

1941

R. C. Syrett v. Tropic and East Fork Irrigation Company, and John H. Johnson : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

R. C. SYRETT,

Plaintiff and Respondent,

vs.

THE TROPIC & EAST FORK IRRIGATION COMPANY and JOHN
H. JOHNSON,

Defendants and Appellant.

Case

No. 6316

RESPONDENT'S BRIEF

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FILED

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STATEMENT OF FACTS AND ISSUES

This is a mandamus action brought by the plaintiff, a stockholder in the defendant corporation, to compel the defendant to deliver to the plaintiff water represented by his shares of stock in the corporation.

The defendant admits that the plaintiff is a stockholder but denies his right to water on his said land described in the complaint.

The irrigation system involved in this dispute con-

sists of a dam as a diversion works on the East Fork of the Sevier River (Tr. 113), and a twelve mile canal running from the dam across a fairly level plateau for a distance of about six miles and then dropping down a very steep canyon, known as Water Canyon, to the Tropic Valley, where it divides. Approximately one-half of the water in the canal is diverted to the right to the town of Tropic, and the other half is diverted to the left to Lossee Valley. There are no laterals from the main canal for the first three miles of its length. For the next three or four miles the canal runs through plaintiff's farm, and plaintiff and his predecessors in interest, have from time to time constructed laterals from this main canal for the purpose of diverting a portion of the water and using it to irrigate their farms. (Tr. 112, 113.) Plaintiff (respondent) in this action is the owner of a farm comprising about 1100 acres, and Ruby's Inn, at Bryce Canyon, Utah. (Tr. 93.) Most of this farm can be irrigated by gravity flow from the defendant's canal (Tr. 94-5), which, as we stated, runs through the farm for a distance of about three miles.

Plaintiff is a stockholder in good standing in the defendant irrigation company (Tr. 31), having purchased 50 shares of stock in the company in 1923, 270 shares in 1934, and 300 shares in 1936. The defendant company is an appropriator of water from the East Fork of the Sevier River, and also from some springs to the east of the river. Some of these springs were sold to the Utah Parks Company for use at the inn at Bryce Canyon about the year 1926. (Tr. 311-13.) Water from defendant's canal

has been used on plaintiff's land for a period of over twenty years and plaintiff himself has used water represented by the 50 shares which he first purchased, ever since 1923, until the controversy over which this suit is brought, arose. (Tr. 95, 103, 109, 207, 563.) Plaintiff, during the irrigation season of 1925, used water represented by the 270 shares through a rental agreement with the record owner of those shares and the consent of the company at that time. (Tr. 111.) Objection was first made to the use of the water by plaintiff on his farm after the purchase of the 270 shares in 1934, and the defendant company refused to allow plaintiff to use any water at all after that time. In the past the company has allowed stockholders to transfer the water from one piece of land to another from year to year, and the company has sold stock for delinquent assessments regardless of the ownership of land. (Tr. 170, 177.) Stockholders, other than the plaintiff, have used water from defendant's canal on land in the neighborhood of plaintiff's land from as early as 1916 (Tr. 211, 277, 300, 562); and in 1923 the defendant corporation, by and through its President and Secretary, held that the use of water from the defendant's canal on land in the neighborhood of plaintiff's land was permitted, as shown by plaintiff's Exhibit 11. (Tr. 456.) The following is a copy of said exhibit, the same being a photostatic copy of a letter from the defendant Tropic & East Fork Irrigation Company, dated February 15, 1923, and written at Tropic, Utah, to the United States Land Office at Salt Lake City, Utah, the original of said letter being on file

in the General Land Office at Washington, D. C., which said letter reads as follows:

“Tropic, Utah

Feb. 15, 1923

United States Land Office
Salt Lake City, Utah

Gentlemen:

“In regard to Desert land entry Serial 010224 Leonard Reynolds, and the right extended by the Tropic and East Fork Irrigation Co. to water certain lands other than just in the Tropic Valley.

“The Tropic and East Fork Irrigation Company’s canal passes through a strip of country seven to twelve miles west of Tropic, and some of our stock holders have entered land in that vicinity.

“Not interfering with any of the right of the company said stock holders have and are allowed to draw their water and use same upon said land.
(Italics added)

“This will also conform to the regulation of State water rights.

“The Tropic and East Fork Irrigation Company does not nor has not for years increased its capital stock, but individual stock is bought and sold and transferred from one part of the valley or district to another so the company takes the stand that each stock holder may use his water upon any land embraced within any part of the

whole system, so long as they do not infringe upon any company right and each bear his equal share of assessment.

Tropic & East Fork Irr. Co.
John H. Johnson, Pres.
Jos. D. Shakespear, Secy.

Subscribed and sworn to before me this 15th day of Feb., A. D. 1923.

MAURICE COPE,
Notary Public.

My Com. Expires
Nov. 12, 1924"

As stated above, the defendant corporation has never been concerned with where the water was used prior to 1934 or until the controversy over which this suit is brought arose. This is further shown by the deed of the defendant corporation to the Los Angeles & Salt Lake Railroad company in 1926. (Tr. 312.)

“(COPY) PLAINTIFF’S EXHIBIT 10
J. T. Partridge, Clerk.

DEED

TROPIC & EAST FORK IRRIGATION
COMPANY, a corporation of the State of Utah.
Grantor hereby grants and conveys unto the LOS
ANGELES & SALT LAKE RAILROAD COM-
PANY, a corporation of the State of Utah, Grantee,

for the sum of One Thousand Five Hundred (\$1500.00) Dollars

all the right title and interest of the Grantor in and to the waters of those certain springs located and rising in the East Half ($E\frac{1}{2}$) of the South East Quarter ($SE\frac{1}{4}$) of the North West Quarter ($NW\frac{1}{4}$) of Section Thirty-four (34) Township Thirty-six (36) South, Range 4 West, Garfield County, Utah located and described as follows:

Beginning at the Quarter Corner of Section 34 and Section 3, Township 36 South, Range 4 West, Salt Lake Base and Meridian, thence North $2^{\circ}26'$ West a distance of 3462.1 ft. to spring No. 1.

Beginning at the Quarter Corner of Section 34 and Section 3, Township 36 South, Range 4 West, Salt Lake Base and Meridian, thence North $3^{\circ}11'$ West a distance of 3637.6 ft. to spring No. 2.

Beginning at the Quarter Corner of Section 34 and Section 3, Township 36 South, Range 4 West, Salt Lake Base and Meridian, thence North $3^{\circ}46'$ West a distance of 3653.5 ft. to Spring No. 3.

Beginning at the Quarter Corner of Section 34, and Section 3, Township 36 South, Range 4 West, Salt Lake Base and Meridian, thence North $4^{\circ}30'$ West a distance of 3772.6 ft. to Spring No. 4.

Beginning at the Quarter Corner of Section 34, and Section 3, Township 36 South, Range 4 West, Salt Lake Base and Meridian, thence North $3^{\circ}23'$ West a distance of 3880.0 ft. to Spring No. 5.

Beginning at the Quarter Corner of Section 34, and Section 3, Township 36 South, Range 4 West, Salt

Lake Base and Meridian, thence North $4^{\circ}07'$ West a distance of 3900.3 ft. to spring No. 6.

Beginning at the Quarter Corner of Section 34 and Section 3, Township 36 South, Range 4 West of the the Salt Lake Base and Meridian, thence North $3^{\circ}29'$ West a distance of 3949.9 ft. to Spring No. 7.

The flow of the above described springs consists of approximately twenty-five hundredths (0.25) second feet of water, more or less.

IN WITNESS WHEREOF, the said Grantors has caused these presents to be executed by its duly constituted officers this 24th day of February, 1926.

TROPIC & EAST FORK IRRIGATION CO.

By WM. ADAIR,

(co. Seal)

Its President."

Attest:

E. H. Smith

Secretary.

Also in November, 1930, defendant corporation attempted to sell more water to the Utah Parks Company. (Tr. 244.) This also indicates an ample supply of water in the defendant's system.

The defendant corporation has in its canal for the use of its stockholders from April 1st to June 1st 20.00

second feet of water and from June 1st to October 15th 15.00 second feet. (Tr. 234). Plaintiff's Exhibit 8.

At the trial of this case in April, 1938, a non-suit was granted from which ruling the plaintiff appealed to the Supreme Court and the ruling of the lower court was reversed. Case No. 6062, reported in 97 Utah 56, 89 P. (2d) 474.

The defendants' motion for a non-suit was based upon the theory that the district court did not have jurisdiction in the case.

The question of damages to the stockholders and defendant corporation has also been raised by the defendant, but no proof has been offered by the defendants on that point. On the contrary, the testimony of George F. Taylor, an engineer formerly employed by the State engineer, was to the effect that water could be taken from the canal as it runs through the plaintiff's land without interfering with the flow of water in the ditch. (Tr. 257.) The witness further testified that assuming the water represented by 620 shares owned by the plaintiff, R. C. Syrett, were withdrawn at points on the canal as it runs through the plaintiff's land near Ruby's Inn, that the effect on the evaporation of water in the Town of Tropic would be so slight that it would be almost impossible to measure, and that further, there would be practically no difference in the amount of seepage. (Tr. 261.)

The water master does not visit each stockholder when it is his watering turn and turn the water into his laterals, but he is simply notified as to his turn by phone or mail and he helps himself. (Tr. 464, 467, 504, 505, 526.) The company stands the cost of all head gates or weirs installed, placing them wherever a stockholder requests. (Tr. 469.)

From the dividing gate of the Lossee Valley canal and Tropic Valley it is about equal distance to the end of each canal—i. e., about three miles. (Tr. 469.)

The principal contention of the appellants (defendants) is the power of the defendant corporation, under its articles of incorporation, to deliver water to the plaintiff's farm. The appellants claim that to do so would be ultra vires and therefore the trial court erred in ordering the defendant to deliver water to the plaintiff's farm contrary to the claimed restrictions in the articles of incorporation, said claimed error being based on the theory that a court has no power to compel a corporation to perform an ultra vires act.

The respondent (plaintiff) contends that the delivery of water to the plaintiff's farm by the defendant corporation would not be an ultra vires act, but on the contrary, that the delivery of said water falls within the implied powers and duties of the corporation. The respondent further contends that assuming the articles are

as restrictive as claimed by the appellants, that the corporation is estopped from relying on the defense of ultra vires because of its conduct and course of dealings over a period of twenty-two years.

Other questions of law raised by the appellants are entirely incidental to this main question.

ARGUMENT

Proposition I

THE PURPOSE CLAUSE OF THE ARTICLES OF INCORPORATION OF THE DEFENDANT CORPORATION DOES NOT RESTRICT THE DELIVERY OF WATER TO ANY PARTICULAR PLACE, BUT ON THE CONTRARY, PERMITS ITS DELIVERY AT ANY POINT IN THE SYSTEM FROM THE HEAD OF THE CANAL OR DITCH TO THE LOWER END.

If the interpretation which the appellants (defendants) attempt to put on the purpose clause were strictly carried out to its logical conclusion, one might easily say that the only purpose for the defendant corporation was to construct and repair a canal—i. e., a construction corporation. Let us examine that portion of the purpose clause in which we are interested.

“The object of this Corporation is to *construct a canal* from the East Fork of the Sevier River to Tropic and to *keep the same in repair* for the con-

ducting of the water from said stream to the Town of Tropic . . .” (Italics added).

There is nothing in this paragraph or so called purpose clause dealing with the distribution of water. It deals with the construction and maintenance of a canal.

Further, to adopt any such strained, twisted interpretation as the appellants are attempting to put on said purpose clause would limit the use of the water to the limits of the Town of Tropic in which there are no farms, and except for a few gardens and other small areas very little irrigating is done or could be done.

The only mention in the Articles in regard to the distribution of water is that reference made in Article XI:

“The Directors shall have power to levy and collect assessments on all capital of this company for the purpose of keeping in repair all ditches and dams, and the payment of its officers and employees, *and shall divide the water to each person according to his stock as a dividend.*” (Italics added.)

As the court can readily see, there is nothing restrictive or even directory as to where the water should be delivered except that it should be delivered to stockholders.

The appellants (defendants) further argue that the deed of conveyance made by the original appropriators restricts the use of the water to the land lying in the Colorado water shed.

A careful reading of the deed, defendant's Exhibit "H," fails to disclose any such claimed reservation or restriction. The only reference, in the deed of conveyance, to the Town of Tropic is in the second and third paragraphs. (We are not interested in the third paragraph which refers to the culinary water arising in Bryce Canyon.) This is merely a description of the property conveyed to the defendant corporation, and said description refers to the Town of Tropic in a general way only by saying:

"At or near the said Town of Tropic, or in the vicinity thereof."

We therefore submit that there is nothing in the Articles of Incorporation or in the deed of conveyance which in any way restricts the use or the place at which the water belonging to the stockholders shall be used.

The plaintiff in this action is a stockholder with land under the irrigation system; the canal runs through his land for approximately three miles; he is entitled to all the rights of a stockholder and the defendant corporation owes to him all the duties which a mutual irrigation company owes to its stockholders.

The rights of a stockholder in a mutual irrigation company are discussed in Kinney on Irrigation and Water Rights, Second Edition, Vol. 3, Sec. 1483. The author cites, among many cases, the case of Rocky Ford Canal, Reservoir, Land, Loan & Trust Company v. Sampson, 5 Colo.

App. 30, 36 Pac. 638. The Colorado court held that a stockholder of an irrigation company, organized to furnish water exclusively to its stockholders, is entitled to the proportion of water carried through its irrigation canal which the amount of his stock bears to the whole amount of the stock of the company. The court also held in that case *The relation between a corporation and its members is one of contract.* (Italics added)

This later statement is axiomatic and needs no long list of cases to support it.

With the thought in mind that the right of a stockholder as against the corporation is one of contract, we call the court's attention to the case of *Möyle vs. Salt Lake City*, reported in 50 Utah 357, 167 P. 660, which presents certain features of striking similarity. In that case, the plaintiff made a contract to exchange her water under an appropriation from Parley's Creek, for certain irrigation waters brought by the city through its own canal from Utah Lake into Salt Lake valley. The point at which the plaintiff would accept delivery of the exchange water was not specified in the contract, but for years she accepted the water at a certain point. Later, owing to the building up of the residential section near the lands where she used this water, she considered it expedient to transfer the water to other lands lying several miles to the South and requested delivery of the water at a point about five miles up the city's canal. The Supreme Court of Utah held that she was entitled to demand

this change, remarking that, in its opinion, the matter involved was in reality nothing but a change of place of delivery.

Referring again to the rights of stockholders, we call the court's attention to Sec. 1487 of Vol. 3 of Kinney on Irrigation and in particular to the case cited therein of *Miller v. Imperial Water Co.*, 156 Cal. 27, 103 Pac. 227. In this case the California court held as follows:

"For instance, nothing is more thoroughly established than the rule than mandamus will lie to restore to his corporate rights a member of a corporation who has been improperly disfranchised or irregularly removed from his connection with the corporation, and yet his right in this regard generally rests wholly on his contract of membership. The same rule appears to us to be applicable where the member is being excluded from participation in the benefits afforded by the corporation to its members, and there is no other adequate remedy. In the case at bar, the stockholder's rights to have water furnished on his land is not based on any special contract entered into by him with the corporation, but it is an inseparable adjunct of his membership and it is a plain duty resting on the corporation in the exercise of its corporate functions to furnish him such water."

A mutual irrigation company is under a duty and obligation to furnish water exclusively to its stockholders proportionately as the number of shares of each bears to the whole number of shares of stock of the company. Kin-

ney on Irrigation, 2nd Edition, Vol. 3, Section 1486. In addition to the foregoing, it may not be amiss to add that in Utah, stock in mutual incorporated ditch companies is held to be personal property, which may be freely transferred by assignment, sale, execution, etc., the purchaser taking good title and having the right to use the water represented by the stock on any lands on which he pleases to use it. 3 Kinney on Irrig., 2nd Ed., Sec. 1485; *George vs. Robinson*, 23 Utah 79, 63 P. 819.

This obviously makes such waters freely transferable to other lands under the same company's system, and allows a free and ready method of changing the point of delivery.

The appellants use much space and time in discussing the court's right to impair the contract between the stockholders and the corporation. As counsel states it, the court, in granting the plaintiff's prayer, is violating a valid contract between the stockholders and the corporation.

We have no quarrel with the appellants' statement of the law, but we do contend that it does not apply in this case. The only logical interpretation to be put on the contract existing between the stockholders and the defendant corporation is that interpretation made by the plaintiff and accepted by the court below, viz., that the plaintiff, a stockholder in good standing, is entitled to have the water represented by his shares of stock delivered

to him on his land at Ruby's Inn, said land being within the irrigation system of the defendant corporation.

Proposition II

A CORPORATION HAS THE POWER TO DO ALL THINGS WHICH ARE NECESSARILY IN ITS STATED OBJECTS.

The defense of the defendant sets forth that the stated object of the corporation was:

“To construct a canal from the East Fork of the Sevier River to Tropic, and to keep the same in repair for the conducting of the water in said stream to the Town of Tropic.”

If the stated purpose is the only business which the corporation can carry on, it has no power to distribute water to its stockholders in the Town of Tropic or anywhere else. Such a construction of the stated purposes is absurd.

If there is implied in these stated purposes the right to distribute water to stockholders in the Town of Tropic, there is also implied the right to distribute water to stockholders at any point along the canal between the East Fork of the Sevier River and Tropic; and the settled practice of the company over the entire term of its existence has resulted in an interpretation of these stated objects which has been relied upon by the plaintiff and cannot now be changed to plaintiff's detriment.

If the corporation has the right to take water from Point A to Point G and deliver it to users at Point G, it clearly has the power to take water from Point A to intermediate points B. C. D. E, and F, and deliver water to users at those points.

13 Am. Jur. 772, Section 740:

“General Nature and Scope of Implied and Incidental Powers.—It is a well-recognized rule that a corporation is not restricted to the exercise of the powers expressly conferred upon it by its charter, but has the implied or incidental power to do whatever is reasonably necessary to effectuate the powers expressly granted and to accomplish the purpose for which it was formed, unless the particular act sought to be done is prohibited by the law or by its charter. Otherwise stated, a corporation, like a natural person, has a right to conduct its legitimate business by all the means necessary to effect such object. The implied powers which a corporation has in order to carry into effect those expressly granted and to accomplish the purposes of its creation are not limited to such as are indispensable for these purposes, but comprise all that are necessary, in the sense of appropriate and suitable, including the right of reasonable choice of means to be employed. Again, acts which, if standing alone or when engaged in as a business, would be beyond the powers of the corporation are not necessarily *ultra vires* when they are merely incidental to, or form a part of, an entire transaction which in its general scope is within the corporate purpose.”

Proposition III

IF THE ARTICLES OF INCORPORATION WERE INTENDED TO BE RESTRICTIVE, THEN THE CONDUCT OF THE DEFENDANT HAS BEEN SUCH THAT IT IS STOPPED FROM RELYING ON THE DOCTRINE OF ULTRA VIRES AS A DEFENSE.

Regardless of what was the intention of the incorporators at the time of the drawing of the articles, we find them at the very beginning constructing a canal around to Lossee Valley. Then as early as 1916 stockholders were using water in the neighborhood of the plaintiff's land (Tr. 211, 277, 300, 562); and from 1923 to 1934 there was delivered to the plaintiff the water represented by his fifty shares of stock with no question whatsoever being raised. In 1926 the defendant sold to the Los Angeles & Salt Lake Railroad water out of its system to be used on the plateau near the plaintiff's land.

In this respect, we call to the court's attention the case of Clark et al v. North Cottonwood Irrigation & Water Co., reported in 79 Utah 425, 11 Pac. (2d) 300, wherein the court held:

“Moreover, the provisions of the articles of incorporation are not necessarily controlling in fixing the present right of the parties to this litigation. The articles were executed in 1891, so that the present rights of the parties depend rather upon the use to which the water has been put since the organization of the defendant company than upon

the provisions contained in its articles of incorporation.”

We also call the court’s attention to Section 623, Williston on Contracts, Revised Edition, as to the interpretation of contracts; also to Fletcher Cyclopedia of Corporations, Permanent Edition, Vol. 7, beginning at Page 775.

The respondent submits therefore that if there is any ambiguity in the articles such ambiguity should be resolved against the corporation and in favor of the plaintiff. In other words, the corporation is estopped from relying on the doctrine of ultra vires by reason of its course of conduct over the years from at least 1916 to and including 1934.

In the case of Bear River Valley Orchard Co. v. P. M. Hanley, 15 Utah 506, 50 Pac. 611; our court said:

“The doctrine of ultra vires, when invoked for or against a corporation should not be allowed when it would defeat the ends of justice or work a legal wrong.”

See also 13 Am. Jur. 793, Sec. 766 and cases listed in note thereto. In 14A-C. J., 324, it is said:

“However, other authorities have so limited the doctrine of ultra vires, as to private corporations, created for business purposes, by applying to them the doctrine of estoppel, as almost to destroy it,

and in the majority of jurisdictions support the rule than an ultra vires transaction when executed by one of the parties may become enforceable by estoppel.”

Proposition IV

In regard to the appellant's Assignment of Error No. 2, we call the court's attention to Finding of Fact No. 22 in which is set out all the facts necessary to constitute or set up an estoppel. As to whether these facts result in an estoppel is properly a question of law and the court, in its Conclusions of Law, concluded that the defendant was estopped from denying that it did not have the right and power under its articles to deliver water to the plaintiff. (Conclusion of Law No. 7.)

The appellant also complains and assigns as error (4, 5, 6, 7) certain findings of the trial court, claiming they are inconsistent. This is answered by reading merely the Complaint and recalling the evidence. The facts show that water was used on the land of the plaintiff by the plaintiff from 1923 to 1934 and by others from 1916 to and including the date of trial. (The Los Angeles & Salt Lake Railroad at the Lodge at Bryce Canyon.) (Findings of Fact 10, 12, 14.)

In 1935, the defendant stopped delivering water to the plaintiff which act resulted in this law suit. (Tr. 109.) Finding of Fact No. 6, when considered with Finding of

Fact No. 7, clearly shows that there is nothing inconsistent between the various findings.

This being an equity case, the Supreme Court may review the record, approve or disapprove the findings, or modify them or make or direct findings. *Holm v. Holm*, 44 Utah 242, 139 Pac. 937; *Westminster Inv. Co. v. McCurtain*, 39 Utah 544, 118 Pac. 564; *Leland v. Bourne*, 41 Utah 125, 125 Pac. 652.

Proposition V

The appellants claim (Assignment of Error No. 8) that the court erred in its Finding No. 16, claiming there was no evidence to support it. We simply call the court's attention to the testimony of George F. Taylor, (Tr. 257) and to the fact that it is not the practice of the water boss or master to visit each stockholder when it is his turn to take water. (Tr. 463, 467, 504, 505, 506, 526.) We may point out, also, that the company has stood the cost of all head gates or weirs installed. (Tr. 469.)

This argument of the appellants again shows the attempt on the part of the defendant and their present officers to discriminate against the plaintiff.

In regard to the reference of the appellants to the loss of seepage or drainage water, we again call the court's attention to testimony of the expert Mr. Taylor (Tr. 261, 262, 274), in which he testified that there would

not be any loss to the defendant corporation or other stockholders because of seepage or evaporation.

The appellants claim that the use of water by plaintiff will prevent various persons who have been using waste water from defendant's irrigation system to obtain the right to use this water since the use of the water by plaintiff will be in a different water shed from where it had been used before.

The cases are legion that no right can be acquired to waste water which has been beneficially used by another. Or, stated in another way, no one can require a valid appropriator of water to continue to use that water so that waste water will result which can be used by another.

Among the many cases on this proposition we cite the following:

Gianulakis v. Sharp, 71 Utah 528, 267 P. 1017; Spring Creek Irrigation Company v. Zollinger, 58 Utah 90, 197 P. 737. Weil Water Rights in the Western States (3rd Ed.), Vol 1, Sec. 508, p. 548; Kinney on Irrigation and Water Rights (2nd Ed.), Vol. 2, Sec. 867, p. 1522. The appellants Assignments of Error Nos. 9, 10, 11, 13, 14, 15 and 16 are merely restatements of No. 8, and the answer to that assignment answers the other assignments.

In regard to Assignment of Error No. 11 in which the

appellant claims it will be necessary to install special measuring devices and supervise thereof if the plaintiff is delivered his water, we call the court's attention to the fact that during the large number of years plaintiff used the water represented by the fifty shares there was no additional expense to the company for supervision and measuring devices.

We again direct the court's attention to the evidence on Page 464 of the Transcript where the defendant, Johnson, testified that when Reynolds received the water on the plateau near Ruby's Inn there was no increase of expense for delivery, and on the same page the witness, Johnson, further testified that the water master did not personally turn the water on to his farm when it was his turn to irrigate.

As to the necessity of requiring the installation of measuring devices for the plaintiff's land, we again call the court's attention to the evidence. The testimony of William Adair, a witness for the defendant as shown on page 506 of the Transcript, is that there is only one weir or measuring box on the entire system and that one is the one to divide the stream between the East Valley or Lossee Valley and the Tropic ditch. All of the outlets on the entire system are governed by mere guesswork. To suggest that the appellants will need measuring devices for the plaintiff to use by which to measure his water, would seem very, very far-fetched.

CONCLUSION

A stockholder in a mutual irrigation company who has been denied the right to use water represented by his shares of stock has a cause of action against the company.

In the case at bar the plaintiff is a stockholder in good standing with land lying under the irrigation system, and as such is entitled to have delivered to him, on his land, the water represented by his shares of stock in the corporation.

In light of the law in the case and of the evidence, the defendant (appellant) has wholly failed to show any grounds for a reversal of the judgment below.

We respectfully submit therefore that the judgment should be sustained.

H. D. LOWRY,

Attorney for Respondent.