

1949

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

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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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.

BRIEF OF APPELLEE QUE JENSEN

APPEALED FROM THE SEVENTH JUDICIAL
DISTRICT COURT, IN AND FOR SAN-
PETE COUNTY, STATE OF UTAH.

JOHN A. HOUGAARD, JUDGE

ELIAS HANSEN

Attorney for defendants and appellants

John Edison Spencer and Elizabeth A. Tibbs

ALLAN G. THURMAN

Attorney for defendant and appellant,

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Indianola Irrigation Company

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Attorney for defendant Que Jensen.

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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.

STATEMENT OF CASE

The Appellants' statement of the case is substantially correct, so far as concerns this the defendant, Que Jensen. The defendant wishes only to emphasize the following:

1. Respective counsel for all of the parties at the trial of the case, including counsel for the Appellants John Edison Spencer and Elizabeth A. Tibbs, conceded that Que Jensen, as the successor of Simon Hugentobler, is entitled to 55 shares or acres of primary water right in the waters of

Thistle Creek and its tributaries.

2. The Appellants in setting forth their claims, in their claim numbered 2, on page 4 of their brief, eliminate the water right of Que Jensen, from the water right they claim to be appurtenant to land conveyed by Richard H. Spencer, during his lifetime, to John Edison Spencer and Elizabeth A. Tibbs.

3. Appellants set out, as the first transaction after the Decree entered in the district court of Sanpete County, Utah, in the action entitled "Indianola Irrigation Company, a comporation, et al., plaintiffs, vs. R. H. Spencer, et al., defendants," on May 6th, 1920, (See plaintiff's Exhibit "A"), the mortgage made and executed on January 3, 1933, by R. H. Spencer and his wife Annie H. Spencer, to Simon Hugentobler, covering Lot 4 of Section 5 and Lot 1 of Section 6, in Township 12 South, Range 4 East, Salt Lake Meridian, consisting of 77 acres, together with 55 acres of primary water right from the waters of Thistle Creek, to secure the payment of a note for \$2577.91, said mortgage being recorded on January 12, 1922, in Sanpete County, Utah. (See Trs. pages 26-28).

4. The other transactions set out by the Appellants in their brief are all subsequent in point of time and subject in point of right to the said mortgage to Simon Hugentobler, the only ones of which we deem it necessary to call to the

attention of the court are the following:

(A) On November 9, 1926, Richard H. Spencer, who is the same person as R. H. Spencer, and J. Vord Spencer and Josie Spencer, his wife, H. M. Spencer and his wife Ida Spencer, gave a mortgage to the Federal Building and Loan Association, corporation, covering certain land, together with two hundred eighty-five (285) shares of the capital stock of the Indianola Irrigation Company, a corporation, also all water and water right appertaining to or used on or in connection with the real estate described in the mortgage. Said mortgage on said land and water right was given to secure a note for \$14,266.59. That mortgage was recorded in Sanpete County, Utah, on November 9, 1926. (See Trs. 29-35).

On the same date R. H. Spencer executed and delivered to the Federal Building and Loan Association written instrument entitled "Assignment", covering 223 shares of Class "A" stock in the Indianola Irrigation Company, and constituting the Indianola Irrigation Company Exhibit No. 1.

(B) On October 16, 1931, Henry M. Spencer, and Ida Spencer his wife, Leo Harold Spencer and Fern Spencer his wife, R. H. Spencer and Annie H. Spencer, his wife, mortgaged to W. H. Hadlock, State Bank Commissioner of Utah, 280 acres of land, together with the water to which said mortgagees and land are or may become entitled and together also with 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 water now used for the irrigation of the lands described in said mortgage. That mortgage was recorded on October 21, 1931. (Trs. 37-41).

(C) By an instrument dated June 21, 1918, a number of persons executed what was designated a Deed to Water Rights, whereby they conveyed to the Indianola Irrigation Company certain water rights. This conveyance was executed by Richard H. Spencer and Annie Spencer, his wife, November 25, 1931. This instrument conveys 160 shares of Class "A" water rights to the Indianola Irrigation Company. (Trs. 43-49) (Plaintiff's Exhibit F. Indianola Irrigation Co. Exhibit No. 8).

5. Subsequent transactions concerning said water rights which we wish to call to the court's special attention are either foreclosures or transfers and issuances of certificates arising out of or based upon the transactions hereinabove set out. Those of the foregoing transactions and the subsequent transactions covering said water rights as appellee deems necessary are set out in Table 1 which follows. It will be noted that all of such transactions covering the water rights in question are subsequent and subject to the mortgage to Simon Hugentobler first set out herein. The transactions selected shall be set forth in the table in chronological order and the succession of title supporting such transactions will be shown:

TABLE I

Table Showing Relative Chronological Position of Various Principal Transactions is Shown on Pages 6 and 7 which follow.

(1)
RICHARD H. SPENCER deeded 448
acres Class "A" water right not
yet conveyed to the corporation.
May 8, 1920.

(2)
Mortgage, 55 acres to
Simon Eugentobler, Jan-
uary 3, 1922.

3 acres water on city lot.

(3)
Mortgage, 285 shares, to Federal
Building and Loan Ass'n, November
9, 1926.

(4)
Mortgage, 60 acres, to
W. H. Hadlock, Bank Com-
missioner of Utah, on
October 16, 1931.

(5)
Deed, R. H. Spencer to Indian-
ola Irrigation Co. 16 acres, on
November 25, 1931.

(6)
Certificate No. 57, dated No-
vember 25, 1931, issued to
Richard H. Spencer for 160 shs.

(7)
Certificate No. 57 surrendered
to Indianola Irrigation Co., on
December 20, 1933.

(8)
December 30, 1933,
Certificate No. 72
for 80 shares issued
to Federal Land Bank
of Berkeley, pledgee
of Richard H. Spencer.

(9)
December 30, 1933,
Certificate No. 73
for 80 shares is-
sued to Federal Land
Bank of Berkeley, as
pledgee of John E.
Spencer.

(10)
Sheriff's deed to Federal Build-
ing & Loan Ass'n, dated November
15, 1934, included 448 acres, of
water.

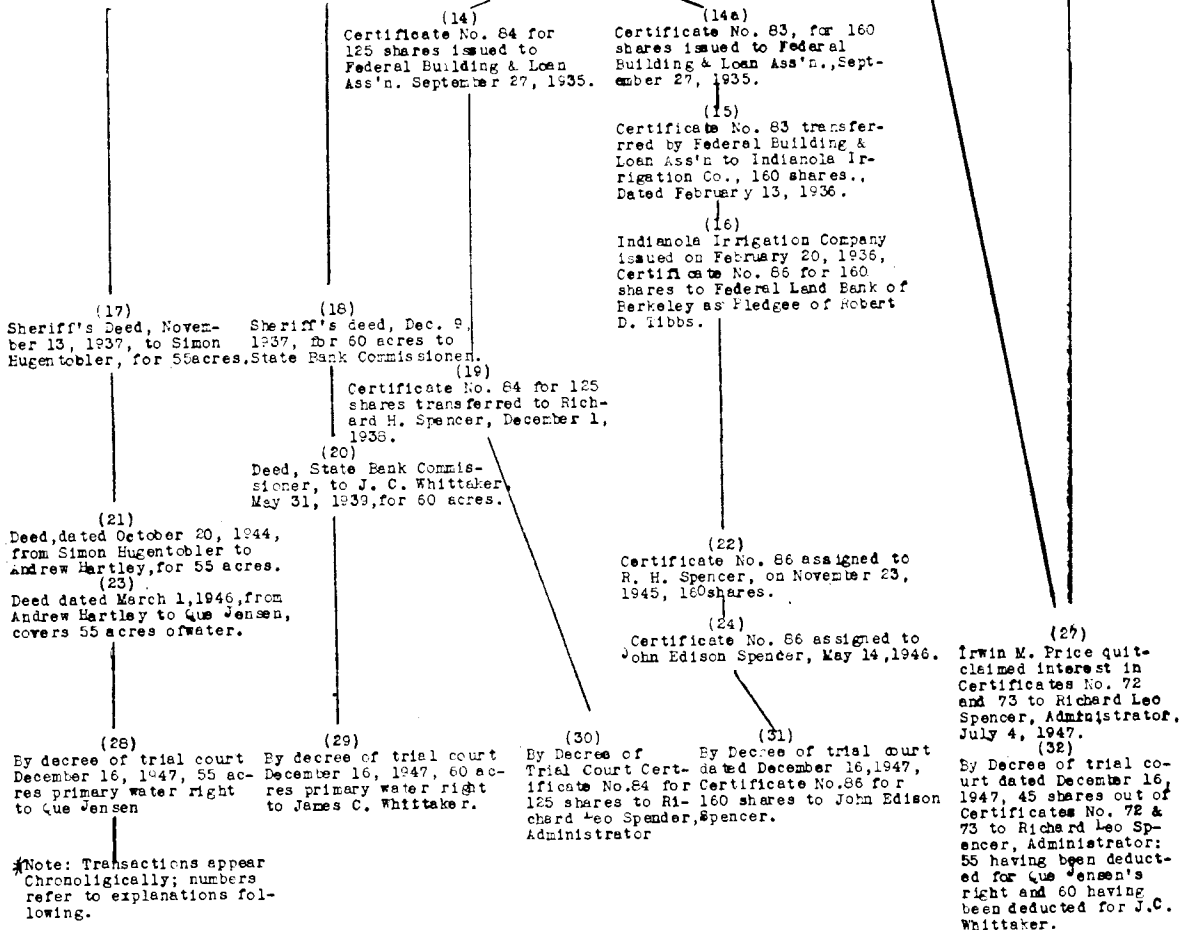
(25)
Undated transfer of
Certificate No. 72
for 80 shares to Ir-
win M. Price.

(26)
Undated Transfer of
Certificate No. 73
for 80 shares to Ir-
win M. Price.

(11)
Federal Building & Loan Ass'n
Deed to Indianola Irrigation Com-
pany for 285 shares; dated March
2, 1935.

(12)
Certificate issued by Indianola
Irrigation Company to Federal
Building & Loan Ass'n for 285
shares of water, dated March 2,
1935. (Certificate No. 81).

(13)
Certificate No. 81 for 285 shares
surrendered to Indianola Irriga-
tion Co., September 25, 1935.



*Note: Transactions appear Chronologically; numbers refer to explanations following.

1. Richard H. Spencer, was, on May 6, 1920, in an action entitled Indianola Irrigation Company, a corporation, et al., vs. Richard H. Spencer, et al., (case No. 1406 Sanpete County) decreed to be the owner of "448 shares, class 'A' stock not yet conveyed to the corporation," of waters in Thistle creek, Clear creek, and Rock creek. (Plaintiff's Exhibit A.)

2. Richard H. Spencer and Annie H. Spencer, his wife, mortgaged, on January 3, 1922, to Simon Hugentobler, 55 acres of said 448 acres class "A" water. (Plaintiff's Exhibit B.)

3. Richard H. Spencer, on November 9, 1926, mortgaged to the Federal Building and Loan Association 285 acres of class "A" water of the said 448 acres decreed to him in 1920. (Plaintiff's Exhibit C.)

4. Richard H. Spencer, on October 16, 1931, mortgaged to W. H. Hadlock, State Bank Commissioner, 60 acres of water of his said 448 acres decreed to him in 1920. (Plaintiff's Exhibit E.)

5. Richard H. Spencer, on November 25, 1931, deeded to the Indianola Irrigation Company 160 acres of class "A" water of the 448 acres of water decreed to him in 1920, and received therefor,

Certificate No. 57 for 160 shares of class "A" water.

(Plaintiff's Exhibit F - Indianola Irrigation Company Exhibit 8.)

At that time, November 25, 1931, Richard H. Spencer had encumbrances against portions of the said 448 acres of primary class "A" water as follows:

Mortgaged to Simon Hugentobler	55 acres
Mortgaged to Federal Building & Loan Association	285 acres
Mortgaged to W. H. Hadlock, Bank Commissioner	60 acres

Total encumbered 400 acres

(See transactions 2, 3, 4, herein.)

7. Richard H. Spencer surrendered certificate No. 57 for 160 shares of class "A" stock to the Indianola Irrigation Company and the irrigation company issued therefor on Dec. 30, 1933,

8. Certificate No. 72 for 80 shares of class "A" stock to Federal Land Bank of Berkeley, pledgee of R. H. Spencer, (Indianola Irrigation Company Exhibit 9), and

9. Certificate No. 73 for 80 shares of class "A" stock to Federal Land Bank of Berkeley pledgee of John E. Spencer. (Indianola Irrigation Company Exhibit 10.)

10. The Federal Building and Loan Association foreclosed its mortgage on 285 acres of said 448 acres of water

in an action entitled Federal Building and Loan Association vs. Richard H. Spencer, et al. (case No. 2730, Sanpete Co.), decree entered June 17, 1933. Sheriff's deed dated Nov-15, 1934. (Plaintiff's Exhibit Y.)

11. The Federal Building and Loan Association, on March 2, 1935, deeded to the Indianola Irrigation Company the said 285 acres of Class "A" water acquired by sheriff's deed. (Plf's. Ex. Y - Indianola Irrigation Company Exhibit 2)

12. The Indianola Irrigation Company issued, on March 2, 1935, to the Federal Building and Loan Association, based on deed in paragraph 11 herein, certificate 81 for 285 shares class "A" stock. (Indianola Irrigation Company Exhibit 11.)

13. The Building and Loan Association surrendered, on September 25, 1935, certificate No. 81 for 285 shares class "A" stock to the Indianola Irrigation Company and received therefor, on September 27, 1935:

14. Certificate No. 83 for 160 shares class "A" stock. (Indianola Irrigation Company Exhibits 11 & 12.) and

14a. Certificate No. 84 for 125 shares class "A" stock. (Indianola Irrigation Company Exhibits 11 & 13).

15. The Federal Building and Loan Association transferred, on February 13, 1936, to the Indianola Irrigation Company certificate No. 83 for 160 shares class "A"

stock, (Indianola Irrigation Company Exhibit 12) and

16. The Indianola Irrigation Company issued therefor, on February 20 1936, certificate No. 86 for 160 shares of class "A" stock to the Federal Land Bank of Berkeley, pledgee of Robert D. Tibbs. (Indianola Irrigation Company Exhibit 14.)

17. Simon Hugentobler foreclosed his mortgage to 55 acres of said 448 acres of water Class "A", in an action entitled John A. Malia, State Bank Commissioner of the State of Utah, vs. Richard H. Spencer, et al., (case No. 2888, Sanpete Pouncty,) decree entered December 4, 1936. Plaintiff's exhibit U 'decree'.)

On November 13, 1937 Simon Hugentobler received a sheriff's deed to said 55 acres of water sold to him under his foreclosure in case No 2888. (Que Jensen's Exhibit 1.)

18. John A. Malia, as State Bank Commissioner, foreclosed the mortgage for 60 acres of primary class "A" water in an action entitled John A. Malia, State Bank Commissioner of the State of Utah, vs. Richard H. Spencer, et al., (case No. 2888, Sanpete County,) decree entered December 4, 1936. (Plaintiff's exhibit U 9 'decree'.)

Rulon F. Starley, State Bank Commissioner, received, on December 9, 1937, a sheriff's deed for 60 acres of primary class "A" water foreclosed in case No. 2888. (Find-

ings No. 15 of trial court.)

19. The Federal Building and Loan Association on December 1, 1938, transferred to Richard H. Spencer certificate No. 84 for 125 shares class "A" stock. (Indianola Irrigation Company Exhibit 20-A.)

20. The State Bank Commissioner deeded to Whittaker, the plaintiff herein, on May 31, 1939, based on Order of sale of court in the proceedings of Liquidation of North Sanpete Bank dated May 22, 1939, 60 acres of primary class "A" water. (Plaintiff's Exhibit X.)

21. Simon and Susannah M. Hugentobler, his wife, deeded to Andrew T. Hartley, on October 20, 1944, the said 55 acres of water mortgaged to , (Plf. Ex. A), decreed to, (Plf. Ex. U, decree) and deeded to (Que Jensen Ex. 1) Simon Hugentobler.

22. Robert D. Tibbs, on November 23, 1945 assigned and transferred to Richard H. Spencer, certificate 86 for 160 and transferred to Richard H. Spencer, certificate No. 86 for 160 shares of class "A" stock. (Administrator's Exhibit 1).

23. Andrew T. Hartley deeded to Que Jensen on March 1, 1946, the said 55 acres of water deeded to him in transaction 21 herein.

24. Richard H. Spencer assigned, on May 14, 1946 certificate No. 86 for 160 shares class "A" water to John

Edison Spencer. (John Edison Spencer Exhibit 3.)

25. At an undated time Richard H. Spencer transferred to Irwin M. Price certificate No. 72 for 80 shares class "A" stock. (Indianola Irrigation Company Exhibit 9).

26. At an undated time John Edison Spencer transferred to Irwin M. Price certificate No. 73 for 80 shares class "A" stock. (Indianola Irrigation Company Exhibit 10.)

27. On July 4, 1947 Irwin M. Price quit-claimed to the estate of Richard H. Spencer his interest in certificates Nos. 72 and 73. (Administrator's Exhibit 16.)

28. Que Jensen was decreed, on December 16, 1947 by trial court herein, to be the owner of said 55 acres of primary water and entitled to the use thereof. (See decree of trial court filed herein.)

29. Whittaker, the plaintiff was decreed on December 16, 1947, by trial court herein, to be the owner of said 60 acres of primary water deeded him by State Bank Commissioner. (See decree of trial court filed herein.)

30. Decree by that court of Certificate No. 84, for 125 shares class A to Richard Leo Spencer, administrator of the estate of Richard H. Spencer, deceased.

31. John Edison Spencer was decreed, on December 16, 1947, by trial court herein, to be the owner and entitled to the use of certificate No. 86 for 160 shares of class

"A" water. (See decree of trial court filed herein.)

32. Decree of that court of 45 shares Class "A" water Richard Leo Spencer, administrator of Estate of Richard H. Spencer, deceased.

ARGUMENT

1. Counsel for all parties hereto have conceded Que Jensen's right to 55 acres or shares of primary water right in Thistle Creek.

2. Que Jensen claims only 55 acres or shares of primary water right in the waters of Thistle Creek and its tributaries, and that the same is appurtenant to Lot 4 of Section 5 and Lot 1 of Section 6, Township 12 South Range 4 East, Salt Lake Meridian, containing 77 acres; and that said water right is 55-1728 of the primary water of Thistle Creek and its tributaries. Que Jensen makes no claim for any of the secondary rights in said stream.

3. Que Jensen consents that the judgment be so modified that he will be adjudged the successor in interest and in title to Simon Hugentobler and is the owner and entitled to the use and enjoyment of the following described tract of land and water right appurtenant thereto which is not represented by any certificate in the Indianola Irrigation Company, in Sanpete County, State of Utah, to-wit:

Lot 4 of Section 5, and Lot 1 of Section 6, in Township 12 South, Range 4 East, Salt Lake Meridian,

excepting the right of way of the Denver and Rio Grande R.R. and the State Highway.

55 acres of primary water right from the water in Thistle Creek heretofore used on Lot 4 of Section 5 and Lot 1 of Section 6, in Township 12 South, Range 4 East, Salt Lake Meridian.

which said 55 acres or shares are part of the 448 acres or shares of primary or Class "A" water right formerly owned by Richard H. Spencer; and is 55-1728 of the primary flow of said stream.

4 The trial court in Civil Case No. 2888, found that the 55 acres or shares of water right mortgaged to Simon Hugentobler are part of Certificates Nos. 72 and 73, and the trial court in this case found the same. All of the other transactions since the Simon Hugentobler mortgage which gives rise to this law suit are subsequent in point of time and subject in point of right to the mortgage to Simon Hugentobler. The contention of Que Jensen is that his 55 acres of primary water right must be satisfied first, whichever of the questioned certificates it is deducted from.

5. The judgment should be affirmed so far as it awards to Que Jensen 55 acres or shares of primary water in Thistle Creek and its tributaries, and Lot 4 of Section 5 and Lot 1 of Section 6, Township 12 South, Range 4 East, Salt Lake Meridian, to which said land said water is appurtenant, and which water right is 55-1728 of the flow of primary

water of said stream. And said judgment should be modified so far as it awards Que Jensen any rights to the secondary waters of said stream.

JOHN S MC ALLISTER
ATTORNEY FOR DEFENDANT
AND APPELLEE
QUE JENSEN