edison and Elizabeth A. Tibbs, and also the Indianola Irrigation Company, in and to the water rights described in the Hugentobler and Hadlock mortgages. In other words, the court enforced the contract, which necessarily implied an adjudication that the contract or mortgage was a valid and binding obligation.

The law upon which we rely in support of our claim that the validity of the Hadlock is *res adjudicata* on these appellants is to be found in 34 C. J. 742, Section 1154, where the general rule is stated in the following language:

“The doctrine of *res judicata*, first definitely formulated in the Duchess of Kingston’s case, embodies two main rules, which may be stated as follows: “1) The Judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or

any other tribunal. 2) Any right, fact, or matter in issue, and directly adjudicated upon, or NECESSARILY INVOLVED IN, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties whether the claim or demand, purpose or subject matter of the two suits is the same or not. . . . Res Judicata is a rule of universal law prevailing every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation. . . .; the other, the hardship on the individual that he should be vexed twice for the same cause. The doctrine applies and treats the final determination of the action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, and such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided.”

A Utah case supporting the proposition that a judgment is conclusive as to matters which were or might have been interposed is *Logan City vs. Utah Power & Light Co.*, 86 Utah 340, 16 Pac. 2d. 1097, the syllabus on the point being as follows:

“Judgment is conclusive against party as to all matters of defense which were or might have been interposed.”

Since these appellants might have interposed the defense that the mortgage is void for uncertainty in the description of the water right in case No. 2888, and failed to make such defense, they are now estopped to set up that defense in this action, which is brought only to enable the plaintiff to enforce the judgment in that case. The defense is not open to them here because the judgment is *res adjudicata* on that defense.

The validity of the Hadlock mortgage was necessarily involved in case No. 2888; for if it had not been found to be a valid mortgage, the court would not have foreclosed it. Therefore that judgment speaks the infallible truth as to the right of the plaintiff in that action to take Spencer's water right away from him by sale on foreclosure and also definitely decides that all rights which any of the appellants in this case may have had in the water rights described in the mortgage were foreclosed. These defendants and appellants are barred by that judgment from now asserting that the Hadlock mortgage is void.

It is almost impossible to imagine a case where the undisputed facts sustain a more complete estoppel by record and judgment and a claim of *res adjudicata*.

The defendants and appellants in law and equity are now barred forever by the record and judgment in 2888 to assert that the Hadlock mortgage is void.

Of course, if the mortgage is valid, then all the proceedings in 2888 are valid; and we will not enter here

upon a discussion of that record to sustain our position. The only attack on the judgment in that case rests upon the assertion that the mortgage is void.

In his brief counsel for John Edison and Mrs. Tibbs more than once throws out the charge that we are trying to retry No. 2888. About all we can say in answer to that charge is that it is he and not us who is trying to retry that case by attacking the validity of our mortgage. All we want to do is to sustain and enforce the judgment in that case. We claim under it as it is written. Neither are we trying, as he also charges, to reform our mortgage. There is no such thought in our minds. We stand on the mortgage as written and claim under it. All we want the court to do is to read and understand that mortgage with the same knowledge and understanding that the parties to it had when they made it concerning the subject matter therein mentioned and the meaning of the terms used therein; and to enforce that judgment and quiet our title to the water rights and enjoin appellants from interfering hereafter with our use of it.

Counsel also makes the suggestion that the parties may have intended the Hadlock mortgage to be a second mortgage. But there is nothing at all in the record to sustain him in this position. While I have pointed out in another connection in this brief that by reason of Section 78-1-13 and Section 78-1-11 there is read into the Hadlock mortgage a covenant from the mortgagor to

the mortgagee that the property therein mortgaged is free from incumbrances.

V.

The Hadlock mortgage is not void for uncertainty.

If the Hadlock mortgage be read, as it should be read, and understood in accordance with the actual meaning and intention of the parties to it, as manifested in the first instance by the terms which they have chosen to employ in the instrument itself, in the light of their long continued and practical usage and construction; if we read this mortgage with the knowledge and understanding which the parties to it had of the subject matter of their contract, there is nothing uncertain about it. They knew and understood that it was intended to cover 60 acres out of Richard H. Spencer's 448 acres of primary or class A water right in Thistle creek, which 448 acres were a part of a total of 1728 acres of primary or class A water right on the stream; and that it was not intended to be a pledge of any shares of stock.

There is implicit in the argument on the other side as the major premise the proposition that a mortgage on a water right in this state is void unless it contains a description of the land upon which the water right has been used and to which it is appurtenant.

We point out to the court in this connection that no court has ever so held. No case or other authority is cited by the other side and we confidently assert that none can be cited which has held that such is the law;

for there are many ways in which a water right may be described and identified without even mentioning the land upon which the water is used.

It would seem to be unnecessary because it is so self evident to point out that a water right is an intangible something, existing only in contemplation of law, and hence not capable of being identified and seen or appreciated through the means of any of the five senses. It is simply a right which a person has to go upon a stream or source of supply and divert therefrom a certain quantity of water and use it for beneficial purposes. These old rights, which originated by diversion and beneficial use long prior to the time there was any law in this state which required records to be made of them, have practically all been conveyed to irrigation companies by deeds no more definite than the deed which Spencer made to the Indianola Irrigation Company. They are described only with reference to the county in which the water is diverted, the name of the stream, the name of the owner of the right, the name of the grantee, and the number of acre feet or second feet or by any one of a number of means of measurement which might be employed. The county recorders keep books of water transfers, with indexes for the same, so that there is a public notice of their execution and of their contents, and no one need be misinformed as to the records, so far as they may go. But anyone experienced in such matters will always make special inquiries as to water rights, for it is well known that the records of these old rights are not all that exacting lawyers might want them to be.

It would be a serious blow to property rights in this state if the court should uphold the appellants' contention with respect to this Hadlock mortgage and with respect to the deed to the Indianola Irrigation Company. For thousand of dollars in property rights would be invalidated by such a holding.

A water right which is appurtenant to a particular tract of land because it is used thereon may be severed from the land and thereby cease to be appurtenant. One way of effecting a severance is by a deed of conveyance of the water right without the land, another way is to convey the land and reserve the water right, and still another way is to mortgage the water right but not the land and then have the mortgage foreclosed. The latter is the way the severance was accomplished in the case of the water right covered by Hadlock's mortgage. The severance did not occur, as has been pointed out heretofore, until the execution of the sheriff's deed on the foreclosure sale.

See in this connection: 67 C. J. 1038, 1039, 1040, 1041, subject "Waters:"

From Section 481 we quote:

"Where possible, without violating the intention of the parties, a contract conveying an interest in water will be given such construction as will make it lawful, operative, definite, reasonable, and capable of being carried into effect."

This also from 67 C. J. 1079, Section 557:

“Under general rules a grant or reservation of water rights should be construed in accordance with the actual meaning and intention of the parties, as manifested in the first instance by the terms they have chosen to employ in the instrument of conveyance, which may be read in the light of their long continued practical usage or construction, and the meaning of which may be further elucidated by comparing the various parts of the instrument and reading it in connection with contemporary or even subsequent deeds or contracts relating to the same subject, or considering contemporaneous circumstances known to the parties. The tendency is to adopt that construction which gives the grantee an unrestricted right or privilege, rather than a limited one.”

We adopt here because it is as good a statement of the law upon this subject as we have found in the books the following statement from 36 Am. Jur., Section 42, found in appellants’ brief on pages 56 and 57, relative to the construction of descriptions of water rights in mortgages:

“In regard to an ambiguity in a mortgage, the modern tendency is to allow a liberal interpretation of the description of the property AND TO UPHOLD THE VALIDITY OF THE MORTGAGE IF IN ANY WAY IT IS POSSIBLE TO ARRIVE AT THE INTENTION OF THE PARTIES THERETO....”

“Furthermore, a description may be sufficient even though it may be necessary on account of its imperfect or indefinite character to aid the intention of the parties by averring and proving extrinsic facts. Accordingly, in order to

identify the property intended to be mortgaged, and to give effect to the intention of the parties to the instrument, parol evidence is generally held admissible to explain a mistake in description of property in a mortgage, or to explain and remove any uncertainty."

See also *Payton, et al v. Browning*, 290 P. 253, wherein Mr. Justice Simms, writing for the supreme court of New Mexico, states the rule for the construction of deeds to water rights, and the rule for mortgages should be even more liberal, if anything, as follows:

"In arriving at a correct solution of this problem, it is the provience and duty of the court to place itself as nearly as possible in the situation of the parties to the instruments under which title is claimed, and endeavor to discover and give effect to the intention of the parties. *Simpson v. Blaisdell*, 85 Me. 199, 27 A. 101, 35 Am. St. Rep. 348. Much is said in the books about deeds which are void because of uncertainty in the description of the premises attempted to be conveyed, but it is not to be understood that the sufficiency of the description in a deed is to be measured by any inflexible rule or set of rules. The test in every case of contracts other than deeds, is whether or not the intention of the parties can be discovered and effectuated."

While the Hadlock mortgage has never appeared to us to be open to just criticism on account of any defect in the description of the water right, yet we knew that the attack would be made if the opportunity were presented; and it is with the foregoing rules of construction in mind that we drafted the complaint in this action,

incorporating therein the allegations of matters of inducement and background which help to an understanding of the situation in which the parties stood and which help to correct understanding of the meaning of the terms which the parties used in the mortgage to describe the 60 acres which Richard H. Spencer intended to give to the bank commissioner as security for the payment of his debt. All these matters are either admitted in the pleadings or were found to be true by the court from the evidence and are now incorporated in the findings of fact.

Is it possible for any one, except a lawyer who is trying to find a way out for his client, to read the complaint and the findings of fact in this case and not know to a reasonable certainty that Spencer intended to mortgage 60 acres out of his 448 acres which he had not mortgaged before to any one else? He intended to mort-
60 out of 448 acres
 in all 1728 acres of such rights.

"Sixty acres of water right." That is as certain and definite as it can be. The parties knew, and we now know, since witnesses have given testimony in this case, that 60 acres of water right means the right to take water from Thistle creek in turns with the other users for a definite number of minutes, at definite length of time between turns, in rotation with the users having in all 1729 acres of such rights.

The parties knew, as we now know, that according to the practices which have been established among the water users, the water master on the stream each sea-

son notifies each user when his turns come and how long to keep the use of the water. No man's rights are unlimited but they are all qualified by the rights of all other users on the stream.

The water master does not tell Spencer: It is your turn now to use the water which was decreed to you because you owned the Jim Ownup farm or any other farm. He simply tells Spencer when his turn comes to use the water, and Spencer uses it on any land he pleases.

The place where he used the water is not important. The turns when he may use it and the length of his turns are the important factors because those factors must be made to mesh in with the same factors pertaining to the rights of all others on Thistle creek to the end that each water user will get his just share of the available supply according to his rights. These factors are as certain as arithmetic can make them, for there are 1728 acres or shares of class A or primary rights on Thistle creek, Spencer owned 448 shares or acres of them, and he mortgaged 60 shares or acres thereof to Hadlock.

The source of supply is certain—Thistle creek; the county in which the diversion is made is certain—Sanpete; the state is certain—Utah; the ownership is certain—Richard H. Spencer; the grantee is certain—Hadlock, the bank commissioner; the quantity is certain 60 shares or acres, which we know means 60 out of 448 acres which Spencer owned and which he had not theretofore mortgaged. We also know that the 60 acres mort-

gaged to Hadlock did not include any water right used on the lands in Section 3, because the mortgage says so.

If we follow the law which we have quoted from Judge Hansen's brief, and uphold the validity of this mortgage if any way is possible to arrive at the intention of the parties thereto, we have no difficulty whatever when we read it in the light of the extrinsic facts which are shown by undisputed evidence and indeed which are admitted by all parties concerned and which have been found by the court in its findings of facts to be true.

In the light of that evidence and those findings, we know for a certainty that Spencer mortgaged 60 acres of the only water right which he owned and which was not then encumbered by liens of prior mortgages to Hugentobler and Federal, and that the same was a part of the water right which had been decreed to him in the 160 acres in the Wansits farm in Section 5 and the city lot of 3 acres.

If there could be said to be any uncertainty in regard to what water right Spencer intended to mortgage, all such uncertainty has been removed by Richard H. Spencer and John Edison Spencer themselves, for they have claimed at all times and the appellants now claim that the only water right which was not then mortgaged when the Hadlock mortgage was executed was the 160 acres on the Wansits farm in Section 5 and the 3 acres of city lot water. John Edison Spencer himself so testified.

It so heppens, as the court found in case No. 2888 and also in this case, to be a part of the same right which was allocated to Spencer in the decree of 1920 in case No. 1406, and which Spencer conveyed by deed to the irrigation company on November 25, 1931, and upon which the irrigation company issued the certificate which later became certificates 72 and 73.

There is no doubt or question about the foregoing.

There is no one way in which to describe a water right in a mortgage. It might be a good way, indeed it might even be the best way, to tie the description of the right to a description by metes and bounds of the lands upon which the right is appurtenant. But parties do not have to use the best way. Often they do not. It is the duty of the courts to accept the way which has been employed by the parties and then try to find out from their writings, read and understood in the light of the knowledge which the parties have of the subject matter of their contract and of the surrounding circumstances and with the same knowledge which the parties had of the meaning of the language which they employed, and then to give effect if possible to their contracts.

Most deeds and mortgages to water rights in this state, we venture to assert, which are not intended to include also the lands upon which the waters are used, contain no description by metes and bounds or legal subdivisions of the lands.

The deed from Spencer to the Indianola Irrigation Company does not. The deed from Federal to the Indianola Irrigation Company does not.

All the shares in this corporation which are now outstanding are based upon deeds of conveyance which do not describe any land.

A casual glance through the records of water conveyances in this county, or in any other county of the state, will disclose hundreds, yes, thousands, of conveyances of water rights in which no land is described.

Most such conveyances simply mention the name of the grantor, the county in which the right is exercised, the name of the grantee, the source of supply, and then in some manner identify the water right by some appropriate description as to second feet or acre feet and so on.

In his brief counsel for appellants state that it is not clear whether the validity of the mortgage should be tested by the law relating to real estate or to personal property, and so he proceeds to test it by both.

It looks very much like an absurdity to test it by the law relating to personal property, since we all know it must be tested by the law relating to the real estate, so far as possible.

In making the test by the law of personal property counsel refer to the case of *Jacobsen v. Christiansen*, 18 Utah 149, 55 P. 562, holding that a mortgage is void for uncertainty which describes 500 sheep bearing certain

marks and brands and the evidence in the case showed that the mortgagor had a larger number of sheep in the herd bearing the same marks and brands.

Since counsel has brought in that case and cites the law of chattels, we answer by calling the court's attention to some more of the law of chattels.

In 11 C. J., page 464, Sec. 84(2), we read:

“Where the mortgaged chattels are of uniform quality and value, such as are ascertained by weight, measure, or count, and the constituent parts, which make up the mass, are not distinguished by any physical difference in size, shape, or quality, a mortgage of a part of the undivided whole is valid for all purposes.”

Since 448 acres of primary water right has no parts and one acre is exactly like another, if there may be said to be likeness relative to things which have no substance, we think the law of chattels which we have cited above supplies the test, if the law relative to personal property is to be applied. So applying it, the mortgage covers 60/448ths of Spencer's water right, and under that law the mortgage must be sustained.

In making the test by the law of real property counsel cites cases and authorities holding that descriptions of real estate must be so certain that an officer can take the writ or instrument and identify the land, point out its boundaries and put the trespasser out and the lawful owner in possession.

But such descriptions cannot be made for water rights. A water right is intangible. It has no boundaries. It cannot be seen. It exists only in contemplation of law like a corporation. No officer could take a writ for a water right and go out and find such right. He could find out who is using water from a certain stream at a certain time, just as we did when we went to Thistle valley and found out that the Spencers were taking the water in the turns which had been set aside for us.

Just because descriptions which are appropriate for tracts of land cannot be used in describing water rights, which have no substance, the authorities which are cited by the other side on this subject are not controlling.

Counsel says that the sheriff could not find the Whitaker water right and that we went up there and looked for it but could not find it. Our answer is that we knew better than to look for a water right which we knew we could not see. What the sheriff looked for and what we looked for and what the sheriff found and what we found was who was taking the water out of our ditches when we were trying to make use of it in the turns which had been set aside for our use. We found exactly what we were looking for, namely Richard H. and John Edison, taking the water from us and we sued them.

Ever since the day when the pioneers first turned the waters of City Creek upon the potato patches which they planted in their new Zion right down to the present time water rights in this country have been measured and described by fractional parts of the whole source of

supply, and by fractional parts with limitations as to the periods of time when used; just as the water users in Thistle valley have always distributed and measured their rights in Thistle creek.

See Compiled Laws of Utah, 1888, Vol. 11, page 135, from which we quote:

“The right to the use of water may be measured by fractional parts of the whole source of supply, or by fractional parts, with limitation as to periods of time when used.”

The standard unit of measurement since we adopted the Wyoming Code in 1919 has been the second foot. (Sec. 100-1-2, Code.) But it is a simple problem in arithmetic, after the stream has been divided into ditches according to the fractional parts thereof owned by the water users, to measure the parts by the cubic foot standard. The custom still persists of describing water rights in decrees, deeds, mortgages and contracts just exactly as they have been described from time immemorial by the farmers in Indianola and as they are described in Hadlock's mortgage. This custom will likely endure long after our day. It has become habitual with our people. There is no reason why they should be required to give it up. It has worked out all right so far and will likely continue to meet with the needs of the people. So why try to change it? It takes some engineering skill and more accurate measuring devices than are generally in use to measure small streams by the second foot; but practical farmers with their crude dams and home

made ditches do pretty well when it comes to dividing the stream among themselves, or when they have their water masters do it, by fractional part.

At page 66 in the brief counsel cites four Utah cases which he says sustain his argument that the Hadlock mortgage is void for uncertainty in the description of the water right. But a glance at those cases will disclose that none of them is in point to this case because they all differ in their facts.

In *Elliott v. Whitmore*, 8 Utah 254, 30 P. 984, the supreme court remanded the case for a new trial so that the lower court could take evidence regarding a number of facts which had to be found before a proper decree could be made. There is nothing in the case of aid here, either as regards the validity of the mortgage or the decree in No. 2888.

In *Smith v. Phillips*, 6 Utah 376, 23 P. 932, the water right in the decree is described as a good irrigation stream. On appeal the court held this description to be indefinite and uncertain and remanded.

In *Nephi Irrigation Co. v. Vickers*, 15 Utah 374, 49 P. 301, the trial court found and decreed: "That defendant is the owner and has the right to use sufficient of the waters of Hot creek to irrigate 30 acres of land." This was held to be uncertain and the case was remanded to the lower court to hear evidence and find and determine the amount of water, in second feet, or fractional parts of the stream of water. This description is not the same as ours and hence the case is not in point.

In *Sharp v. Whitmore*, 51 Utah 14, 168 P. 273, the decree on collateral attack was held void for uncertainty. The attempt had been made to describe the right by giving the capacity of the ditch. But neither the grade of the ditch nor the velocity of the water was given, so it was impossible with factors stated to measure the flow. As the method used in that case is not the method used here, the case is not in point.

We have stated that a water right may be described in many different ways.

For example see:

Middle Cut Ditch Co. vs. Henry, 15 Mont. 558, 39 P. 1054, which is cited in 67 C. J. 1038, Sec. 479, where it was held that an instrument whereby the appropriator does give and grant his water right is sufficient as a conveyance of the usufruct of the water. The land was not described.

If we apply in this case the test which the supreme court of New Mexico says in the case cited in the beginning of this part of our brief we must apply, namely, to discover and give effect to the intention of the parties, then this mortgage must be sustained. It is clear that Spencer intended to mortgage something in addition to the land and the water right appurtenant thereto in Section 3, for it is so stated in the mortgage. It is clear that he intended to mortgage 60 acres of his own water right of the primary or Class A type. It is clear that he intended to mortgage part of his 448 acres of decreed right.

It is clear that his right was to the use of the waters of Thistle Creek, in this county. It is beyond question, notwithstanding counsel's assertion to the contrary, that Spencer did not intend this to be a second mortgage but that he did intend it to be a first mortgage on the 60 acres of primary water right. It is beyond all question, for counsel say so in their brief on page 63, that the water right here involved was always used on Sections 5 and 8 and no part of it was ever used on Section 3, and that, since the water right which was used on Section 8, the Old Jim or Jim Ownup farm, went to Federal and underlies certificates 84 and 86, the water right which was mortgaged to Hadlock must have been that used on Section 5, the Wansits farm. Such is also John Edison's testimony. It is clear that Spencer did not intend to mortgage to the bank commissioner any of the water rights which he had theretofore mortgaged to Hugentobler and Federal. It cannot be questioned that he owned 448 acres of primary water right out of 1728 acres of such rights on Thistle creek and that he intended to mortgage 60 acres out of those 448 acres. It is clear that Hadlock intended to get as security a first mortgage on the 60 acres of water right which Richard H. Spencer owned in addition to the other security described in the mortgage. It is a simple matter for the water master to make out the tickets each season for the users of the primary water rights and to tell Whittaker when his turns come in rotation with the turns of the users. It is not difficult to enforce this decree, now that we have Price and the false claim which John Edison and his father have

been making in his name out of the picture. If John Edison takes the water hereafter when it is Whittaker's turn, he can be cited into court in a minute and punished for contempt and also sued for damages. It is not difficult to identify the water right, for John Edison has put up a stay bond in this appeal and is now using the waters when it is our turn under the decree to use them.

We shall not refer specifically to the part of the argument which attacks the validity of the judgment in case No. 2888. If our mortgage is not void, or if the matter is *res adjudicata*, or if the appellants are estopped to attack the mortgage, then the decree is valid.

We wish to call attention to who is not attacking the judgment in this case and who is attacking it. The Indianola Irrigation Company is not attacking; neither is Que Jensen, the successor of Hugentobler; neither is Richard H. Spencer, who is dead and whose disclaimer still stands; neither is the plaintiff. John Edison is attacking it, right in the face of the disclaimer which he filed to our complaint; Elizabeth A. Tibbs is attacking it, right in the face of her default in this case, which stood until her present counsel became interested in the case; and the administrator of the estate of Richard H. Spencer, deceased, is attacking it, right in the face of the disclaimer which his intestate filed and which still stands.

We are not concerned with the lawsuit which was carried on among the Spencer defendants and Mrs. Tibbs. Since they are all foreclosed in this action as they were

in case No. 2888 of their rights to our water rights, any rights which any of them may have being subordinate to the date of our mortgage, it matters nothing to Whittaker who gets certificates 74 and 76 and what is left in 72 and 73 after those certificates are cancelled. Neither are we concerned with the question which is argued at length in the brief as to whether the water rights are appurtenant to the lands. Our rights were severed from the land when the Hadlock mortgage was foreclosed and the sheriff's deed on foreclosure was delivered to Hadlock.

VI.

At pages 53 and 54 of their brief appellants assert that the court erred in awarding Whittaker 60/1728ths of the stream and Que Jensen 55/1728ths thereof.

The argument on this point is based upon Article 5 of the articles of incorporation of the Indianola Irrigation Company, which describes the Class A and the Class B stock of that corporation.

Since neither the Whittaker right nor the Que Jensen right is in the corporation and has not been in the corporation since the decree was rendered in case No. 2888, and hence is not subject to the regulations prescribed by its articles of incorporation, the argument is not valid.

There has not been and there will not be any difficulty in the distribution of the water rights in this

respect. Whittaker and Que Jensen have no controversy with the Indianola Irrigation Company over this matter, and that corporation represents all of the water rights on the stream except theirs. There will be no impairment of the Class B. rights, in any event, for the water will continue to be distributed just as it has always been distributed among the water users.

Furthermore, the appellants have not shown how the judgment will in this particular is any concern of theirs, for they own no class B rights which might be adversely affected.

VII.

The Costs

Appellants John Edison and Mrs. Tibbs complain because the court awarded plaintiff judgment for costs against them.

This was done no doubt because these defendants were the only parties to the action who contested the plaintiff's claim. It was apparent to the court from the pleadings and from the proceedings before the court that but for the defense of these two defendants, the case would have gone in favor of the plaintiff on his complaint without any contest. In fact, Mrs. Tibbs was in default and John Edison was bound by his disclaimer until well along in the trial, when the court permitted them to come in and defend on the ground that the Whittaker mortgage was void.

The plaintiff prevailed against all defendants so that he was entitled to his costs. (Section 104-44-2, Code.) It was within the discretion of the court as to which of the defendants should be required to pay them. (Section 104-44-4, Code.) No abuse of discretion is shown in this respect.

We have answered all the criticism which have been directed at the judgment in the plaintiff's favor.

It is respectfully submitted:

1. That the plaintiff's mortgage is not void for uncertainty in the description of the water right therein mortgaged, just because the mortgage contains no description by metes and bounds or legal subdivisions of the land upon which Richard H. Spencer used his water right.

2. That the record and judgment in case No. 2888 is not void for uncertainty in the description of the mortgaged water right, nor for any other reason.

3. That the record in this case shows that the plaintiff's mortgage takes priority over all claims of all of the defendants in this action, except Que Jensen's, and hence that the decree properly forecloses all such claims.

4. That appellants are estopped by the mortgage, by their pleadings in this case, and by the record and judgment in case No. 2888 to assert that plaintiff's mortgage is void.

5. That the validity of the Hadlock mortgage is res adjudicata, having been decided in case No. 2888 to which appellants were parties.

6. That there is no prejudicial error shown in this record on appeal.

7. That the judgment appealed from does justice and equity between the plaintiff on the one side and all of the defendants, including appellants, on the other; and hence the judgment in favor of the plaintiff should in all respects be affirmed.

8. That this respondent should be awarded his costs on this appeal.

Respectfully submitted,

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