

1939

# Hyde Park Town v. George Chambers and Tacy Chambers, E. S. Chambers, Bertha Poulsen, David J. Weeks, and Mary Weeks : Abstract of Record

Utah Supreme Court

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Young & Bullen; Irvine, Skeen, Thurman & Miner; Attorneys for Appellant

M. C. Harris; Attorney for Defendants;

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In  
The Supreme Court  
of the  
State of Utah

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HYDE PARK TOWN,  
a Municipal Corporation,  
Plaintiff and Appellant,  
vs.

GEORGE CHAMBERS AND  
TACY CHAMBERS. His  
Wife, E. S. CHAMBERS. a  
Single Man, BERTHA POUL-  
SEN, as Guardian of ADELL  
IDA POULSEN. a Minor.  
DAVID J. WEEKS. and  
MARY WEEKS. His Wife,  
Defendants and Respondents.

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Appeal From First Judicial District Court in and  
for Cache County  
Honorable Lewis Jones, Judge

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## ABSTRACT OF RECORD

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YOUNG & BULLEN, AND  
IRVINE, SKEEN, THURMAN & MINER.  
Attorneys for Plaintiff  
and Appellant.  
M. C. HARRIS,  
Attorney for Defendants  
and Respondents.

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In  
The Supreme Court  
of the  
State of Utah

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HYDE PARK TOWN,  
a Municipal Corporation,  
Plaintiff and Appellant,  
vs.

GEORGE CHAMBERS AND  
TACY CHAMBERS, His  
Wife, E. S. CHAMBERS, a  
Single Man, BERTHA POUL-  
SEN, as Guardian of ADELL  
IDA POULSEN, a Minor,  
DAVID J. WEEKS, and  
MARY WEEKS, His Wife,  
Defendants and Respondents.

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**ABSTRACT OF RECORD**  
**COMPLAINT**

(TITLE OF COURT AND CAUSE).

1 The plaintiff complains of the defendants,  
and each of them, and for cause of action  
alleges :

1.

That plaintiff is a corporation organized under  
and existing by virtue of the laws of the State  
of Utah, as a municipal corporation, and that

pursuant to the laws of the State of Utah, plaintiff has vested in it the right and power of eminent domain for the purpose of acquiring rights of way for the purposes hereinafter set forth.

## 2.

That the defendant Bertha Poulsen is the duly appointed, qualified and acting guardian of Adell Ida Poulsen, a minor, and that Tacy Chambers, one of the defendants herein, is the wife of George Chambers, and that the defendant E. S. Chambers is an unmarried man; that Mary Weeks, one of the defendants herein, is the wife of David J. Weeks.

## 3.

That the defendants David J. Weeks and Mary Weeks his wife, and each of them, are the owners of the following described land situated in Cache County, Utah:

Beginning at a point 1320 feet South and 800.9 feet East from the Northwest corner of the Northeast quarter of Section 35 T 13 North Range 1 East Salt Lake Base Meridian; thence North 1 degree 30 minutes East 1320.6 feet; thence East 16.5 feet; thence South 1 degree 30 minutes West 1320.6 feet; thence West 16.5 feet to the point of beginning, containing one-half acre more or less.

And that the lands above described are part and portion of a larger tract of land, but that the acquiring of the right of way, as hereinafter set forth, over the lands above described,



will not, in any way, injure the remaining tract of land.

## 4.

That the defendants, George Chambers and Tacy Chambers, his wife, and each of them, and E. S. Chambers, a single man, are the owners of the following described land situated in Cache County, Utah:

Beginning at a point 835.5 feet East from the Northwest corner of the Northeast quarter of Section 35 Township 13 North Range 1 East Salt Lake Base Meridian; thence North 1 degree 30 minutes East 825.2 feet; thence East 16.5 feet; thence South 1 degree 30 minutes West 825.2 feet; thence West 16.5 feet to the point of beginning and containing 50 square rods more or less.

And that the lands above described are part and portion of a larger tract of land, but that the acquiring of the right of way, as hereinafter set forth, over the lands above described, will not, in any way, injure the remaining tract of land.

## 5.

That the defendant Bertha Poulsen, as guardian of the estate of Adell Ida Poulsen, a minor and the said Adell Ida Poulsen are the owners of some right, title or interest in said property in this paragraph described, which said interest, defendant alleges to be a mortgage. The exact amount of the indebtedness incurred by said mortgage, being unknown to this plaintiff, and for that reason this plaintiff does not allege the amount thereof.

## 7.

That all of said lands above described and hereby sought to be acquired by the right of

eminent domain, lies within the boundaries of Cache County, Utah.

## 8.

That the plaintiff herein is the owner of a certain culinary water system which supplies the inhabitants of the plaintiff with culinary water by means of a system of pipes connecting certain springs with the individual homes of said inhabitants and that said water system, as now constructed, is inadequate to supply the needs of said inhabitants, and that in order to supply said needs in a reasonably adequate manner and in order to provide facilities for protection against fire, within the boundaries of plaintiff, it has become necessary and proper for the plaintiff to construct a new pipe-line connecting certain springs now owned by the plaintiff, with the water system of the plaintiff, which springs are intended to and will furnish water sufficient to supplement the inadequate supply of water now owned by the plaintiff and available for the use of its inhabitants thereof.

## 9.

That on the 15th day of June, A.D. 1937, the Board of Trustees of the plaintiff made and entered a resolution by which said resolution it was determined by said Board of Trustees that it was necessary to acquire the rights of way above described together with other rights of way not in said resolution referred to. That all of the parcels of land above described are also described by map attached hereto and

marked Exhibit A, and is hereby made a part of this complaint.

## 10.

That it is proposed to excavate a trench over and across the lands above described to a depth of approximately 4 feet and to lay in the bottom of said trench, a pipe-line across said lands as above set forth, which said trench will then be filled in as said pipe is so laid. That for the purpose of constructing and maintaining said pipe line, it will be necessary, during the construction of the same, to pass across said lands with vehicles of various kinds loaded with pipe and other supplies, but that work and labor will be done in a reasonably adequate manner and with the least possible damage to the lands of the defendants ;

That after said pipe-line is constructed, and in case said pipe-line shall at any time become out of repair, it will be necessary for plaintiff to have the right to enter upon said lands for the purpose of making said repairs.

## 11.

That the project above referred to is a public project and that plaintiff is now in the process of constructing the same at other points in its system, and that plaintiff has attempted to buy the rights of way above referred to but that defendants have refused and do now refuse to sell the same; and that plaintiff is able and willing to pay a reasonable compensation for the damages done to the lands of the defend-

ants and each of them, in the construction of said proposed project.

## 12.

That in order to facilitate the construction of said project, it is necessary that the court grant to the plaintiff the right to immediately occupy the said premises pending the determination of the above entitled action, so that said work can be continued without unnecessary and expensive delays and that said occupancy be granted without requiring bond of said plaintiff. That a date be set for the hearing of said application of plaintiff for the right of immediate occupancy.

WHEREFORE, plaintiff prays first, that the court give judgment to the plaintiff against the defendants, and each of them, in eminent domain condemning and granting to plaintiff all the rights, title and interest of every nature of said premises described herein and required for said public purposes and uses.

That the court ascertain the values of the property sought to be condemned and every part and parcel of the same, and each and every separate estate or interest therein; that the court assesses the damages which will accrue to the proportions severed from that parcel herein described and which forms a part of the greater parcel and assess the benefits which will accrue to the defendants, and each of them, because of the improvements constructed upon said property.

YOUNG & BULLEN,

Attorneys for Plaintiff.

Verified June 22, 1937.

Filed June 23, 1937.

## ANSWER

## (TITLE OF COURT AND CAUSE).

27 Come now the defendants, George Chambers and Tacy Chambers, his wife, and for separate answer to the plaintiff's complaint herein admit, deny and allege as follows:

## 1.

Admit that the plaintiff is a municipal corporation organized and existing under the laws of the State of Utah.

## 2.

Admit and allege that these defendants are the owners of the following described property in Cache County, Utah, towit:

The Northwest Quarter of Section Twenty-five, Township Thirteen North, Range One East of the Salt Lake Meridian, containing 160 acres. Also, the South Fifty Rods of the Southeast Quarter of Section Twenty-six, Township Thirteen North, Range One East of the Salt Lake Meridian, containing 50 acres;

and admit and allege that the pipe-line of the plaintiff extends across their said lands for a distance of approximately 100 rods but these defendants are without sufficient information to form a belief as to the correctness of the said description in paragraph three of the said complaint and upon information and belief deny that the same is a correct description thereof.

## 3.

Admit that the right of way or easement described in the complaint takes only a portion or part of a larger tract of land. These defendants are without sufficient information to

form a belief as to the other matters alleged in the complaint, and therefore, deny on information and belief each and every other allegation contained in the complaint

BY WAY OF FURTHER AND SEPARATE  
ANSWER TO THE SAID COMPLAINT  
THESE DEFENDANTS ALLEGE AS  
FOLLOWS :

1.

That ever since the year 1913 the plaintiff has been and now is the owner of a right of way across these defendants' property for the purpose of conducting its water pipe-line used in its culinary water-works system to conduct water to the Town of Hyde Park and to these defendants, which said right of way is fully capable of taking care of the defendants out of the water rights and depuration. That for 50 rods of the above described pipe-line, they are using the identical right of way so owned by the plaintiff, and that since the commencement of this proceeding they have taken up the old pipe-line and laid a new pipe-line in the same place.

2.

That the Town of Hyde Park are the owners of sufficient waters to supply the inhabitants thereof and these defendants with culinary water in accordance with the agreement hereinafter set out, and these defendants further allege that the real purpose of this proceeding is to acquire and otherwise deprive these defendants of the use of their water rights in the said pipe-line as hereinafter described.

3.

That it appears from the conduct of the plaintiff that the real purpose of this condemnation

proceeding is to abandon its former right of way and easement, and that if so the said abandonment is not made in good faith but for the ulterior purpose and motive of cheating the defendant out of the water rights and destroying and defeating these defendants' water rights as hereinafter described, and acquiring and depriving these defendants of the use of the same. That for these reasons, plaintiff ought not to be permitted to continue this proceeding but the same should be dismissed.

FOR A THIRD AND FURTHER SEPARATE ANSWER TO THE SAID COMPLAINT, THESE DEFENDANTS ALLEGE AS FOLLOWS :

1.

That the predecessors in interest of these defendants for many years prior to 1913 were the owners of and had placed to beneficial use the culinary and stock-watering purposes, by the use of a small stream conducted through ditches from said springs and from the creek of Birch Creek in Birch Canyon near the property of these defendants, and that these defendants and their predecessors in interest had diverted sufficient water from Birch Creek and the said springs each and every year, in excess of 25 years. for culinary, domestic and stock-watering purposes and to irrigate a small garden on the said premises, and that these defendants' predecessors in interest resided upon the said premises for approximately 6 years until the year 1920.

2.

That on or about the year 1913 the officers of the Town of Hyde Park were desirous of ob-



taining water for culinary and domestic purposes for their town, and well knowing that Robert Reid and John P. Toolson, predecessors in interest of these defendants, was the owner of the said water rights in Birch Creek, as aforesaid, represented to the said Robert Reid and John P. Toolson that for the purpose of saving water wasted in running through the said ditch and for the right of way to conduct the water across the said lands they would be willing to pipe the water from Birch Canyon through and across the premises of the said Robert Reid and John P. Toolson, now the premises of these defendants, and for and in consideration of the surrender of the said water rights and easement or right of way for such pipe-line and the use of the water saved as aforesaid, the Town of Hyde Park would furnish the defendants' predecessor in interest, Robert Reid and John P. Toolson, with a tap to be used on the said premises to furnish water for culinary and domestic and stock-watering purposes.

## 3.

That thereupon the said Robert Reid and John P. Toolson, relying upon the said representations, entered into an agreement with the said Town of Hyde Park, by the terms of which the said Robert Reid granted to plaintiff the right to construct the said pipe-line across the said premises and convey the said water to the Town of Hyde Park for culinary purposes, for which the Town of Hyde Park promised and agreed to supply the said Robert Reid and John P. Toolson, free of charge, a tap in the said pipe-line together with the right to use sufficient water from the said tap for culinary, domestic and



stock-watering purposes upon the said premises, and that pursuant to the said agreement the Town of Hyde Park did, during the year 1911, construct said pipe-line and convey the said waters through the same over the said premises and did furnish Robert Reid and John P. Toolson and these defendants since they became owners of the said premises, waters from the said tap for the said purposes, and that these defendants and their predecessors in interest Robert Reid and John P. Toolson, have ever since the year 1911, openly, continuously, adversely, and under claim of right, used the said tap and the waters flowing therefrom in an amount of approximately two gallons per minute for culinary, domestic and stock-watering purposes.

## 4.

That the plaintiff has now constructed a new pipe-line over their proposed right of way apparently sought to be condemned herein, and have declined and refused to furnish these defendants a tap or to permit these defendants to take any water from the said pipe-line, and that the plaintiff is by these proceedings attempting not only to take the said right of way but to acquire, take and destroy these defendants' water right as aforesaid.

## 5.

That the said described property consists of two separate tracts of approximately 125 acres of arid land suitable for pasture and cultivation purposes and of great value for pasture purposes with the said water right, and particularly in the spring and fall of each year, but that without the said water right it is neces-

sary to haul water to the said lands for culinary purposes a distance of  $2\frac{1}{2}$  miles, and there is no other water available on the said premises for stock-watering and culinary purposes and that the said lands for pasture purposes are practically valueless, and that the loss of the said culinary water right likewise very greatly depreciates the value of the said lands for farming purposes as well as pasture purposes and that as a result of abandoning the old pipe-line and depriving these defendants of their water rights and in the construction of the new pipe-line, and the refusal of the plaintiff to permit these defendants to take water therefrom, these defendants will be greatly damaged and that the damage to the property taken, including the said water rights, will be the sum of \$1000.00 and that the amount of the damage to the property not taken, as the result of the taking in the construction of the said pipe-line will be the sum of \$2500.00.

## 6.

These defendants now tender and offer to grant to plaintiff the right of way across the said property without compensation, providing that the plaintiff will install for the use and benefit of these defendants a tap on their water pipe-line in substantially the same condition as they have been using for more than 25 years last past.

WHEREFORE, defendants pray:

## 1.

That this court adjudge and decree that these defendants are the owners of the right of sufficient water from a tap on their premises from

the plaintiff's water pipe-line to furnish domestic water for culinary, drinking and stock-watering purposes, and that this court further make its order and decree that it is not necessary or proper for the plaintiff to condemn the said water rights or any part thereof, and that this court order and direct the said plaintiff to furnish these defendants the said waters as aforesaid.

## 2.

That this court make and enter its order that it is not necessary for the plaintiff to condemn the said right of way described in the said complaint and adjudging that the plaintiff has no right to condemn the same.

## 3.

That if the court permits the condemnation of the said property, then that the court fix the value of the property taken from these defendants in the sum of \$1000.00, and that the court fix the damages suffered by these defendants as a result of the said taking to the property not taken, in the sum of \$2500.00.

These defendants pray for general and equitable relief.

M. C. HARRIS,

Attorney for Defendants  
George Chambers and  
Tacy Chambers,  
His Wife.

Verified June 24, 1939,

Filed June 28, 1939.

## AMENDED ANSWER

(TITLE OF COURT AND CAUSE).

21 Comes now the defendants, David J. Weeks and Mary Weeks, his wife, and for an amended separate answer to the plaintiff's complaint herein admit, deny and allege as follows:

## 1.

Admit that the plaintiff is a municipal corporation organized and existing under the laws of the State of Utah.

## 2.

Admit and allege that these defendants are the owners of the following described property in Cache County, Utah, to wit:

Beginning at the Northeast Corner of the Northwest Quarter of Section 36, Township 13 North, Range 1 East of the Salt Lake Meridian, running thence South 160 rods; thence West 130 rods; thence North 80 rods; thence West 30 rods; thence North 40 rods; thence East 80 rods; thence North 40 rods; thence East 80 rods to the place of beginning, containing 125 acres.

Also, Beginning at the Northeast Corner of said Section 36 and running thence West 160 rods to the Northeast Corner of the Northwest Quarter of Section; thence South 72 rods to North Bank of Creek; thence Northeasterly along Creek to a point 20 rods South of the place of beginning; thence North 20 rods to the place of beginning, containing 46 acres.

Also, The North Half of the Northeast Quarter; and the East 45 Rods of the South

Half of the Northeast Quarter; and The Northeast Quarter of the Southeast Quarter of Section 35, Township 13 North, Range 1 East of the Salt Lake Meridian;

across which extends the pipeline apparently intended to be described in paragraph three of the said complaint, but these defendants are without sufficient information to form a belief as to the correctness of the said description in paragraph three of said complaint, and upon information and belief deny that the same is a correct description thereof, and admit that the right of way or easement takes only a part and portion of the larger tract of land.

3.

These defendants are without sufficient information to form a belief as to the other matters alleged in the complaint and therefore deny on information and belief each and every other allegation contained in the complaint.

BY WAY OF FURTHER AND SEPARATE  
ANSWER TO THE SAID COMPLAINT  
THESE DEFENDANTS ALLEGE AS  
FOLLOWS:

4.

That ever since the year 1911 the plaintiff has been and now is the owner of a right of way across the property of these defendants above described for the purpose of conducting and maintaining its water pipeline used to conduct a culinary water system for the purpose of furnishing water to these defendants and the people of the town of Hyde Park, which said right of way is and was fully capable of taking care of all of the requirements of the plaintiff

corporation, and that it is therefore totally and wholly unnecessary for the plaintiff to resort to condemnation proceedings to condemn such a right of way.

## 5.

That the Town of Hyde Park are the owners of sufficient waters to supply the inhabitants thereof and these defendants with culinary water in accordance with the agreement hereinafter set out and these defendants further allege that the real purpose of this proceeding is to acquire and otherwise deprive these defendants of the use of their water rights in the said pipeline as hereinafter described.

## 6.

These defendants are informed and believe, and therefore allege that the real purpose of this condemnation proceeding by the plaintiff is an attempt to abandon its former right of way and easement, and is not made in good faith but is for the ulterior purpose and motive of depriving these defendants of their water rights as hereinafter described and acquiring the right to the use of the same by this plaintiff, and, therefore the plaintiff ought not to be permitted to continue this proceeding but that the same should be dismissed.

FOR A THIRD AND FURTHER SEPARATE  
ANSWER TO THE SAID COMPLAINT,  
THESE DEFENDANTS ALLEGE AS  
FOLLOWS :

## 7.

That these defendants during the year 1886, entered upon the property above described and homesteaded 160 acres thereof, and in the year 1887 constructed a ditch to the springs in Birch



Canyon, the waters of which canyon are now used to supply culinary water through the pipe-line described in the plaintiff's complaint, and these defendants diverted from the said springs through the said ditch sufficient waters onto their homestead property for culinary, domestic and stock-watering purposes and to irrigate a garden, and lived upon the said property from 1887 until 1893, and each and every year appropriated and used the said waters through the said ditch for the purposes aforesaid.

## 8.

That during the period of time last above mentioned these defendants also constructed a ditch higher up on the mountain and appropriated waters from the said Birch Canyon and the said Birch Springs for irrigation, stock-watering and culinary purposes on their said land each and every year up until the year 1911, except that in very dry seasons, late in the fall of some years, it was necessary and they did drive their cattle to the said springs for stock-watering purposes when there was not sufficient water to run through the said ditch for said purposes.

## 9.

That on or about the year 1911, the officers of the Town of Hyde Park were desirous of obtaining water for culinary and domestic purposes, and represented to these defendants that for the purpose of saving the water wasted in running through the said ditch, they would be willing to pipe the water through and across the premises of these defendants, and for and in consideration of the right of way of such pipe-line and for the use of the water saved

as aforesaid the plaintiff would furnish the defendants with water taps to be used on the said premises to furnish water for culinary and domestic and stock-watering purposes.

## 10.

That thereupon these defendants, relying upon the said representations entered into an agreement, by the terms of which, the defendant granted to the plaintiff their said water rights and the right to construct the said pipe-line and convey the said water to the town of Hyde Park for culinary purposes in consideration of which the town of Hyde Park promised and agreed to supply these defendants a tap in the said pipe-line together with the right to use sufficient water from the said tap for culinary, domestic and stock-watering purposes upon the said premises, and thereupon the said Town of Hyde Park, pursuant to the said agreement, during the years 1910 and 1911 did construct the said pipe-line and convey the said waters through the same over the said premises, and ever since the said time have supplied these defendants with said waters, and that ever since the said year 1911, these defendants have openly, continuously, adversely and under claim of right used the said tap and the water flowing therefrom in the amount of 2 gallons per minute for culinary, domestic and stock-watering purposes.

## 10-A

That from time to time since 1913, plaintiff has improved said culinary water system by acquiring and using different and additional springs in Birch Canyon, and on or about the year 1934 the plaintiff changed its point of diversion and moved its water line to a spring



higher up in Birch Canyon, and at said time there arose a controversy between the Smithfield Irrigation Company on the one part and the Hyde Park Town on the other part, and that on or about the 22nd day of January, 1935 the plaintiff and the Smithfield Irrigation Company entered into an agreement by the terms of which plaintiff company acquired  $\frac{1}{2}$  c.f.s. of the waters of the said spring situated in Birch Canyon in Cache County, State of Utah and more particularly described as follows:

That certain spring which is 11851 feet East and 2288.2 feet North from the Cache National Forestry Marker No. 68 which is located 2427 feet South from the Northeast Corner of Section 24, Township 13 North, Range 1 East of the Salt Lake Base and Meridian;

in consideration of which the plaintiff quit-claimed and surrendered to the Smithfield Irrigation Company all its right, title and interest in and to the balance of the waters of the said spring and all other waters in Birch Canyon, including the waters granted by the defendants herein to the plaintiff during the year 1911 as aforesaid;

And thereupon the plaintiff constructed its said pipe-line up to the said last described spring and conducted the water for its culinary system thereafter from the said spring and continued to furnish water to these defendants during all of the said time until the commencement of this action, from said spring and pipe-line, and that if the plaintiff is permitted now to abandon their contract with these defendants the

defendants will be then wholly deprived of the consideration by the delivering to the plaintiff for which they received the said culinary water for the past 25 years, and will be damaged accordingly as hereinafter set out.

## 11.

That the plaintiff has now constructed a new pipe-line over their proposed right of way apparently sought to be condemned herein, and have declined and refused to furnish these defendants a tap or to permit these defendants to take any water from the said pipe-line, and that the plaintiff is by these proceedings attempting not only to take the said right of way but to acquire, take and destroy these defendants' water right as aforesaid.

## 12.

That the above described property consists of 266 acres of arid lands suitable for pasture purposes and of great value for pasture purposes with the said water right, but that there is no other water available on the said premises and that without the said water right the said lands are valueless for pasture purposes, and that as a result of the abandoning of the old pipe-line and these defendants' water rights and in the construction of the new pipe-line and the refusal of the plaintiff to permit these defendants to take water therefrom these defendants will be greatly damaged, and that the damage to the property taken by these proceedings will be the sum of \$2000.00 and that the amount of the damage to the property not taken, as a result of the taking and construc-

tion of the said pipe-line, will be the sum of \$3,500.00.

## 13.

These defendants now tender and offer to grant to the plaintiff the right of way across the said property without compensation, providing that the plaintiff will install for the use and benefit of these defendants a tap on their water pipe-line in substantially the same condition as they have been using for more than 25 years last past, and these defendants offer and agree to install such modern equipment as will prevent any unnecessary waste of water.

BY WAY OF FURTHER ANSWER, AND SPECIAL DAMAGES, THESE DEFENDANTS ALLEGE AS FOLLOWS:

## 14.

That during the season of 1939 the plaintiff has wilfully and unlawfully and in violation of its contract deprived these defendants of the use of any culinary water from the said pipe-line and that it has been necessary for these defendants to daily drive their cows a distance of  $2\frac{1}{2}$  miles to water, to their special damage in the sum of \$2.00 per day.

WHEREFORE, defendants pray as follows:

## 1.

That this court adjudge and decree that these defendants are the owners of the right of sufficient water from a tap on their premises from the plaintiff's water pipe-line to furnish domestic water for culinary, drinking, and stock-watering purposes, and that this court further make its order and decree that it is not neces-

sary or proper for the plaintiff to condemn the said water rights or any part thereof, and that this court order and direct the said plaintiff to furnish these defendants the said waters as aforesaid.

## 2.

That this court make and enter its order that it is not necessary for the plaintiff to condemn the said right of way described in the said complaint and adjudging that the plaintiff has no right to condemn the same, and that this action be dismissed hence at plaintiff's costs.

## 3.

That if the court permits the condemnation of the said property, then that the court fix the value of the property taken from these defendants in the sum of \$2000.00, and that the court fix the damages suffered by these defendants as a result of the said taking to the property not taken, in the sum of \$3,500.00.

## 4.

That the court award these defendants their special damages in the sum of \$2.00 per day from May 2, 1939 to date of judgment herein.

These defendants pray for general and equitable relief.

M. C. HARRIS,

Attorney for Defendants David J. Weeks  
and Mary Weeks, His Wife.

Verified June 24, 1939.

Filed June 27, 1939.

REPLY TO THE ANSWER OF THE DEFENDANTS GEORGE CHAMBERS AND TACY CHAMBERS.

(TITLE OF COURT AND CAUSE).

- 17 Comes now the above named plaintiff, and replying to the answer of the above named defendants admits, alleges and denies as follows:

1.

Plaintiff admits that since the year 1910 this plaintiff used a certain right of way through the lands of the defendants above mentioned, and in this connection plaintiff alleges that said right of way became unfitted for the use of this plaintiff for the reason that the same was not a direct route, and for said reason this plaintiff abandoned said right of way on or about the last mentioned year.

2.

Plaintiff denies generally and specifically each and every allegation of the further and separate answer of the said defendants except only that plaintiff admits that it constructed a pipe line across the lands belonging to the defendants on or about the year 1910.

3.

Replying to the third and further separate answer to the said complaint this plaintiff admits and alleges as follows: Plaintiff denies that it has sufficient information to form a belief as to the allegations of said separate

answer and for said reasons and upon said grounds, this plaintiff denies generally and specifically each and every allegation contained in said separate answer except only that plaintiff admits that since the year 1910 the plaintiff has substantially improved its said water system on two or more different occasions and has moved its point of diversion to springs higher up in Birch Canyon because of the failure of said springs to adequately supply the needs of the citizens of the plaintiff Town.

#### 4.

As an affirmative reply to defendants' answer, this plaintiff alleges: That if there was any agreement as set forth in defendants' answer the said purported agreement was not in writing and that the same was not to be performed within one year, and that the same is void and unenforceable by reason of Section 33-5-4, sub paragraph one, commonly known as Statute of Frauds.

#### 5.

As a separate and second affirmative reply to defendants' answer, this plaintiff alleges that the purported agreement referred to in plaintiff's complaint, if there was any such agreement, is void and ultra-vires, and that neither this plaintiff nor its officers had any power to enter into any such a contract, and that the same is unenforceable because of the provisions of Section 6 of Article 11 of the Constitution of Utah, which reads as follows:

“Section 6. No municipal corporation, shall directly or indirectly lease, sell, alien



or dispose of any water-works, water rights, or sources of water supply now, or hereafter to be owned or controlled by it; but all such water-works, water rights, and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, that nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water rights, or sources of water supply, for other water rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants.”

## 6.

Plaintiff has heretofore offered to convey and does hereby offer to convey to the defendants all of its right, title and interest in and to the pipe line which heretofore conveyed water to the farms of the defendants.

WHEREFORE, plaintiff prays that defendants’ answer be dismissed, and that plaintiff have judgment as prayed for in this complaint.

YOUNG & BULLEN,  
Attorneys for Plaintiff.

Verified June 24, 1939.

Filed June 24, 1939.

REPLY TO THE AMENDED ANSWER OF  
THE DEFENDANTS DAVID J. WEEKS  
AND MARY WEEKS.

(TITLE OF COURT AND CAUSE).

19 Comes now the above named plaintiff, and replying to the amended answer of the above-named defendants admits, alleges and denies as follows:

1.

Plaintiff admits that since the year 1910 this plaintiff used a certain right of way through the lands of the defendants above-mentioned, and in this connection plaintiff alleges that said right of way became unfitted for the uses of this plaintiff for the reason that the same was not a direct route, and for said reason this plaintiff abandoned said right of way on or about the last-mentioned year.

2.

Plaintiff denies generally and specifically each and every allegation of the further and separate answer of the defendants David J. Weeks and Mary Weeks.

3.

Replying to the third and further separate answer to the said complaint, this plaintiff admits and alleges as follows: Plaintiff denies that it has sufficient information to form a belief as to the allegations of said separate answer, and for said reasons and upon said grounds, this plaintiff denies generally and specifically each and every allegation contained in said separate answer except only that plaintiff admits that since the year 1910 the plaintiff has



substantially improved its said water system on two or more different occasions and has moved its point of diversion to springs higher up in Birch Canyon because of the failure of said springs to adequately supply the needs of the citizens of the plaintiff Town.

## 4.

Replying to the further answer, by way of special damages, plaintiff admits, alleges and denies as follows: Plaintiff denies generally and specifically each and every allegation of said further answer.

## 5.

As an affirmative reply to defendants' answer this plaintiff alleges: That if there was any agreement as set forth in defendants' answer, the said purported agreement was not in writing and that the same was not to be performed within one year, and that the same is void and unenforceable by reason of Section 33-5-4, subparagraph one, commonly known as Statute of Frauds.

## 6.

As a separate and second affirmative reply to defendants' answer, this plaintiff alleges that the purported agreement referred to in plaintiff's complaint, if there was any such agreement, is void and ultra-vires, and that neither this plaintiff nor its officers had any power to enter into any such a contract, and that the same is unenforceable because of the provisions of Section 6 of Article 11 of the Constitution of Utah, which reads as follows:

“Section 6. No municipal corporation, shall directly or indirectly lease, sell, alien

or dispose of any water-works, water rights, or sources of water supply now, or hereafter to be owned or controlled by it; but all such water-works, water rights, and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, that nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water rights, or sources of water supply, for other water rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants.”

## 7.

Plaintiff has heretofore offered to convey and does hereby offer to convey to the defendants all of its right, title and interest in and to the pipe-line which heretofore conveyed water to the farms of the defendants.

WHEREFORE, plaintiff prays that defendants' answer be dismissed, and that plaintiff have judgment as prayed for in its complaint.

YOUNG & BULLEN,

Attorneys for the Plaintiff

Verified June 24, 1939.

Filed June 24, 1939.

## BILL OF EXCEPTIONS

(TITLE OF COURT AND CAUSE).

DAVID J. WEEKS, a witness called by defendants, testified as follows:

58 I am one of the defendants and reside at Smithfield; am 73 years old and have lived in Smithfield all my life.

(Thereupon, it was stipulated that the defendant David J. Weeks was the owner of the land described in paragraph 2 of his amended answer).

I first went on the land in 1888; I believe in the spring. In those days it was necessary to reside on the homestead. We built a house and lived there for five years. I acquired some additional land to the 160 acres in the homestead. I bought 45 acres from a Mr. Reid; that would be the piece described in Section 36, containing 46 acres. I bought the property a little south and a little west from Mr. Jensen. I lived on the property for about 6 years with my wife and some of the children.

70 I tried to dig a well, but found no water. We then went over to Birch Creek and took out this spring that the Town has. We took it out with the ditch. The ditch was about a mile and a quarter long and was constructed down to my place. I turned the water in, in 1888—the latter part. I raised a little garden; I didn't have a large stream; it was only for culinary purposes. There was enough water "to run down a corn row, good."

72 I used a continuous stream while I was homesteading. In the winter time it froze up

and we could not get it over. I drove my stock over to Birch Creek. Cattle could go over there at that time, but they can't now because it is fenced up. At the present time I have to take my cattle to the canal, about 80 rods away. My pasture lies in the Dry Canyon. And the land that I farm lies below the mouth of the canyon. Dry Canyon and Birch Canyon are two different canyons. Dry Canyon is the one south of the farm lands.

The lands lie right straight east from the south part of Smithfield, and northeast from Hyde Park. The spring lies above Smithfield and above Hyde Park; that is, in altitude. No streams cross my land, and there is no means of my getting water aside from the culinary water system, except through the ditch that I made.

73 Five years later, we went further up the canyon and took a ditch out for irrigation. We didn't have any permanent right on that, but we used it for irrigation and culinary purposes. After I got the ditch, in low water I used it for watering my stock. After I got my ditch on my place, I used the continuous stream. I am referring to the last ditch. I abandoned my lower ditch and told the Hyde Park people that they ought to have that for a water system. That ditch went dry once.

After we constructed the upper ditch, about 1893, I took my water through that ditch. We started to negotiate with the Smithfield Irrigation Company along in 1910, 1911 or 1912. Between 1893 and 1910 or 1911, I watered my cattle from the ditch. I had a continuous stream. We made the upper ditch so that we

could irrigate with it; we have at least two second-feet in it now when we use it. The culinary water between those years was enough for us to get a drink and also for the cattle to drink. Other neighbors of mine use similar streams of water for culinary purposes.

77      The upper part of Birch Canyon is very porous. The water runs down nearly a mile underground and then springs up. There are more than two springs; it then runs down for two miles. When there is a lot of water it runs over, a part of it sinks and a part of it runs on. It sinks all the way down. I have been in Birch Canyon since I was four years old. During the summer time I would be up there nearly every day. The water in the canyon usually flows underground and not over the ground. In about 1910 some negotiations were commenced with Hyde Park, and Hyde Park was to construct a culinary system or pipe line out of Birch Canyon for part of the water of that canyon.

,      Some of the officials of the Town came and talked with me. I am not clear as to who they were, but Mr. George Daines was one of them. I am satisfied that Rast Lamb was a member of the town board; also Ren Peterson; and there were two or three others. George Daines came a long time afterwards.

81      I do not think the negotiations were put in writing. They (the town board) asked if a dribble would be enough for our culinary purposes; that is, a dribble through the pipe-line. For this, I was to give them a right of way. We met together several times, and the agree-

ment was that we were to have a dribble, and they were to have a right of way.

83 They furnished the tap. They built a gravity line, and they put a three-quarter inch pipe into the line. There is a hole in the pipe about the size of an eight-penny nail through which the water went into the trough. They installed the trough as soon as they got the water in the pipe.

84 About a gallon a minute went through. This was done about 1910 or 1911, and the water was furnished continuously thereafter until the fall of 1938. During this time, there was no complaint of any kind from any officer of Hyde Park.

85 (Thereupon, it was stopulated by counsel as follows: That about 1913, the plaintiff moved up Birch Creek Canyon a short distance and tapped another set of springs, using both this set of springs and the one first taken out. Then, about 1916 or 17, plaintiff moved further up Birch Creek Canyon and tapped a spring near the Cache National Forest Line).

After I got this socalled dribble, I abandoned the culinary system I described.

86 Whereupon, the following objection was made:

MR. YOUNG : I move to strike out from the answer, the words 'I abandoned it,' on the grounds that it is incompetent, irrelevant, and immaterial; a proper foundation not having been laid.

THE COURT: The montion is denied.

I didn't use it (the culinary system), be-



cause I had tap water for my stock and myself there.

87 I used the dribble to water my cattle. It was free to everybody. The water was good culinary water for both man and beast. It was much better than what we got through the culinary system.

88 There was a cap on the tap. They riveted the cap on the pipe, to hold the cap so they could not monkey with it. There was nothing said in any of the conversations about anyone having a right to discontinue this stream.

89 We have had no water out of the pipe-line during the year 1939.

90 It has been necessary for me to drive my cattle to water. The season begins in April. Since the first of April, it has been necessary for me to drive my cattle to water every day.

91 The fair value would be \$2.00 a day.

92 We had no water up there for drinking purposes. It is hard to put a value on the use of the water, when you want to drink it.

#### CROSS - EXAMINATION:

93 Birch Canyon runs east and west. The head of the canyon is east. The springs tapped by Hyde Park in 1910 or 11, were straight north of Section 35. They were right along the bottom of the canyon. There was one side spring, and one spring at the bottom of the canyon — right in the creek.

94 My land is located south of this spring —

probably just a little bit west. Chambers' land adjoins mine on the north.

95 Dry Canyon runs east and west, also. It runs down through my land. The grade is from east to west. We get no water from Dry Canyon, except a little in the spring when the snow is melting.

96 The head of the ditch which I first constructed was right in the creek, by one of these springs. This was constructed in 1887.

97 The ditch went west for some distance—about thirty rods; the ditch was on the south side of the creek; it then turned due south, then dipped to the east.

98 It struck our land 30 or 40 rods above the west boundary, to where the house was. It also struck about 40 rods up in the Chambers property. It stopped at our house.

99 I used the ditch for about five years. I then abandoned it. I constructed a ditch higher up the canyon, about 160 rods.

100 It started in Birch Canyon, on the south side of the creek bed. We started this ditch right in the creek bed and continued it westerly for about 160 rods. This was about 300 feet higher in elevation than the old ditch.

101 It struck the Chambers land. It entered the Hansen land first, and then the Chambers land, then it went over to mine. It stopped on my land.

103 Generally speaking, the upper ditch served our purposes after '94. I should say I used the lower ditch three or four years after 1894. I have not used it since. We have used the upper ditch ever since.



104 The water ceases to flow in the upper ditch about July 1st. Birch Creek dries up in spots.

105 Birch Creek is porous all the way down. The water disappears; this is true all the way down the canyon. The water in Birch Creek always flowed to our upper ditch. Below our ditch, the water sinks at times; the ground is porous.

106 It disappears in the main creek bed pretty near every year, in the late season—I mean after August. I have seen it pretty dry on July 1st.

107 In the lower ditch, the water ran all summer. It got over to my place. This would be until it froze up.

108 The upper ditch was started in 1893. I used the ditches for gardening. This garden was large enough to furnish vegetables for three or four of us.

109 The house was located on the west, right close to the center line. I abandoned the lower ditch after 1895. I have had no garden after that time.

110 I irrigated from the upper ditch. I am still doing everything with the water from that upper ditch that I ever did.

#### RE-DIRECT EXAMINATION:

111 We cleaned it out every year and irrigated with it. This water runs every ten days. I have used it for our cattle and stock-watering, but I never take a drink out of it.

112 The water flows in the ditch just the same as it ever did, since 1894.

113 I abandoned the lower ditch in 1895 or 1896; that was a complete abandonment. I got my

culinary water during the next few years out of the upper ditch. The cattle drank there, when it was there.

114 After I moved from my homestead, I used Smithfield water-works water for drinking purposes. Whenever the water is in the upper ditch we use it for watering our cattle, but it is only there once in ten days. Other farmers take it the rest of the time.

115 Me and Reid constructed that ditch ourselves. Later, I gave other people rights in the ditch. They used it for culinary purposes too. At the present time, I take my turn in that ditch the same as I did in 1911. I traded a right of way over my land for this tap. I did not pay them any money.

116 I got the tap stream for my right of way until the spring of 1939; for that I allowed them to pass over my land with their pipe.

117 I have six head of cattle up there at the present time. They are all in the mountains. My land is all mountains. They have been taking them to what they call "Spring Hollow" to drink. It is across one quarter and one section. There is no fence to prevent my cattle from going to this spring from my land, but the hill is pretty steep and they have not been going up there. I have taken them up there

118 every day, beginning with the 1st of April. Altogether, I have been herding twenty-five cattle. I go up at about a quarter to three in the afternoon and I do not get back until six. All six cows are milk cows. I just milk enough for me and the old lady to drink. I don't milk

119 any of the twenty-five cows. They don't give as much milk as they would if they had a

watering trough down there. There are 160  
120 acres plus 40 acres.

121 The Hyde Park and Smithfield canal is  
west of my place about 80 rods. Previous to  
1939, my cattle went down to the tap to drink.  
I have had twenty-five cows at the pasture this  
spring. The boys have paid me some to drive  
the cattle up to water. I have been taking the  
cows down from the pasture to Smithfield  
each night. I took them up in the morning. I  
123 have had six of my own cattle and nineteen be-  
longing to my son. I have been taking these  
cattle to the upper field for several years, my-  
124 self . It takes me about an hour in the morn-  
ing to get the cows. Before the water was shut  
125 off, I used to go up at 5 o'clock instead of at  
3 o'clock. It has taken me about two addi-  
tional hours since the water was shut off. My  
sons are giving me things to live on for the  
use of the pasture. They have been giving me  
126 50c a head for each month. Before 1939, the  
boys did not pay me anything for driving the  
cows because I had some cows of my own.  
Since 1939, they have been paying me at the  
rate of 50c per head per month. I have never  
127 received any rental for this land. I have never  
leased it at all.

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JOHN P. TOOLSON, a witness called by the  
defendants, testified as follows:

### **DIRECT EXAMINATION:**

My name is John P. Toolson; I reside at  
Smithfield. I am 73 years of age. I have lived  
there all my life.

On December 8, 1906, I purchased a fifty-  
acre tract of land adjoining the Weeks land.

near Birch Canyon. It is nearer to Dry Canyon. I disposed of this land in 1913. I was the owner of this tract when the Hyde Park  
 128 culinary water system was constructed. I don't remember the date. I don't recall which officers of Hyde Park came to see me, but some of them did. They came for a right of way across my lands. In the discussion I  
 129 asked them for a tap for water. They didn't seem to make much objection. I also asked about a trough. We got together on that matter. They agreed to give me a tap and put a trough in. They fixed the tap on my land. I don't know what kind of a pipe-line they constructed. I was not there. They also built me a trough. The trough has always been full and running over. I don't recall how much water there was in it.

130 I don't recall how long I owned the land after the tap was put in. I had cattle up there at times previous to the time when the tap was put in my land. There were no fences and they watered over at W. O. Smith's. He had a reservoir and water ditch in Birch Canyon. W. O. Smith was east of me. There was nothing said as to whether or not this agreement was a perpetual agreement.

#### CROSS - EXAMINATION:

131 MR. THURMAN: We offer in evidence, as part of our cross-examination of Mr. Weeks, exhibit A, which is an attempted reproduction of what we have on the board.

THE COURT: Received.

MRS. MARY WEEKS, called as a witness by the defendants, testified as follows:

My name is Mary Weeks and I am the wife of David Weeks. I recall my husband filing on 160 acres of land; that was about the time we were married. We moved up there just as soon as we were married. We moved up there just as soon as we filed on the homestead.

132 We lived up on the farm and built a house up there. We lived there five years, maybe a few days over. My husband tried to dig a well but could not find water. There was a little stream that we had that came from Birch Canyon. That would be the lower ditch. I knew of my husband constructing the upper ditch. He watered his cattle like he said he did. We moved up there a year after we were married, and we were married in 1888. We moved up there in 1889. We moved down about 1894. We raised a small garden. We had a  
133 few chickens. They got their water from the same ditch that we did. We had cows while we were up there. I know that we had a trough up there, but I don't remember when.

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SAMUEL P. NIELSEN, a witness called by the defendants, testified as follows:

**DIRECT EXAMINATION:**

134 My name is Samuel P. Nielsen; I am 75, and reside at Smithfield. I am the person who sold the fifty-acre tract to John P. Toolson. I owned it about thirteen years before I sold it to him. I am acquainted with David J. Weeks. They had cattle on their lands.

135 Before the pipe-line was constructed, they watered the cattle from the Will Smith ditch.



I think this ditch was built by Dave Weeks and Rast Hansen.

136 When they were irrigating, they had quite a good-sized stream.

137 Whereupon, it was stipulated that water had run out of the taps from the time they were constructed until the fall of 1938.

### **CROSS - EXAMINATION:**

138 I moved in the neighborhood about 1890. I sold my land to Toolson in 1906. I then bought it back in 1913. A year later, I sold it to Robert Reid. That was in 1914. I remember the water back forty years ago.

139 The upper ditch had been constructed before I bought my land. I think, then, both ditches were being used. I don't know when Dave Weeks abandoned the use of the lower ditch. The Will Smith ditch was the upper ditch.

140-141 I had a right to the lower ditch. I did not have any right to the upper one.

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ALFRED G. RASMUSSEN, a witness called by defendants, testified as follows:

### **DIRECT EXAMINATION:**

142 My name is Alfred G. Rasmussen; I live in Smithfield; and I am 51 years of age. My father homesteaded some land in the same neighborhood. I recall when W. O. Smith homesteaded. This was the land Mr. Chambers now owns. I started to work on it when I was a good - sized boy.

143 I was born in 1888. I was 16 or 18 years. He kept the water running in the ditch all the

time. It came from Birch Canyon. He never had much water at some times, in the upper ditch; at times there would not be any. Then, of course, we would go up and take more as the stream comes down out of the creek. There was no other place that Mr. Smith could get water.

- 144 The pipe-line did not go across our land. Mr. Reid acquired the property Mr. Toolson had. I remember he used to haul water there to drink. He had water for the animals but he used to haul his drinking water. He hauled this water from the tap of Toolson's.

#### CROSS - EXAMINATION:

- 145 We hauled water for household purposes. Mr. Smith's sheep and cattle were on the upper ditch and we did not use it for drinking purposes.

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FOSTER GORDON, a witness called by the defendants, testified as follows:

#### DIRECT EXAMINATION:

- 146 My name is Foster Gordon; I was County Clerk at one time; I reside at Smithfield.
- 147 I am 65 years old. I have been acquainted with this neighborhood up there in Birch Canyon for some time. I am an officer of the Smithfield Irrigation Company. I was not an officer in 1912.

Whereupon, defendants offered as an Exhibit, a contract with the Smithfield Irrigation



Company. This offer was objected to by the plaintiff, and the court admitted it pro forma

- 148 After this agreement was made, Hyde Park furnished the Smithfield Irrigation Company twenty-five shares of the capital stock of the Logan Northern Irrigation Company, and they have permitted them to connect up with the springs in Birch Canyon. Hyde Park paid the water taxes on this stock.
- 149 The contract was offered in evidence as Defendants' Exhibit 2. This offer was objected to by plaintiff, and the court admitted it pro forma.
- 150 We claim that one-hundred shares of the Logan Northern Irrigation Company stock will approximate between two and two and a half second-feet.
- 153 The reasonable rental value of the land with the water on, would be \$150.00. I doubt that it would be possible to rent the property without water on it.
- 154 Mr. Weeks and Mr. Chambers got water for irrigation there, in turns. They are not stockholders in the Smithfield Irrigation Company. They would fix the turns among themselves. It was simply surplus waters. I think they got the last of the water this year, about July 1st. I don't know anything about Mr. Weeks' turn. Every time I went up to the intake of Hyde Park, they had an overflow.
- 155 On the first of July, this year, Birch Creek at the mouth measured 3.7 second-feet. This was an unusually dry year. This was measured at the mouth of Birch Canyon. It would

probably be a mile or mile and a half below the 1911 springs.

- 156 I have never seen Birch Creek dry up except in the year 1934.

### CROSS-EXAMINATION:

I was not an officer in the Irrigation Company when the 1911 agreement was made. I knew about it. Previous to that time, Hyde Park had no water rights in Birch Creek Canyon. I think that previous to that time, they had no water rights at all.

- 157 As far as I know, they operated no irrigation or culinary system. I know they did not have one. Smithfield Irrigation Company owned all the waters of these springs. These are the springs we call the 1911 springs, and Smithfield Irrigation Company agreed to transfer their rights in the springs if Hyde Park would transfer to the Smithfield Irrigation Company twenty-five shares of the stock in the Logan Northern Irrigation Company.

- 158 I do not know when they acquired title to this twenty-five shares. Previous to this time the 1911 springs would find their way in Birch Creek and down the Canyon, and that became part of the water which was distributed by the Smithfield Irrigation Company. It was considered at the time, that the waters in the springs were more valuable than the twenty-five shares of stock.

- 159 I became acquainted with these springs about 1899.

DAVID J. WEEKS, heretofore called as a witness by the defendants, was re-called, and testified as follows:

- 160 I am not a stockholder in the Smithfield Irrigation Company. We took turns in the upper ditch, and irrigated the land. This was until around the 24th. We started as soon as the ditch could be cleaned out. The only thing we claim, is a surplus right. This irrigation method has continued from the beginning. After the flush water seasons previous to 1913, we only used the water to water the stock and for culinary purposes. I didn't have enough to run a corn row. After the Hyde Park system was constructed, I didn't drink out of the stream any more. The stock would water on this stream.
- 161 W. O. Smith told me that he had it all the time. That was after the Hyde Park system was installed. After it left Smith's land, it came to mine. Mr. Smith let enough get past to water my cattle. After the Hyde Park system was installed, my cattle watered at the tap. After that, Mr. Smith did not let the water pass. We still have our flush water stream. I would generally have it two days and a half out of ten.
- 163 Up until July 1st, I had a continuous stream, if I wanted it, for stock purposes.

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FRED DUCE, a witness called by the defendants, testified as follows:

**DIRECT EXAMINATION:**

My name is Fred Duce; I live in Hyde

Park. I was the Mayor of Hyde Park for the years 1934 and 1935.

164 I signed the Exhibit 2. I was Mayor at that time. As the new pipe was laid in, we continued to furnish water to Mr. Weeks and Mr. Chambers, for culinary purposes.

166 While I was Mayor, there was sufficient water to let these defendants have the tap stream. After we had the extension, we had plenty of water; yes sir.

### CROSS - EXAMINATION:

In 1934, we went dry. We didn't have any water. We went dry in 1933.

167 Our average population is around 735 people. In 1934, we extended the pipe-line to Miller Spring. We made a contract to get half a second-foot of water.

168 I did not measure the water. I was present when the engineer measured it. The engineer told me there was a half a second-foot. It was all Greek to me. I do not know the flow of water at any time.

169 I don't know what the supply of water was in so many feet, prior to 1934. Hyde Park was put on restrictions; there were some years when we had to go on restrictions for watering lawns.

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GEORGE CHAMBERS, a witness called by the defendants, testified as follows:

171 I am one of the defendants in this case.

Thereupon, it was stipulated that the witness George Chambers, was the owner of the land described in his answer.

I reside at Smithfield, and I am 45 years old. I have a tap on my land; it was there when I went on the land. We had a trough that would hold about two-hundred gallons of water. Possibly a gallon a minute came out  
172 of the tap.

173        There are about 125 acres fenced in, in the same field where the trough is located. I received fifty-five acres from Mr. Reid. On it, I raised grain and hay; in the spring and fall I also used it for pasturage.

174        There has been no interference with the trough or the tap since I have had the land. Only one person ever said anything to me about it. That was Ren Peterson; about fifteen years ago. He said to me that the stream was not a very large one, and that it was recorded in the court house — that is, the amount of water I was to have. I have made a search in the Recorder's Office, but can not find it. There is no other water on the fifty-five acres which can be used for the watering of cattle, or for culinary purposes. I haven't used the land this year, because I didn't have the water.

175        I am a farmer, and I have had experience in renting farms. I know the rental value of farms. I have an opinion as to the rental value of the land, with the culinary water; also, an opinion as to the rental value for pasturage purposes, without the water. The difference in the value would be at least two dollars an acre. If you can find anybody that would rent the land at all without the water, the fair rental value would not be over \$15.00.

176        Since 1920, the upper ditch has been used

by Hansen brothers, David Weeks, and myself. The three of us received so many shares under the Kimball decree. That decree gave me one-hundred shares, Mr. Weeks, thirty shares. During the flush season, we would divide the water between us. While we have been using the water, we have never allowed any part of the stream to go down to Mr. Weeks for culinary purposes; neither have Hansen brothers. Since I went up there, there has been no culinary water in the upper ditch.

### CROSS - EXAMINATION:

77 In 1920, I think it was fifty acres of land that I bought. Last year, I used the acreage for hay and grain. I didn't use it this spring because I didn't have any water. In 1938, I used it for pasturage; also in the spring of 1937. I pastured it almost every year.

78 I didn't pasture it in the spring of 1939, because I didn't have any water. I didn't turn my cattle in there during the spring of 1939 — at no time after 1938. I would usually turn the cattle in there for about a month. I have also leased land up there for pasturage and paid from \$1.50 to \$2.50 an acre. I don't think I ever paid any less than that.

79 I never took the cap off the tap; there was never any on while I have been up there. My tap clogs up every now and then. I have talked with members of the Board, and they told me it would be a perpetual stream. I don't know, definitely, whether it was a gallon a minute. I think I have rented land at \$1.50 an acre from Mr. Thornley. That would be for about two weeks.



JOHN P. TOOLSON, a witness heretofore called by defendants, was recalled, and testified as follows:

I had a written agreement with Hyde Park about this tap. To the best of my recollection I placed it on the deed when I disposed of the land. I had a written paper, but I don't know what you call it. I don't know where that paper is, and haven't tried to find it. When I sold the land, I took it to the man that made out the deed, and I have not seen it since. The deed is recorded in the Recorder's Office, and the contract is on the deed.

180        Thereupon, there was received in evidence the following extract from the record of the Town of Hyde Park, from the Minutes of July 31, 1911 :

“George Z. Lamb was appointed to install watering spouts for the Smithfield people where our pipe-line crosses their land as per agreement of the Board to furnish them with water for animals only and dropping stream.”

Defendants rested.

## 181                    MOTION FOR NONSUIT

Thereupon, plaintiff moved the court to grant a nonsuit, and to dismiss the defendants' cross-complaint, or the relief sought by the defendants under their further defenses or affirmative defenses, on the following grounds:

“ . . . we ask for the granting of this motion separately as to each of the two de-



fendants, each of the two groups of defendants, George Chambers and his wife Taey Chambers, and E. S. Chambers, a single man, as the one group; and then the next group would be David J. Weeks and Mary Weeks, his wife; we ask for a non-suit as against each of these groups of defendants separately, on the grounds that the defendants, or either group of defendants, have no rights at all, no color of title to the waters involved in this proceeding; that their alleged claimed right is grounded upon a contract entered into between Hyde Park and the two groups of defendants in about the year 1910 or 1911, and that the contract being oral — that is, the contract made by the said Town with each of the two groups of defendants, that contract being oral, is void and unenforceable under Section 33-5-4, Revised Statutes of Utah, 1933, sub-paragraph 1. That is the first ground. The second ground is, that this contract entered into with each of the two groups of defendants, was an attempt on the part of the plaintiff, a municipal corporation, to alienate, sell and dispose of a certain portion of its water rights, and that by reason of that fact, the said contract is void and unenforceable under the provisions of the Constitution of this State, under the provisions of Section 6, Article 11, of the Constitution of the State of Utah.”

182      THE COURT: The motion for non-suit may be denied at this time.

REUBEN A. PERKES, a witness called by the plaintiff, testified as follows:

183 My name is Reuben A. Perkes. I was a member of the Town Board of Hyde Park in 1910 and 1911, and again, later, for four years. In 1910 and 1911 negotiations were under way to obtain rights of way from the defendants in this case. I participated in the exchange of rights with the Smithfield Irrigation Company; these negotiations culminated in the contract which has been introduced in evidence in this case.

We made an examination of the springs at the time; the summer before, my father, Mr. Petersen, and I went up there. Our primary purpose was to see whether or not the springs were high enough in the canyon to justify our acquiring them for Hyde Park, if we could make the exchange.

184 Our survey showed we could get in above a cliff that was there, into the springs, and then to the reservoir where it is at its present site. The cliffs were just high enough so that we could go through the edge of them; of course, they had to be blasted. The cliff prevented the putting of the ditch so it would reach the Weeks property, except only for just one little corner. I am wrong in this; I would say that it was the piece north of there, the piece that Mr. Reid or Mr. Toolson owned at the time; the ditch would strike the corner of that land.

185 The ditch came out of the creek, I would say, three-quarters of a block below where the spring was located, and then went around the hill and in a southwesterly direction. The ditch hit through the corner of the Chambers

property, but did not strike the Weeks property at all.

Thereupon, defendants reopened their case.

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**EPHRAIM WEEKS**, a witness called by the defendants, testified as follows:

**DIRECT EXAMINATION:**

186 My name is Ephraim Weeks. I live in Smithfield, Utah, and I am Water Master of the Smithfield Irrigation Company. I have had occasion to visit the intake of the Hyde Park water-works system. There is a concrete box at the head, and a control valve on the inside. This control valve is locked. I don't know who has the key to the box.

187 When I have been up there, there has been an overflow out of the intake box. I examined Hyde Park's reservoir on June 25, 1938 and found an overflow there. I measured it, and found .18 of a second-foot.

**CROSS - EXAMINATION:**

It was at Miller's Spring that the control of the water which Hyde Park receives, was located. I don't know how much water Hyde Park is receiving.

Thereupon counsel for defendants stated that they made no contention that Hyde Park was receiving in excess of one-half of a second-foot of water.

188 I was at the Hyde Park reservoir on June 25, 1938, at four o'clock in the morning. At

that time, there would be less call for the water than at any other time during the day.

189 I made my measurement with a weir. It started at four o'clock and continued until five. Before four o'clock, the reservoir had been filling all night. At four o'clock it was overflowing. I only saw the overflow once, and don't know what the situation was at any other time.

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EUGENE SCHAU, a witness called by the defendants, testified as follows:

**DIRECT EXAMINATION:**

190 My name is Eugene Schaub, and I am an engineer. I have had experience in designing and constructing culinary water systems in Cache County. In this community, the amount of water usually desired by engineers in designing irrigation and culinary water systems, is two-hundred gallons per capita per day. It is my idea that that takes care of the requirements of a community.

**CROSS - EXAMINATION:**

191 If we assume that Hyde Park has an additional number of families, and approximately ten acres of land in the cemetery, in which a large part of it is now placed in lawn grass, I would say that two-hundred gallons per capita per day, would be enough. I have in mind, also, that the school yards occupy a large part of a block in lawns, and that at the present time they are keeping a quarter of a block in lawn around the church.

192 I also appreciate that Hyde Park is a dairy center, and that the livestock population is ab-

normally high. The livestock population might be, probably, at least twice that of the human population. I think maybe that the human being may use about eighty gallons; the rest of it would go for irrigation and stock watering. This would be on the assumption that there were twice as many cattle as human beings. I have no definite statistics as to just how much a cow would drink; twenty-five gallons might be about right.

193 Altogether, there might be about forty acres on the lawns. The general design of the system is two-hundred gallons per capita per day. I don't know how many acres of lawn grass there is in Hyde Park. I didn't know that, when I made the estimate. I based it on general designs.

195 In Logan, the consumption is 135 gallons. For those who run meters, it would be a higher per capita consumption; I think it would go about 175 to 200 gallons per capita, per day. In the Logan system, we get about 8 second-feet, and there is a population of about 12,000. That would run up to about 400 gallons per capita. There may be some overflow. Where meters are used, the consumption is not as large.

#### CROSS-EXAMINATION:

197 About 50 percent of Logan are on meters. Logan has a few cattle, but not nearly the same as Hyde Park. In Logan, the cattle, comparatively speaking, are negligible. In Logan, I think we use more water for lawns than does Hyde Park; I mean per capita.

198 Thereupon, over plaintiff's objection, both Mr. Weeks and Mr. Chambers, witnesses here-



tofore examined by defendants, were permitted to testify that Hyde Park had never requested them to pay anything for the upkeep of the water system.

Defendants again rested.

200      Thereupon, plaintiff renewed its motion for a non-suit, said motion being as follows:

“The plaintiff moves for a non-suit in this case and a dismissal against each of the separate groups of defendants, that is, Mr. Weeks and his wife in the one group, and the Chambers group in the other, on the following grounds: If either, or if any of the defendants in this case, have any rights to the waters owned and controlled by Hyde Park, that right is grounded upon a contract, an oral contract, entered into in about the year 1911, under the terms of which, according to the testimony, Hyde Park agreed to supply the defendants with a tap and to a perpetual stream of water, in consideration of the defendants giving Hyde Park a right of way for the pipeline over the defendants’ property; and if any such oral agreement was entered into at that time, it is void for the following reasons: First, that it is in violation, or it comes within the provisions of Section 33-5-4, sub-paragraph 1, Revised Statutes of Utah, 1933, commonly referred to as the Statute of Frauds; that sub-paragraph providing that the contract not to be performed within one year must be in writing; Second, the oral contract that has been testified to, is void and not binding

upon the City under the provisions of Section 6, Article 11, of the Constitution of the State of Utah.''

THE COURT: The motion is denied.

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CHARLES L. ASHCROFT, a witness called by the plaintiff, testified as follows:

**DIRECT EXAMINATION:**

201 My name is Charles L. Ashcroft; I reside in Hyde Park, and I am forty-eight years old. I was Water Master of Hyde Park during 1936 and 1937, during which time the present water line was installed. It was completed in the fall of 1937. In the year 1936, we were very short of water; we had to put the Town on sprinkling hours—two hours a day for sprinkling lawns.

202 There is a reservoir that checks some of the supply; it is located a quarter of a mile east from Hyde Park, or one-eighth of a mile east of the City limits. The pressure in the water is by means of gravity only.

203 During the summer months of 1936, when the people down below were using their lines, we could not keep enough pressure in the mains to supply the upper users. They didn't use water on the lawns through the taps, and they were also without drinking water. In 1937, prior to the completion of the pipe-line, the conditions were the same. The new pipe-line was completed in the latter part of the summer; with its completion, matters were helped



somewhat. I did not serve as Water Master after 1937.

### CROSS . EXAMINATION:

204 Sprinkling was limited during the summer for a few weeks, only. We never limited them to less than two hours a day for sprinkling. We divided the Town into two sections; half of them got water in the morning, and half of them in the afternoon. There have been times when the people of Hyde Park could get no drinking water.

205 There are no water meters in Hyde Park. As Water Master, it was my duty to shut off streams that were constantly running. I would not say that in all cases the water has been shut off. When there is water, there is enough pressure to get a stream out of the hydrant. It is not the case that when there is a lot of water in the reservoir, the people in the upper part of the Town are unable to get water.

### RE-DIRECT EXAMINATION:

206 When there is water in the reservoir, everybody can get it. The upper users would be about a quarter of a mile below the reservoir.

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GEORGE Z. LAMB, a witness called by the plaintiff, testified as follows:

### DIRECT EXAMINATION:

My name is George Z. Lamb; I have resided in Hyde Park all my life; I am 65 years old. In 1911 I was a member of the Town Board

and had something to do with the water question. I was first elected, I believe, in 1910. In that year, Hyde Park operated no water system. The system was started for the inhabitants of Hyde Park in 1911, and the first source of supply was from the springs that went into Birch Creek. The springs were acquired from the Smithfield Irrigation District, Hyde Park giving therefor twenty-five shares of stock in the Logan Northern Irrigation Company. At the time when negotiations commenced, Hyde Park did not own any shares in the Logan Northern Irrigation Company.

7 The shares were acquired in 1911, after the negotiations. They were purchased from J. W. Seamons, and other residents of the Town. The pipe-line was installed in 1911; that is when we went and connected up with the springs.

8 Exhibit A fairly represents a diagram of Birch Canyon; the springs which were tapped in 1911 and the relative position of the canyon to Dry Canyon, and to both the Chambers and Weeks properties. On Exhibit A, I notice there has been designated a lower ditch and an upper ditch. I was familiar with both ditches; likewise with the Weeks property and the Chambers property, formerly the Toolson property. At the time we went up the canyon, the lower ditch did not pass through the Weeks property; that was in 1911. In this particular, Exhibit A is incorrect, as the lower ditch did not pass through the Weeks property at that time. The upper ditch did not pass through either the Weeks or Chambers properties, but the properties were connected up by laterals. When I refer to the Chambers prop-

erty, I refer to the property which was formerly owned by Toolson.

209 I continued to reside in Hyde Park after the installation of the water system, in 1911. While a member of the Board in 1911, I was also Water Master, and continued to act in that capacity for a short period after the pipeline had been completed. At that time we had sufficient water. In the winter, we would have a little more than sufficient; also during the spring run off. During the summer months we would not always have sufficient; it would go short in the latter part of the summer; that would be every year, from the beginning of the system. We always had a shortage during the summer months.

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#### CROSS - EXAMINATION:

210 I live in the lower part of the Town of Hyde Park, and I am the George Z. Lamb who installed the taps for the defendants. The taps interfered with the water supply to the extent that they took water. The reason the upper people do not get water is because the lower people run it off too fast. We have always had water there—not very big; not very much sometimes; very little pressure.

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#### RE-DIRECT EXAMINATION:

212 When there is little pressure in the lower part of Town, the upper users do not have any water. All are citizens of Hyde Park.

JOHN D. KIRBY, a witness called by the plaintiff, testified as follows:

213 My name is John D. Kirby; I reside in Hyde Park; I am 65 years old. I was Water Master of Hyde Park either in 1916 or 1917. I succeeded Mr. Lamb. I am not certain as to the year I started, whether it was 1916 or 1917. I have been a resident of Hyde Park practically all my life; I was there in 1911. I assisted in the installation of the pipe-line. I worked with the engineer, Richard R. Lyman. I was acquainted with the location of the Weeks and Toolson land, now owned by Mr. Chambers. I don't think the lower ditch reached the Weeks land.

214 During the time I observed it, we were very short of water. That was all but high-water seasons. This was every year. I served six years at one time, and four years thereafter. The shortage would commence in early summer. That depends on the season. I would say it started from the first of June, until the first of April of the next succeeding year, so that there was only enough  
215 water during April and May. I was succeeded by Martin C. Reeder.

216 I talked to Mr. George Chambers a time or two about using water. I found a cap taken off the pipe so that the pipe was wide open; it was a one-half inch pipe. Originally, there was a cap on the end of the pipe, and there was a hole in the pipe about a sixteenth of an inch in diameter. The water passed through this hole. This was the cap he had taken off.

217 I talked to Mr. Chambers about the removal of the cap. He blamed it onto someone

else. At one time, I shut the water off from Mr. Reid, who was predecessor of Mr. Chambers. This was because he had taken off the cap. I talked to Mr. Reid and Mr. Weeks about the excessive use.

#### CROSS - EXAMINATION:

- 218 I talked to Mr. Chambers right by the tap on his property. This was in the summer time. I talked to him once, in town — that is, in Smithfield. There was no one present.
- 219 I meant to testify that we were short of water all year except April and May. In the winter time, Hyde Park people used the water for their cattle and other culinary purposes. They did not leave their taps open.
- 220 There was not an averflow during the winter; there was times when roots got into the pipe, but they were cleaned out. I cleaned them very often. They had restrictions on lawn watering every year while I was Water Master. There were two years, I believe, when the lawns simply burned up. I can not recall the years.
- 221 I was familiar with the condition of the water during my entire time. I worked at it, virtually, daily. The people complained of water shortage frequently. There were complaints at times during every year. Most of the complaints came from the upper part of Town. There were complaints from the lower part of Town, claiming they were too restricted in their use.
- 222 I never saw George Chambers' tap clogged up so that it would not run out.

**MARTIN C. REEDER**, a witness called by the plaintiff, testified as follows:

**DIRECT EXAMINATION**

My name is M. C. Reeder; I reside in Hyde Park; I am 68 years of age; I have resided there since 1871 — practically all the time. I was a member of the Town Board elected in 1922. I served two years. I was Water Master during that time. I succeeded Mr. Kirby. Mr. Petersen succeeded me.

223 During the summer months we didn't have water enough for drinking; sometimes we didn't have enough for us to drink. I think that went back to 1911, in the summer months from July on; and February was always a dry month.

224 I re-cleaned a portion of the water system during the time I was Water Master. My observations were that we did not have adequate water. The citizens were put on restriction in all parts of Town. The condition was about the same as it was in 1911.

**CROSS - EXAMINATION:**

226 I didn't go up and shut off Weeks and Chambers during the short season. I made no measurements as to how much water was going into the system.

**LORENZO PETERSEN**, a witness called by the plaintiff, testified as follows:

**DIRECT EXAMINATION**

227 My name is Lorenzo Petersen; I am 76 years of age; I live at Hyde Park; I have lived there



72 years. I was there in 1910 and 1911 when the water system was installed. I was familiar with the springs they tappel at that time. I was counsellor to the Bishop of the Ward at this time, and was designated to go up and look at the water. I was a member of the Town Board in 1924. I succeeded Martin Reeder as Water Supervisor in 1924 I think. I served two years. John Kirby followed me.

228 We were so short of water in 1924 and 1925 that we didn't have any, scarcely. This was in the winter time. The shortage commenced in the summer, about June. It would continue  
299 until fall and winter. We would put the town on restrictions. We had half the town use it in the forenoon and half in the afternoon and give them one and one-half hours to water their lawns and flowers. I observed that when the lower half of the town used the water, the upper half could not get it.

230 I think the shortage became worse in later years than in the early part. They never did have enough. The springs did not fail us altogether but they got pretty low. At times we cut open the pipe and turned the creek water in. A few years after 1910 they extended the pipe line higher up the canyon. This was to get more water.

#### CROSS - EXAMINATION:

231 We did not shut off Weeks and Chambers when we had a shortage of water.

#### RE-DIRECT EXAMINATION:

232 I did not know whether I had any right to turn Weeks' and Chambers' water off. At times. I found the hole in the tap to be a lot



233 enlarged. I took the enlarged cap off and put another one on. I had the cap I took off in my possession ever since. (This cap was then offered in evidence as Exhibit B. and was received).

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JOHN KIRBY, a witness heretofore called by the plaintiff, was recalled and testified as follows:

234 I helped Richard R. Lyman, the engineer, install the system. Two or three years later it was extended up the canyon a few rods, to get more water. This was because we were short of water. This did not give us enough to take care of the needs of Hyde Park. It was extended up the canyon while I was Water Master, in about 1916. This would be about a mile and a half or a mile and three quarters and would be east of the forest line about a mile.

235 We used all of the springs which we had previously taken out after we extended the line in 1917, so that we had three sets of springs running into the system. Notwithstanding this, we were still short of water. There were seven valves to regulate the water going to various parts of the Town of Hyde Park. At times it was necessary to shut off some of these valves. I remember doing this, I think it was in the winter time of either 1916 or 1917. I  
236 think it was only one year. This was because of shortage of water. We would shut it off in one part at night and then turn it on in the morning. When we did this, they didn't have any water at all. This would be neither for

drinking purposes nor for toilets. After 1917, we still had a shortage. We then tapped another small spring. I broke the pipe and let  
 237 the water from the creek run in. This was after 1917, and after we had tapped all three sets of springs and were using all the water from all the sets.

### CROSS - EXAMINATION:

Notwithstanding that we were constantly adding to our water supply, we were still short. There was no water running down the canyon in the winter time, past our springs. I haven't any record of measurements but we made some measurements. We made measurements with a bucket. We measured it both at  
 238 the intake and at the reservoir. This was with a 14-quart bucket. We got eight buckets to the minute. There were two or three of us made the measurements. We'd just put the bucket in, get it full of water, and count the time. That was in the winter time.

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MARTIN C. REEDER, a witness heretofore called by the plaintiff, was recalled and testified as follows:

239 I remember extending the system up the canyon about two years after the 1911 installation. This was done to get more water. I did not do the extension, but I knew of it.

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GEORGE D. CLYDE, a witness called by the plaintiff, testified as follows:

240 My name is George D. Clyde. I am a civil engineer. I am employed at the Utah

State Agricultural College. (Whereupon, the defendants admitted the qualification of the witness). I was the engineer in charge of the installation of the new water source for Hyde Park. This was about the year 1934. I made an investigation at this time to determine the water needs of the community. I investigated the number of people, the number of cattle and horses. I estimated twelve hundred cows, approximately the same number of dry stock, and about three hundred head of horses. I

241 investigated the lawn plantings, such as the cemetery, school and church; the cemetery is about five or six acres; the schools about three, and the church three or four acres; twelve or fifteen acres total as I remember. I considered the future needs of the community; I based my estimate on about twenty-five years in the future. There are approximately six hundred fifty people in the town. I estimated between three and four hundred gallons per capita. I can break that down. The minimum per capita is about forty gallons, that is, human consumption. The minimum per capita consumption for a cow, ten gallons; per horse, ten gallons. I didn't figure hogs, nor chickens, nor sheep. Hogs will run five gallons, and sheep three gallons, and a hundred chickens, three gallons per day.

242 For students of the school, it required thirty gallons per capita; this was in the schools, themselves. For the lawns at the grounds, it will take sixteen gallons per day to apply a quarter inch of water, to a hundred square-foot of lawn. If you apply an inch of water, it will take sixty-five gallons per day to apply an inch of water. The total, if you

figure this up, will run around four hundred gallons per capita per day, if you were to base it on the human population. This is only an arbitrary method of basing it. For a town of a thousand population, I believe that a thousand gallons per minute is fire protection. If you figure a family of five persons, at forty gallons per capita, you have two hundred gallons; ten cows a hundred gallons; six horses, sixty gallons per family use; five hogs, twenty-five gallons, and a hundred chickens three gallons per family; and that gives three hundred seventy-eight gallons per minute. This does not include anything for fire protection or lawns, and the difference between the per capita consumption as detailed from the first figures, and the four hundred, which I used is in the needs for lawns and for fire protection.

- 243 My estimate was that the community would remain a small community for twenty-five years in the future. In 1934, there were about six hundred fifty people. I am now informed there are seven hundred fifty people in Hyde Park. A town of that size will not grow rapidly. In twenty-five years, I think we could figure an increase of twenty-five percent in the present consumption. This would be about two hundred forty gallons per capita, based on a seven fifty population. I estimate they will need seventy-five hundredths of a second foot in twenty-five years. They get one-half of a second foot at the present time. I don't think there is any surplus water if their flow remains at one-half a second foot.

#### CROSS - EXAMINATION:

- 244 I designed the pipe line for seventy-five hundredths of a second foot. The pipe might

carry a little more than that, but this was the minimum estimate. My estimate was based on the hand book given out by the R. Hardesty Manufacturing Company. (Thereupon, this hand book was offered in evidence as Exhibit 3, and admitted over objection).

245 Four years ago, I estimated six hundred  
fifty people, twenty-four hundred head of cattle,  
three hundred head of horses. I also include  
246 for each student in the school, thirty gallons  
per capita per day. I don't know how many  
there were. I think the student would use  
ten gallons extra, in addition to the forty gal-  
247 lons allowed him. This gives the human con-  
sumption, fifty-six thousand gallons a day;  
two hundred seventy-eight gallons for lawns;  
not all for lawns. We have got some for fire  
protection. Fire protection is very important.

248 I don't know what percentage of the peo-  
ple at Logan are on meters.

249 The consumption will vary from eighty to  
three hundred gallons per capita for the arid  
regions. Wellsville uses more than two hun-  
dred; Logan City uses five hundred gallons  
per capita now. They are about ten second  
feet. I have measured it, at the intake of De-  
Witt's springs.

250 The demands for fire protection over-  
shadows the demand for purely domestic uses.  
I can produce standard work to substantiate  
it; that is, that it requires a thousand gallons  
a minute flow to take care of a community of  
that population; that is for fire protection.

251 A town may have a fire at any time. I  
think it more important at Hyde Park to have

more water for fire protection even than for domestic uses.

### RE-DIRECT EXAMINATION:

The use per capita tends to increase as time goes on. There are ten thousand people in Logan. Mendon uses one hundred ninety gallons; Millville, two hundred; Salt Lake City is a little better than two hundred gallons per capita. I haven't the specific figures on this town, but I think this is correct. They use all the water they can get.

252 I figured that during the school year, Logan has a population of twenty-five hundred more than ten thousand; these are students.

I measured the water going into the Hyde Park intake; it was fifty-five hundredths of a second foot. That is a little more than they are entitled to. This was at the reservoir.

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ARTHUR PETERSEN, a witness called by plaintiff, testified as follows:

### DIRECT EXAMINATION

253 My name is Arthur Petersen. I reside at Hyde Park. I am fifty-nine years of age. I have lived there all my life; I was born there; I am engaged in farming. I remember the installation of the pipe line, in 1911. I remember the springs. Shortly thereafter, the pipe line was extended two or three rods up the canyon. This was done because the water supply was getting low.

254 I assisted in this extension work. I remember an extension three or four years ago.



The water in all the other springs ran into the system until we tapped the last spring. After that, this spring alone furnished the water supply. I lived in the lower part of town. In the lower part of town, I don't know that it ever got so short that we could not get a drink, but in order for the other fellow to get a drink, we had to shut the water off. This would be from the middle of June to late in the fall; this has been experienced every year.

255 That has been so since 1911, until the new supply of water in 1934. We were placed on restrictions. Sometimes they got down as low as an hour and a half for sprinkling lawns a day. I remember that they shut us off entirely once, from sprinkling lawns. That would be each day. They did not shut us off entirely for drinking purposes, or for watering cattle. I don't know of any taps that were not shut off. Those in the upper part of town have  
256 frequently been short of water for drinking purposes.

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J. E. HANSEN, a witness called by plaintiff,  
testified as follows:

#### DIRECT EXAMINATION

257 My name is J. E. Hansen; I live at Hyde Park; I am 42 years old. I have lived there all my life. I am a farmer. I am constable and water superintendent of the Town of Hyde Park. I was made water superintendent last September, 1938. I succeeded Charles L. Ashcroft. I believe we have plenty of water, but we have no surplus at the present time. I

gave out notice last Sunday night that a lot of people in the upper part of town have been short. One party came and told me she could not even draw a bucket of water. I asked the people, Sunday night, in church to check if they had any leaks. I wanted them fixed or we would have to restrict the hours in sprinkling. This was in 1939. At the present time, we have had plenty of water, but no surplus. I think there are more people living in the lower part of town.

### CROSS - EXAMINATION:

258 In the night there is an overflow at the reservoir. I think Mr. Jensen would use the overflow, and that Mr. Kirby has it now. I don't know as to how much land he irrigates. There is no overflow to speak of, that is today. Towards morning there is some overflow; after ten or eleven o'clock, there is not any overflow till late in the night. I have never measured the overflow. The overflow is more in the spring than at any other time. Now there is really not an overflow, only just a few hours in the morning, when people shut it off during the night. Very often the reservoir is empty at this time of year.

259 Today is the 8th of July. At this season, in the afternoon, the reservoir is pretty empty. The reservoir will have more water in towards morning; that would be about five o'clock; then they start using it again; then the reservoir starts to go down. There is a little spring west of the reservoir; when there is overflow from the reservoir, it runs down and collects with the spring. The reservoir is forty rods west of the upper ditch; it is be-

tween the two ditches. These are canals, not  
 260 the ditches that were originally talked of.  
 Kirby uses the overflow comingled with this  
 spring. You can't tell when it is overflow and  
 which is spring. As far as I know, it is a con-  
 tinuous flow from the spring. I haven't seen  
 it dry.

(Whereupon, it was stipulated that Mr.  
 Clyde would testify that the reservoir holds  
 sixty-two thousand gallons).

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GEORGE S. DAINES, a witness called by  
 plaintiff, testified as follows:

**DIRECT EXAMINATION:**

261 My name is George S. Daines; I am sixty-  
 three years old; I reside in Hyde Park; I was  
 born there and have lived there continuously.

262 I was a member of the Hyde Park Town  
 Board in 1911, when they installed the first set  
 of springs. I was also a member in 1926 and  
 1927. I have been a member the last four  
 years. I am a member now. When the system  
 was first installed, the supply of water was  
 inadequate. It pretty much remained inade-  
 quate as the years went by. It was necessary  
 to put in a new pipe-line. That was in the  
 last two or three years, but at no time, from  
 the beginning, was there enough water. It was  
 263 necessary to get water at intervals. I could  
 not say how many times they went up to get  
 additional water. The water was restricted  
 frequently; practically every year or so. In  
 1934 I was without water. We were short of  
 drinking water practically all of the time after

1911, at times. In the east end of town it was hard to get a drink of water. In the east part they would get out of water probably at seven in the morning and would not have a bit of water in their system until eight o'clock in the evening; that would last for three weeks at a time.

### CROSS - EXAMINATION:

- 264 This shortage would be in the latter part of July, August and September. The officers had to be diligent to keep the taps from running in the lower part of town.

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ROBERT S. McQUARRIE, a witness called by the plaintiff, testified as follows:

### DIRECT EXAMINATION:

- 265 My name is Robert S. McQuarrie; I am fifty-three years old. I reside at Hyde Park. At the present time, I am engaged in the loan department of the Utah Mortgage Loan Corporation. I am the owner of real estate in Hyde Park. I am farming it. I draw water from the Hyde Park irrigation system. I was a member of the Town Board in 1910, 1911 and 1912. I was acting as secretary of the board, or Town Clerk. I was clerk when the pipe line was installed, in 1910 or 1911. The water supply was never adequate.
- 266 That would be right from the beginning, in 1911. There has always been a shortage. I live about in the center of the populated area. I have been wholly deprived of water; that is, I could not draw any out of the taps. This would occur in the summer months and sometimes in February. I have seen that, others

have also, been wholly deprived of water, that would be in the upper part of town. We have been restricted practically every year in June, July, and August.

267 I had knowledge of the extending of the pipe line further up the canyon than the original springs. I was not a member of the Board. I am a member at the present time. I was a member in 1916 and 1917, and there has never been a term I was in office that there wasn't shortages during certain seasons of the year.

### CROSS - EXAMINATION:

I have been up to look at the intake; that has been a number of times; I never saw an overflow at the intake. I don't know how many times I have been up there.

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C. A. HURREN, a witness called by the plaintiff, testified as follows:

### DIRECT EXAMINATION:

268 My name is C. A. Hurren. I am forty-five; residence, Hyde Park. I am President of the Town Board at the present time. I am a farmer and a teacher. I am acquainted with the spring situated southwest of the Hyde Park reservoir. There is quite a flow, and when there is irrigation there is a seepage. It causes a flow to come down in the gravel hole; that hole lasts the entire summer because there is a good deal of irrigation. It fluctuates in quantity.

269 The water runs out of the gravel pit. I

have made an estimate that there are about a thousand dairy cows, and fully as many young cattle; about four hundred horses, in Hyde Park. There are quite a few chickens. The last few years they have developed quite a lot of poultry.

There are some few hogs in practically every home. A few sheep in quite a few homes, and there are quite a few chickens. I should judge eight to ten thousand chickens. There are ten acres plotted in the cemetery, about six and a half or seven acres that is pretty well taken up with grass.

270 The last three years there has been more of it put into shape to bring it available for this sprinkling system. That is, we plan a constant increase. There is about a quarter of a ten-acre lot around the church, in lawn. This would be about two acres and a half. There are about two acres and a half around the school house. In 1934, they went up the canyon to get additional springs. In 1936, we replaced the old pipe line with a new pipe line. This new pipe was a metal pipe; it was a pressure pipe.

271 We have no water in the reservoir, except possibly in the early morning hours, at this time of the year. It is very necessary to conserve the water at this time. It is not true that there are a large number of taps running. There are a number of private lawns, flower gardens, etc. in Hyde Park; I would think ninety percent of the homes are surrounded with lawns and flowers. I would say they average from twenty to thirty square rods. Our houses are much farther back from the  
272 street than they are in Logan City. I think



the lawns are larger. Our lots are considerably larger than Logan City lots.

### CROSS - EXAMINATION:

273 We have no meters and I have never made any observation as to comparison between the average use of water in Hyde Park and the average use of water in Logan, per family.

I am sure that the taps are closed in Hyde Park, except when they are used for legitimate culinary purposes. I am willing to go with you and see if you can find any. There are probably ten or fifteen acres of land above that spring at the reservoir, which are irrigated. This would drain directly into the gravel hole.

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GEORGE CHAMBERS, a witness heretofore called by the defendants, was re-called and testified as follows:

274 The land I own is about thirty rods from the 1911 springs. Since 1920, I have been up there frequently. I pass there at least once every ten days, on the average. I have observed the intake of the Hyde Park system. The last years have been the only years that I  
275 haven't seen an overflow at the intake. I have never known John B. Kirby. He has never talked to me about the taps. He never talked  
276 to me about any subject. I never saw Exhibit B, before. I had nothing to do with the making of that hole in Exhibit B.

### CROSS - EXAMINATION:

I live in Smithfield. It is approximately a couple of miles from the water. I don't know

that Hyde Park had to extend their pipe line farther up the canyon in 1913; I know they had in some years, but I don't know the year. I think they went up there a couple of times. That was for the purpose of augmenting their water supply, which was inadequate.

277 I think this was done to obtain an adequate supply. I don't know whether they were short of water, or not.

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EUGENE SCHAUB, a witness heretofore called by defendants, was recalled and testified as follows:

278 It has been my experience that we should allow more water for domestic and culinary purposes, and irrigation purposes, than for fire protection. The fire protection feature depends a great deal on the size of the reservoir. Fires are so remote. In some towns, it is quite prevalent to have a system of pipes improperly proportioned, and in these cases, the lower part of town may have water and the upper part may not have water, even though the reservoir has water in it, because the lower part of town would draw the water off.

279 It is possible for the reservoir to be full and a condition of this kind exist.

It would take some four to six hours with one-half a second foot of water to fill a reservoir containing sixty-two thousand gallons.

#### RE - CROSS EXAMINATION

Ordinarily, they use from five hundred and fifty to seven hundred fifty gallons of

water per minute, at a fire. They would draw the water out twice as fast as it is filling in the reservoir.

280 I don't know that this condition happens there. I don't know anything about their system.

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GEORGE D. CLYDE, a witness heretofore called by plaintiff, was recalled and testified as follows:

281 The culinary demands in the system of Hyde Park fluctuate greatly from time to time. The fluctuation varies from one hundred twenty-five to one hundred fifty percent of the daily consumption. I visited the intake of the Hyde Park system when I constructed it. It was in July, 1934, as I recall. Construction began in August.

282 Both sides rested.

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### BILL OF EXCEPTIONS STIPULATED

299 Bill of Exceptions served upon defendants, and returned by defendants to plaintiff, with no amendments offered or proposed, the 29th day of September, 1939; and a Stipulation entered into between counsel for the respective parties on said date, that said Bill of Exceptions may be signed, settled, and allowed by the Court as the true and correct Bill of Exceptions in said cause.

# CERTIFICATE

(TITLE OF COURT AND CAUSE).

300 IT IS HEREBY CERTIFIED, that the foregoing Bill of Exceptions in the above entitled cause, consisting of 242 pages, (not including this page and that containing the Stipulation of counsel) contains a full, true, and correct transcript of all of the evidence and testimony in said cause, together with the orders and rulings of the Court during the trial thereof, and the exceptions taken thereto, and also all orders and rulings of the Court made subsequent to the trial thereof; and the same is hereby allowed, settled, and signed as a true and correct Bill of Exceptions in said cause.

Dated this 13th day of October, 1939.

(Signed) LEWIS JONES, Judge.

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CONSENT THAT PLAINTIFF FURNISH  
TROUGH AND DRINKING TAP

(TITLE OF COURT AND CAUSE).

32 Come now the defendants, George Chambers, Tacy Chambers, E. S. Chambers, David J. Weeks and Mary Weeks and within the time directed by the Court, and pursuant to the direction of the Court, hereby makes and files herein their consent that a water trough and drinking tap may be constructed and maintained by the plaintiff, at its option, on each of their premises in lieu of the present arrangement, and that neither they nor their successors will interfere with the same except in the presence of, or after notice to, the town water master, and then only for the purpose of secur-

ing sufficient water for human and stock watering purposes with no waste of water.

Dated this 31st day of July, 1939.

DAVID J. WEEKS,  
MARY WEEKS,  
GEO. CHAMBERS,  
E. S. CHAMBERS,  
TACY CHAMBERS.

M. L. HARRIS,  
Attorney for Defendants.

Filed August 5, 1939.

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW

(TITLE OF COURT AND CAUSE).

- 33 This matter came on regularly for trial upon the complaint of the plaintiff and the answer of George Chambers and Tacy Chambers, his wife, E. S. Chambers, and the amended answer of David J. Weeks and Mary Weeks, his wife, and the separate replies thereto. Plaintiff being represented by Attorneys Young & Bullen of Logan, Utah, and Irvine, Skeen & Thurman of Salt Lake City, Utah, and the defendants being represented by Attorney M. C. Harris of Logan, Utah. It being stipulated in open court that the court should first try out the question of the equitable defenses of the defendants including the question of necessity, which matter should be determined by the court in the absence of the jury. Witnesses were sworn and examined on behalf of the respective parties and the matter argued

and submitted to the court for its decision, and the court having in writing indicated its decision in the matter, now makes and files herein the following

## FINDINGS OF FACT

### 1.

That the matters in dispute between the defendant, Bertha Poulsen, as Guardian of Adeli Ida Poulsen, a minor, have been settled and adjusted out of court and for that reason the court makes no finding on the issues as to the last named defendant.

### 2.

That the plaintiff is a corporation organized and existing by virtue of the laws of the State of Utah, as a municipal corporation, and that pursuant to the laws of the State of Utah, plaintiff has vested in it the right and power of eminent domain for the purpose of acquiring rights of way for the purposes hereinafter set forth.

### 3.

That Tacy Chambers, one of the defendants herein, is the wife of George Chambers, and that E. S. Chambers is an unmarried man, and that Mary Weeks, one of the defendants herein, is the wife of David J. Weeks.

### 4.

That David J. Weeks and Mary Weeks, his wife, are the owners of the following described property:

Beginning at the Northeast Corner of the Northwest Quarter of Section 36, Town-



ship 13 North, Range 1 East of the Salt Lake Meridian, running thence South 160 rods; thence West 130 rods; thence North 80 rods; thence West 30 rods; thence North 40 rods; thence East 80 rods; thence North 40 rods; thence East 80 rods to the place of beginning, containing 125 acres.

Also, Beginning at the Northeast Corner of said Section 36 and running thence West 160 rods to the Northeast Corner of the Northwest Quarter of Section; thence South 72 rods to North Bank of Creek; thence Northeasterly along Creek to a point 20 rods South of the place of beginning; thence North 20 rods to the place of beginning, containing 46 acres.

Also, the North Half of the Northeast Quarter; and the East 45 Rods of the South Half of the Northeast Quarter; and, the Northeast quarter of the Southeast Quarter of Section 35, Township 13 North, Range 1 East of the Salt Lake Meridian.

across which extends the pipeline of the plaintiff described as follows:

Beginning at a point 1320 feet South and 800.9 feet East from the Northwest corner of the Northeast quarter of Section 35 T 13 North Range 1 East Salt Lake Base Meridian; thence North 1 degree 30 minutes East 1320.6 feet; thence East 16.5 feet; thence South 1 degree 30 minutes West 1320.6 feet; thence West 16.5 feet to the point of beginning, containing one-half acre more or less.

and that the lands last above described are a

part and portion of the larger tracts of land above described.

### 5.

That the defendants George Chambers, Tacy Chambers, his wife and E. S. Chambers are the owners of the following described tract of land:

The Northwest Quarter of Section Twenty-five, Township Thirteen North, Range One East of the Salt Lake Meridian, containing 160 acres. Also, the South Fifty Rods of the Southeast Quarter of Section Twenty-six, Township Thirteen North, Range One East of the Salt Lake Meridian, containing 50 acres;

across which extends the pipeline of the plaintiff described as follows, and which constitutes a part only of a larger tract:

Beginning at a point 1320 feet south and 800.9 feet East from the Northwest corner of the Northeast Quarter of Section 35, Township 13 North, Range 1 East of the Salt Lake Base and Meridian, running thence North 1 degree thirty minutes east 1320.6 feet; thence East 16.5 feet; thence South one degree thirty minutes West 1320.6 feet; thence West 16.5 feet to the point of beginning, containing one-half acre, more or less.

### 6.

That the plaintiff is the owner of a certain culinary water system which supplies the inhabitants of the plaintiff town together with the defendants, George Chambers, Tacy Chambers, E. S. Chambers, David J. Weeks and

Mary Weeks with culinary water by means of a system of pipes connected to certain springs in Birch Canyon with the individual homes of the inhabitants of the said plaintiff and with watering troughs supplied by the plaintiff to the last named defendants.

## 7.

That the plaintiff is the owner of adequate water to supply both the Town and these defendants through the said pipe line.

## 8.

That on or about the time of the commencement of this action, the plaintiff Town adopted a resolution directing and authorizing the officers of said corporation to commence this action; that pursuant thereto the same was commenced, and thereafter a motion made for temporary occupancy of said right of way; that at said hearing the defendants did not appear but that plaintiff did appear and offer oral testimony in support of its motion to the effect that a resolution had been passed authorizing the action; that this was a proper case for temporary occupancy, and the defendants consented to the same, whereupon this Court made its order authorizing plaintiff to take immediate possession of said sought right of way in order that the work might be commenced. That the said resolution, nor any resolution of the Town Board of Hyde Park was not presented for the consideration of the Court at any of the proceedings herein.

## 9.

That ever since the year 1911 the plaintiff has been and now is the owner of a right of way

across the property of the said defendants above described for the purpose of conducting and maintaining its water pipeline used to conduct a culinary water system for the purpose of furnishing water to these defendants and the people of the Town of Hyde Park, which said right of way is and was fully capable of taking care of all of the requirements of the plaintiff corporation, and that it is, therefore totally and wholly unnecessary for the plaintiff to resort to condemnation proceedings to condemn such a right of way. That the plaintiff's pipe-line on the old right of way was a gravity water line which courses and meanders across defendant's premises, while the new pipe line on the so-called new right-of-way is a pressure system which runs more or less straight across the defendants' property crossing and recrossing the old line but in general traversing the same area of the defendants' premises.

## 10.

That the Town of Hyde Park is the owner of 1.5 c.f.s. of water in their said culinary water system which is sufficient to supply the 750 inhabitants of Hyde Park with 432 gallons of water per person per day and that there are approximately 181 families in Hyde Park using water so that there is sufficient water to furnish each family of four people 1728 gallons per day. That 300 gallons per day per person is a reasonable amount of water to be allowed for culinary purposes, and 1200 gallons per day is a reasonable amount of water to be allowed to a family of four persons and that the Town of Hyde Park is the owner of an adequate supply of water for culinary purposes

to supply the defendants with water for human consumption and for cattle watering purposes in addition to an adequate supply for all culinary purposes for all of the inhabitants of the Town of Hyde Park and that the use of the water in question by the defendants has not and will not seriously impair the use and enjoyment by the citizens of Hyde Park of their rights to the use of culinary water from the said springs. That it does not appear that the Town Board of Hyde Park has ever by any resolution or ordinance determined that the use of a small portion of its water by the defendants as hereafter described, has worked or will in the near future bring about any water shortage to said municipality nor its inhabitants.

## 11.

That said defendant, Weeks, during the year 1886, entered upon the property above described and homesteaded 160 acres thereof and in the year 1887 constructed a ditch to the springs in Birch Canyon, the waters of which canyon are now used to supply culinary water through the pipe line described in the plaintiff's complaint, and these defendants diverted from the said springs through the said ditch sufficient waters onto their homestead property for culinary, domestic and stock watering purposes and to irrigate a garden, and lived upon the said property from 1887 until 1893 and each and every year appropriated and used the said waters through the said ditch for the purposes aforesaid.

## 12.

That during the period of time last above mentioned said defendants also constructed a ditch



higher up on the mountain and appropriated waters from the said Birch Canyon and the said Birch Springs for irrigation, stock watering and culinary purposes on their said land each and every year up to the year 1911, except that in very dry seasons, late in the fall of some years, it was necessary and they did drive their cattle to the said springs for stock watering purposes when there was not sufficient water to run through the said ditch for said purposes.

## 13.

That on or about the year 1911 the officers of the Town of Hyde Park were desirous of obtaining water for culinary and domestic purposes for a culinary water system for the said town and at the said time entered into separate oral agreements with the defendants Weeks, and with John P. Toolson and with Robert Reid, predecessor in interest of the defendants Chambers, by the terms of which the said defendants and their predecessors in interest granted to the plaintiff the right to construct the said pipe line and conveyed a portion of the waters of Birch Creek to the Town of Hyde Park for culinary purposes in consideration of which the Town of Hyde Park promised and agreed to supply the said defendants and their predecessors in interest separate taps in the said pipe line, together with the right to use sufficient water from the said tap for culinary, domestic and stock-watering purposes upon their respective premises and thereupon the said Town of Hyde Park, pursuant to the said agreement during the year 1911 did construct the said pipe line and convey the said waters through the same over the said prem-



ises and ever since the said time have supplied said defendants and their predecessors in interest with said waters, and that ever since the said year 1911 these said defendants have openly, continuously, adversely and under claim of right used the said taps and the water flowing therefrom for the purpose of human consumption and watering of their livestock in an amount of about 300 gallons per day, and that the use of the waters in question by the said defendants and their predecessors in interest has not and will not seriously impair the use and enjoyment of the citizens of Hyde Park of their rights to the use of adequate culinary water.

## 14.

That on or about the year 1911 the said defendants Weeks and the predecessors in interest of the defendants Chambers, upon receiving the right to use the said waters from the said pipe line through the said taps as aforesaid abandoned and discontinued the use of the waters of Birch Creek through the said culinary stream in the said open ditch and obtained their supply of culinary water through the said taps.

## 15.

That from time to time since 1913 plaintiff has improved said culinary water system by acquiring and using different and additional springs in Birch Canyon, and on or about the year 1934, the plaintiff changed its point of diversion and moved its water line to a spring higher up in Birch Canyon and at said time there arose a controversy between the Smithfield Irri-

tion Company on the one part and the Hyde Park Town on the other part, and that on the 22nd day of January, 1935 the plaintiff and the Smithfield Irrigation Company entered into an agreement by the terms of which the plaintiff company acquired one-half c.f.s. of the waters of the said spring situated in Birch Canyon in Cache County, State of Utah, and more particularly described as follows:

That certain spring which is 11851 feet East and 2288.2 feet North from the Cache National Forestry Marker No. 68 which is located 2427 feet South from the Northeast Corner of Section 24, Township 13 North, Range 1 East of the Salt Lake Base and Meridian;

in consideration of which the plaintiff quit-claimed and surrendered to the Smithfield Irrigation Company all its right, title and interest in and to the balance of the waters of the said spring and all other waters in Birch Canyon, including any waters surrendered by said defendants herein during the year 1911 as aforesaid; and thereupon the plaintiff constructed its said pipe-line up to the said last described spring and conducted the water for its culinary system thereafter from the said spring, and continued to furnish water to said defendants during all of the said time until the commencement of this action, from said spring and pipe-line, and that if the plaintiff is permitted now to abandon their contract with these said defendants the defendants will be then deprived of that part of the consideration by them surrendered up for which they received the said

culinary water for the past 25 years and will be damaged accordingly.

## 16.

That by bringing this action the plaintiff sought a second and additional right of way which traversed the same general area and was for the purpose of providing a means for the coursing of the same waters to the same point which the old right of way and pipe-line successfully provided.

## 17.

That the property of the defendants Weeks consists of 266 acres of arid land suitable for pasture purposes and of substantial value for pasture purposes with the water right, but that there is no other water available on the said premises for watering livestock or for human consumption and that without the said water right the said lands are valueless for pasture purposes.

## 18.

That the lands of the defendants Chambers, consists of 125 acres of arid land suitable for pasture and cultivation purposes and of great value for pasture purposes with the said water, and particularly in the spring and fall of each year, but that without the said water it is necessary to haul water to the said lands for culinary purposes a distance of  $2\frac{1}{2}$  miles and there is no other water available on the said premises for stock watering and culinary

purposes and the said lands for pasture purposes are practically valueless without water.

## 19.

That the said defendants by their answer and in open court tendered and offered to grant to the plaintiff the right of way across the said property described in their complaint without compensation provided that the plaintiff would install for the use and benefit of the said defendants, or permit the defendants to install, on their respective properties a tap on the plaintiff's said pipe-line in substantially the same condition as they have been using for more than 25 years last past and to take therefrom sufficient culinary water for human consumption and stock watering purposes. That in accordance with the direction of the court said defendants have filed with the clerk of this court their written consent that a water trough and drinking tap may be constructed and maintained by the plaintiff at its option on each of their respective premises in lieu of the present arrangement and that neither they nor their successors will interfere with the same except in the presence of or after notice to the town water master and then only for the purpose of securing sufficient water for human and stock watering purposes with no waste of water, and that the court might retain jurisdiction of the cause for the purpose of requiring the installation of such modern equipment at the said taps as will prevent any unnecessary waste of water.

## 20.

The court finds that during the season of 1939 the defendants have been without the use of

plaintiff's water which they enjoyed in former years by reason of the fact that no taps nor outlets were provided for in the new pipe-line across the defendants' premises although demand has been made therefor; that up to the time that all the water was turned out of the old pipe-line and into the new line (which was at a time subsequent to the filing of the complaint and the making of the order of occupancy herein) the defendants had sustained no damages by reason of a denial of water, but the court makes no findings in this action as to damages, if any, sustained by the defendants by reason of being deprived of water during the late spring and summer of 1939.

## 21.

The court further finds that by reason of the part performance of the said agreement over the long period of years their said agreement is not void and unenforceable by reason of Section 33-5-4, Subparagraph 1, commonly known as the Statute of Frauds.

## 22.

The court having found that the plaintiff has now and at all times since 1911 has had a good and sufficient right of way for its pipe-line as now used by it in connection with its municipal water system, now further finds that the taking of said new right of way by court proceedings was and is not necessary to the use and enjoyment of said water system aforesaid.

## 23.

That it is not possible at the present time for the plaintiff to restore the defendants back to the water rights for domestic and stock watering purposes which they enjoyed and sur-

rendered upon the completion of the original pipe-line, nor has it offered to try to do so.

24.

That in view of the foregoing findings, the court further finds that it would be inequitable and unjust for plaintiff to be permitted to challenge the constitutionality of said 1911 agreement under which it has and is now, in part, operating its water system without any great burden or hardship to it or its citizens, and that plaintiff should be estopped by the facts found herein from challenging the constitutionality of said agreement aforesaid in this proceeding, but that plaintiff may in the future, should its population greatly increase, or its water supply suddenly greatly diminish, or if the defendants waste the waters they would otherwise be entitled to if the agreement is void, be entitled to challenge said contract as may hereafter be determined on said new facts, if any.

25.

That except as hereinbefore expressly found to the contrary, all of the allegations of defendants' answers and affirmative defenses are true and correct while the allegations of plaintiff's complaint and reply are untrue and incorrect.

From the foregoing FINDINGS OF FACT the court now makes and files herein the following

## CONCLUSIONS OF LAW

1.

That the plaintiff is now the owner of a right of way for its said pipe-line over and across



the premises of the said defendants as above described and that it is not necessary for the plaintiff to condemn an additional right of way and that the plaintiff's complaint should, therefore, be dismissed with prejudice. The court, however, to retain jurisdiction to re-examine any new facts or changed conditions which may hereafter be shown to the court bearing on the probable waste of water by the defendants or their successors at any time as going to the possible necessity of condemnation of the said right of way.

## 2.

That under the agreement herein specified the defendants are each entitled to the use of a tap on the plaintiff's water line to supply the said defendants on their respective premises with sufficient culinary water for human consumption, not to exceed 300 gallons per day per tap, and for the purpose of watering the livestock of the said defendants.

## 3.

That the respective counterclaims of the said defendants asking for a judgment of specific performance of the said agreement and for damages or the breach thereof should be dismissed without prejudice to the said defendants bringing a proper proceedings in equity for specific performance of the said agreements, should it hereafter appear that plaintiff has, in fact, denied defendants access to its pipe-line for the purpose of obtaining the waters to which they are entitled, under the agreement of 1911. and for damages, if any, sustained by defendants subsequent to the turn-

ing of the waters out of the old line by plaintiff.

## 4.

That while plaintiff's pipe-line across defendants' premises is a proper legal part of its municipal water works and the use of defendants' land for that purpose is a use authorized by law, yet that it is not necessary that said right of way be taken by eminent domain proceedings in order to continue to such use, the 1911 agreement being sufficiently valid so as to deny to plaintiff, in law, the right to eminent domain in this action. And that plaintiff is estopped from setting up the constitutional invalidity, in whole or part, of said 1911 agreement between the parties as grounds for a legal necessity for the exercise of the right to eminent domain, so far as the so-called new right of way across defendants' premises is concerned.

## 5.

That the defendants Weeks and Chambers have a valid, subsisting right to take out of plaintiff's pipeline as same crosses their respective properties sufficient of the waters which may be in said pipe-line so as to provide 300 gallons out of each tap for human consumption on each of the two properties, plus sufficient water for watering the same number of cattle as have been since 1911 habitually on said premises.

Dated this 15th day of August, A. D., 1939.

LEWIS JONES, District Judge.

Filed August 15, 1939.

## DECREE

(TITLE OF COURT AND CAUSE).

44 This matter came on regularly for trial upon the complaint of the plaintiff and the answer of George Chambers and Tacy Chambers, his wife, and E. S. Chambers, and amended answer of David J. Weeks and Mary Weeks, his wife, and the separate replies thereto. Plaintiff being represented by attorneys Young & Bullen of Logan, Utah, and Irvine, Skeen & Thurman of Salt Lake City, Utah, and the defendants being represented by attorney M. C. Harris of Logan, Utah. It being stipulated in open court that the court should try out the question of the equitable defenses of the defendants including the question of necessity, which matter should be determined by the court in the absence of the jury. Witnesses were sworn and examined on behalf of the respective parties and the matter argued and submitted to the court for its decision, and the court having in writing indicated its decision in the matter, and having made and filed herein its Findings of Fact and Conclusions of Law, now in accordance therewith it is

ORDERED, ADJUDGED AND DECREED as follows:

## 1.

That the plaintiff is now the owner of the right of way described in its complaint herein for its pipeline over and across the premises of the defendants under their 1911 oral arrangement with said defendants and their predecessors in interest, and that it is not necessary for the plaintiff to condemn the said right of

way, and that the plaintiff's complaint to condemn the said right of way be and the same is accordingly dismissed with prejudice on the facts now presented to the court, provided that the court does hereby retain jurisdiction to re-examine any new facts or changed conditions which may hereafter be presented to the court bearing on the waste of water by the defendants or their successors at any time as going to the necessity of condemnation of the said right of way and for the further purpose of requiring installation of modern devices at the taps of the defendants to prevent unnecessary waste of water.

2.

That under the said oral agreements the defendants, David J. Weeks and Mary Weeks on their separate premises described as follows:

Beginning at the Northeast Corner of the Northwest Quarter of Section 36, Township 13 North, Range 1 East of the Salt Lake Meridian, running thence South 160 rods; thence West 130 rods; thence North 80 rods; thence West 30 rods; thence North 40 rods; thence East 80 rods to the place of beginning, containing 125 acres.

Also, beginning at the Northeast corner of said Section 36 and running thence West 160 rods to the Northeast corner of the Northwest Quarter of Section ...; thence Northeasterly along Creek to a point 20 rods South of the place of beginning; thence North 20 rods to the place of beginning, containing 46 acres.

Also, the North Half of the Northeast Quarter and the East 45 rods of the South

Half of the Northeast Quarter, and the Northeast Quarter of the Southeast Quarter of Section 35, Township 13 North, Range 1 East of the Salt Lake Meridian.

and the defendants George Chambers, Tacy Chambers and E. S. Chambers on their separate premises described as follows:

The Northwest Quarter of Section Twenty-five, Township Thirteen North, Range One East of the Salt Lake Meridian, containing 160 acres. Also, the South Fifty Rods of the Southeast Quarter of Section Twenty-six, Township Thirteen North, Range One East of the Salt Lake Meridian, containing 50 acres;

are each entitled to the use of a tap connected with the plaintiff's pipe-line to supply the said defendants and their successors in interest on said premises with sufficient culinary water for human consumption and stock watering purposes for the same number of domestic animals heretofore habitually kept on said respective premises, the said human consumption from each of said two taps to not exceed 300 gallons per tap each day.

### 3.

That the separate counterclaim of the said defendants and each of them praying for specific performance of said contract and for damages for breach thereof be and the same are hereby dismissed without prejudice to the said defendants bringing a proper proceeding in equity for specific performance of the said agreements, and for damages, if any, growing

out of the breach thereof (subsequent to the time of making of the order of occupation herein) should it hereafter appear that plaintiff has in fact denied defendants' access to the water running through its pipe-line and across said defendants' Weeks and Chambers premises.

#### 4.

That the defendants have and recover of and from the plaintiff their costs of this action herein taxed at \$39.20.

Done in open court this 15th day of August, 1939.

LEWIS JONES, District Judge.

Filed August 15, 1939.

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## NOTICE OF FINDINGS AND CONCLUSIONS

(TITLE OF COURT AND CAUSE).

That thereafter, towit, on August 16, 1939 the defendants, George Chambers and Tacy Chambers, his wife, E. S. Chambers, David J. Weeks and Mary Weeks, his wife, served a written notice on plaintiff that the court had made Findings of Fact and Conclusions of Law, and had entered its decree dismissing plaintiff's complaint and denying the defendants relief on their counterclaim, and determining that defendants had a right to the use of a tap on said pipe-line and awarding defendants their costs in said action; that said notice was thereafter, towit, on August 17,



1939 filed with the clerk of the District Court of the First Judicial District of the State of Utah, in and for Cache County.

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### ORDER EXTENDING TIME

That thereafter, towit, on August 26, 1939, the court made and filed an order in said cause, granting plaintiff to and including November 1, 1939, within which to prepare, serve and file its Bill of Exceptions.

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### NOTICE OF APPEAL

(TITLE OF COURT AND CAUSE).

To the Defendants, George Chambers and Tacy Chambers, his wife; E. S. Chambers, a single man; and David J. Weeks and Mary Weeks, his wife, and to their attorney, M. C. Harris; and

To the Defendant, Bertha Poulsen, as Guardian of Adell Ida Poulsen, a minor, and to her attorney, Jesse P. Rich:

307 You, and Each of You, WILL PLEASE TAKE NOTICE, that the Plaintiff, HYDE PARK TOWN, a municipal corporation, hereby appeals to the Supreme Court of the State of Utah from the judgment and decree of the District Court of the First Judicial District in and for the County of Cache, State of Utah, and the whole thereof, made and entered in said court in favor of defendants and against plaintiff, which judgment and decree was made,

entered, and filed in said cause on August 15, 1939.

This appeal is taken on both questions of law and fact.

Dated this 13th day of October, 1939.

YOUNG & BULLEN AND  
IRVINE, SKEEN, THURMAN & MINER,  
Attorneys for Plaintiff.

By ERNEST T. YOUNG,

Served October 13, 1939.

Filed October 13, 1939.

## ASSIGNMENTS OF ERROR

(TITLE OF COURT AND CAUSE).

Comes now the appellant in the above-entitled cause, and for grounds of reversal of the judgment and decree made and entered in said cause, assigns the following errors:

### I.

That the court erred in making that portion of its Finding of Fact No. 6 wherein the court finds that plaintiff is the owner of certain culinary water which supplies "defendants George Chambers, Tacy Chambers, E. S. Chambers, David J. Weeks and Mary Weeks with culinary water," for the reason that said portion of said finding is not supported by the evidence, in this, that the uncontradicted testimony of both plaintiff and defendants was that plaintiff

has supplied none of the defendants with any water since January 1, 1939.

## II.

That the court erred in making its Finding of Fact No. 7, reading as follows:

“That the plaintiff is the owner of adequate water to supply both the town and these defendants through the said pipeline,”

for the reason that said finding is against the clear preponderance of the evidence bearing upon the question of the adequacy of the water owned by the plaintiff to supply itself and the defendants; that but two witnesses (Fred Duce Tr. 163; Eugene Schaub Tr. 190) testified that plaintiff owned sufficient water to supply both itself and the defendants, and that their testimony on that point was limited to the period subsequent to 1934; that said witness Fred Duce, testified that plaintiff had to put itself on restrictions prior to 1935, and that all of the other witnesses who were called to testify as to plaintiff's supply of water (Charles L. Ashcroft Tr. 201; George Z. Lamb Tr. 206; John D. Kirby Tr. 212 and 233; Martin C. Reeder Tr. 222; Lorenzo Petersen Tr. 227; George D. Clyde Tr. 240 and 281; Arthur Petersen Tr. 253; J. E. Hansen Tr. 256; George S. Daines Tr. 261; Robert S. McQuarrie Tr. 265; C. A. Hurren Tr. 268) testified that during each and every year following the installation of plaintiff's water system in 1911, plaintiff had to put itself on restrictions, and that at frequent intervals part of plaintiff's inhabitants were un-

able to secure from the system as much as a drinking stream for human needs.

### III.

That the court erred in making that portion of its Finding of Fact No. 10, wherein the court finds that plaintiff is the owner of 1.5 c.f.s of water, for the reason that the uncontradicted evidence in the case shows that plaintiff was the owner of  $\frac{1}{2}$  c.f.s. of water only.

### IV.

That the court erred in making that portion of its Finding of Fact No. 10, wherein the court finds that plaintiff was the owner of an adequate supply of water for culinary purposes to supply the defendants with water for human consumption and for cattle watering purposes, in addition to an adequate supply of culinary water for all of plaintiff's inhabitants, for the reasons set forth in appellant's Assignment of Error No. 2, *supra*.

### V.

That the court erred in making that portion of its Finding of Fact No. 13, wherein the court finds that defendants, and their predecessors in interest "conveyed a portion of the waters of Birch Creek to the Town of Hyde Park for culinary purposes," for the reason that the uncontradicted evidence of the defendant, David J. Weeks, (he being the only witness called by defendants to testify on the question of the consideration paid for the water right now claimed by defendants), and the uncontradicted evidence of plaintiff's witnesses, is that defendants and their predecessors paid

or gave nothing for their tap stream, except only a right of way over their land.

#### V L

That the court erred in making that portion of its Finding of Fact No. 13, wherein the court finds that plaintiff "ever since the time (1911) have supplied said defendants and their predecessors in interest with said waters," for the reason that said portion of said Finding is not supported by the evidence, in this, that the uncontradicted evidence of both plaintiff and defendants was that plaintiff has supplied none of the defendants with any water since January 1, 1939.

#### VII

That the court erred in making its Finding of Fact No. 13, wherein the court finds "that ever since the said year 1911 these defendants have openly, continuously, adversely and under claim of right, used the said taps and the water flowing therefrom for the purpose of human consumption and watering of their livestock in an amount of about 300 gallons per day," for the reason that there is no evidence in the record to support a finding that defendants, from their taps, have used water in an amount of about 300 gallons per day, the only evidence bearing upon the question of the gallonage used by defendants being that of the defendant, David J. Weeks (Trans. 72), who testified that he had enough water from the tap to irrigate a row of corn, there being no evidence in the record as to the amount of water used by any of the other defendants, or their predecessors in interest; and for the further reason that there is no evidence that the defendants, or

either of them, used said water at any time, adverse to the rights of the plaintiff.

### VIII.

That the court erred in making that portion of its Findings of Fact No. 15, wherein the court finds that plaintiff quit claimed and surrendered to the Smithfield Irrigation Company all of its right, title and interest to certain waters, "including any waters surrendered by said defendants herein during the year 1911," for the reason that there is no evidence in the record that plaintiff surrendered or transferred to Smithfield Irrigation Company any water which had ever been owned by defendants, or that there is any evidence in the record to show that defendants, during the year 1911 or at all, surrendered or transferred any water to plaintiff.

### IX.

That the court erred in making its Findings of Fact No. 21, reading as follows:

"The court further finds that by reason of the part performance of the said agreement over the long period of years their said agreement is not void and unenforceable by reason of Section 33-5-4, Subparagraph 1, commonly known as the Statute of Frauds."

for the reason that said purported Finding is not a finding of any fact constituting an issue in said cause, but is a Conclusion of Law.

### X.

That the court erred in making its Finding of Fact No. 23, reading as follows:

"That it is not possible at the present time



for the plaintiff to restore the defendants back to the water rights for domestic and stock-watering purposes which they enjoyed and surrendered upon the completion of the original pipe-line, nor has it offered to try to do so ”

for the reason that there is no evidence to show that defendants, upon the completion of the original pipe-line, surrendered to plaintiff any water rights whatsoever.

## XI.

That the court erred in making its Finding of Fact No. 24, reading as follows:

“That in view of the foregoing findings, the court further finds that it would be inequitable and unjust for plaintiff to be permitted to challenge the constitutionality of said 1911 agreement under which it has and is now, in part, operating its water system without any great burden or hardship to it or its citizens, and that plaintiff should be estopped by the facts found herein from challenging the constitutionality of said agreement aforesaid in this proceeding, but that plaintiff may in the future, should its population greatly increase, or its water supply suddenly greatly diminish, or if the defendants waste the waters they would otherwise be entitled to if the agreement be void, be entitled to challenge said contract as may hereafter be determined on said new facts, if any.”

for the reason that said purported finding is

not a finding of any fact constituting an issue in said cause, but is a conclusion of law.

## XII.

That the court erred in failing and neglecting to find upon the issue raised by the pleadings that the oral agreement entered into between plaintiff and the defendants, or their predecessors in interest, in the year 1911, was void and ultra vires, and that neither the plaintiff nor its officers had any power to enter into any such agreement, and that the same was unenforceable by virtue of the provisions of Section 6 of Article 11 of the Constitution of the State of Utah.

## XIII.

That the court erred in failing and neglecting to find the number of cattle which defendants have watered from their said tap streams during any of the years since the installation of plaintiff's water system in 1911.

## XIV.

That the court erred in making its conclusion of law No. 2, for the reason that the said conclusion of law is not supported by any finding of fact which is supported by the law or the evidence, and for the reason that the evidence shows that none of the lands of defendants is inhabited by human beings; that they are used for grazing purposes only, and that there is no evidence to show the number of cattle on said land.

## XV.

That the court erred in making the following portion of its fourth conclusion of law:

“ . . . . And that plaintiff is estopped from

setting up the constitutional invalidity, in whole or part, of said 1911 agreement between the parties as grounds for a legal necessity for the exercise of the right to eminent domain, so far as the so-called new right of way across defendants' premises is concerned,"

for the reason that said portion of said conclusion is not supported by any finding of fact which is supported by the law or the evidence.

### XVI.

That the court erred in making its fifth conclusion of law reading as follows:

"That the defendants, Weeks and Chambers, have a valid, subsisting right to take out of the plaintiff's pipe-line as same crosses their respective properties, sufficient of the waters which may be in said pipe-line so as to provide 300 gallons out of each tap for human consumption on each of the two properties, plus sufficient water for watering the same number of cattle as have been since 1911 habitually on said premises,"

for the reason that said conclusion is not supported by any finding of fact which is supported by the law or evidence, and for the reason that the evidence shows that none of said lands of defendants is inhabited by human beings; that they are used for grazing purposes only, and that there is no evidence to show the number of cattle on said land.

### XVII.

That the court erred in making its conclusion of law No. 2, for the reason and upon the

grounds that said agreement, if there was an agreement, was subject to cancellation at the will and upon the option of the plaintiff, and that the plaintiff did cancel and rescind said contract and refuses to further perform the same, as shown by the uncontroverted evidence in this case.

### XVIII.

That the court erred in making its conclusion of law No. 5, for the reason and upon the grounds set forth in Assignment of Error No. 17.

### XIX.

That the court erred in making and rendering a decree, as made and rendered in this cause, adjudging that the defendants are "each entitled to the use of a tap connected with plaintiff's pipe-line to supply the said defendants and their successors in interest on said premises with sufficient culinary water for human consumption and stock watering purposes for the same number of domestic animals heretofore habitually kept on said respective premises. the said human consumption from each of said two taps to not exceed 300 gallons per tap each day," for the reason that the conclusion of law upon which said decree is based, is based upon findings of fact which are not sustained by the evidence, and which the evidence is insufficient to support in the particulars hereinbefore set forth

### XX.

The court erred in making and entering paragraph No. 2 of the decree, for the reason and upon the grounds that the uncontroverted evi-

dence in this case shows that said purported agreement, if there was any agreement, was subject to cancellation and rescision at the option of the plaintiff, and that the plaintiff did elect to rescind and cancel said agreement and that the same is no longer in force and effect,

WHEREFORE, by reason of the manifest errors herein set forth, plaintiff and appellant prays that the Findings of Fact and Judgment, and each of them, be reversed and set aside and the cause remanded to the trial court for a new trial, or such other proceedings as to the Court may seem proper.

**YOUNG & BULLEN, AND  
IRVINE, SKEEN, THURMAN & MINER**  
**Attorneys for Plaintiff  
and Appellant.**

*and for the further  
reason, that said  
decree and paragraph  
is uncertain and  
unintelligible*