

1941

Oscar W. Moyle and May P. Moyle v. Salt Lake City : Appellant's Abstract of Record

Utah Supreme Court

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E. R. Christensen; City Attorney; Gerald Irvine; Assistant City Attorney; A. P. Kenler; Assistant City Attorney; Attorneys for Defendant and Appellant;

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In the Supreme Court of the State of Utah

OSCAR W. MOYLE AND MAY P.
MOYLE,

Plaintiffs and Respondents,

vs.

SALT LAKE CITY, a municipal
corporation,

Defendant and Appellant.

APPELLANT'S ABSTRACT OF RECORD

APPEAL FROM THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, UTAH.

HON. ALLEN G. THURMAN, *Judge, Presiding.*

E. R. CHRISTENSEN,
City Attorney

GERALD IRVINE,
Assistant City Attorney

A. P. KESLER,
Assistant City Attorney

*Attorneys for Defendant
and Appellant.*

FILED

JAN 27 1941

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In the Supreme Court of the State of Utah

OSCAR W. MOYLE AND MAY P.
MOYLE,

Plaintiffs and Respondents,

vs.

SALT LAKE CITY, a municipal
corporation,

Defendant and Appellant.

Case No. 6328

APPELLANT'S ABSTRACT OF RECORD

COMPLAINT.

TR. PAGE

1 Plaintiffs complain of defendant and for cause
of action allege:

1. That the defendant is a municipal corporation, being a city of the first class organized and existing under the laws of the State of Utah, and was such during all of the times hereinafter mentioned.

2. That plaintiffs are now and were at all times hereinafter mentioned the owners of twen-

ty-two and three-quarters (22.75) shares of water right in the Big Cottonwood stream and entitled to the use thereof through the Big Cottonwood Tanner Ditch and that said water is and at all times hereinafter mentioned was appurtenant to plaintiffs land situate in the Southeast quarter of the Southeast quarter of Section 15, Township two South, Range one East, Salt Lake Meridian in Salt Lake County, Utah.

3. That in an action then pending in this Court wherein the defendant herein was plaintiff and these complaining plaintiffs were defendants said Salt Lake City as such plaintiff procured an order of this court to be entered on the 23rd day of July, 1926, for the immediate possession of said water so owned by these plaintiffs to be delivered to said Salt Lake City and that on said 23rd day of July, 1926, said Salt Lake City entered into the possession of said water so owned by these plaintiffs and said defendant, Salt Lake City, has continuously had and held the possession thereof from the said 23rd day of July, 1926, until the present time and does now continue to withhold the possession and use thereof from these plaintiffs.

4. That on or about January 7, 1938, said Salt Lake City without notice to these plaintiffs or either of them and without the knowledge of these plaintiffs or either of them procured an

order of this Court to be entered dismissing said action in which such order of possession had been entered whereby said order of this Court for such possession became terminated and became of no further force or effect. That notwithstanding such order of dismissal said defendant, Salt Lake City, has continued to and does now use such water belonging to these plaintiffs and has failed and refused to deliver the same or any part thereof to these plaintiffs or either of them.

5. That the reasonable value of the use and possession of such water so withheld and possessed by defendant from these plaintiffs from the time of such taking of possession by said defendant to the time of filing this complaint is the sum of \$4,150.00.

6. That these plaintiffs heretofore and on the 17th day of April, 1939, duly presented their claim to the Board of Commissioners of said Salt Lake City in writing and properly verified and that at least ninety days have elapsed since such presentation of said claim and that said claim has not been audited or allowed by said Board nor has said Board heretofore rejected said claim.

7. That by reason of all of which these plaintiffs have been damaged in the sum of \$4,150.00.

WHEREFORE plaintiffs pray judgment against said defendant in the sum of \$4,150.00 and for the

return to these plaintiffs of the use and possession of said water and whole thereof and for costs of suit.

T. D. LEWIS, O. W. MOYLE, JR.,
DAN T. MOYLE, DAVID T. LEWIS,
Attorneys for Plaintiffs.

Duly verified.

Filed July 20, 1939.

(Title of Court and Cause):

4

DEMURRER.

Comes now the defendant above named and demurs to plaintiff's complaint on file herein upon the ground and for the reason that said complaint does not state facts sufficient to constitute a cause of action against said defendant.

FISHER HARRIS,
E. RAY CHRISTENSEN,
GERALD IRVINE,

Attorneys for Defendant.

I, FISHER HARRIS, one of the attorneys for the defendant, Salt Lake City, hereby certify that the foregoing demurrer is filed in good faith.

FISHER HARRIS.

Served and filed Aug. 8, 1939.

5 NOTICE CALLING UP DEMURRER for
hearing served and filed August 9, 1939.

(Title of Court and Cause):

6 SUMMONS in usual form served on the 20th
day of July, 1939.

8 DEFENDANT'S DEMURRER overruled
August 15, 1939.

(Title of Court and Cause):

9 ANSWER.

Comes now the defendant, Salt Lake City, and
in answering plaintiff's complaint on file herein
admits, denies and alleges as follows:

1. Defendant admits paragraph 1 of plain-
tiff's complaint.

2. Defendant denies paragraphs 2, 3, 4, 5, 6
and 7 of plaintiff's complaint.

3. Defendant denies generally and speci-
fically each and every allegation in plaintiff's
complaint not herein specifically admitted.

WHEREFORE, defendant prays that plaintiff
take nothing and for its costs herein incurred.

HARRIS, CHRISTENSEN & IRVINE,
Attorneys for Defendant.

Duly verified.

Served and filed September 5, 1939.

(Title of Court and Cause):

10

DEMAND FOR TRIAL.

Demand by plaintiff to have cause set for trial at earliest open date after the 7th day of September, 1939, and case was set for trial on the 16th day of October, 1939.

(Title of Court and Cause):

11

AMENDED ANSWER.

Comes now the defendant Salt Lake City and answers plaintiff's complaint herein.

Admits the allegations of paragraph one thereof.

Denies each and every other allegation, matter and thing in said complaint contained.

Further answering said complaint defendant alleges that any cause of action set forth therein is barred by the provisions of Section 76 of Article 12 of Title 15, Revised Statutes of Utah, 1933, and by the provisions of Section 23 of Article 2 of Title 104, Revised Statutes of Utah 1933, and by the provisions of Section 8 of Article 2 of Title 104, Revised Statutes of Utah 1933, and by the provisions of Section 6 of Article 2 of Title 104, Revised Statutes of Utah 1933.

WHEREFORE, defendant prays that plaintiff take nothing and for its costs herein incurred.

HARRIS, CHRISTENSEN & IRVINE,
Attorneys for Defendant.

Duly verified.

Served and filed September 27, 1939.

13 AMENDMENT TO AMENDED ANSWER.

Comes now the defendant Salt Lake City and asks leave to add to the amended answer in the case of *Oscar W. Moyle and May P. Moyle vs. Salt Lake City*, Case No. 63302, the following:

Further answering said complaint defendant alleges that any cause of action set forth in plaintiffs' complaint is barred by the provisions of Section 15-7-76, Revised Statutes of Utah, 1933, and by the provisions of Section 104-2-23 of the Revised Statutes of Utah, 1933, and by the provisions of Section 104-2-8 of the Revised Statutes of Utah, 1933, and by the provisions of Section 104-2-6 of the Revised Statutes of Utah, 1933, and by the provisions of Section 104-2-28 of the Revised Statutes of Utah, 1933.

(Title of Court and Cause):

17 MINUTE ORDER ENTERED
January 18, 1940.

This case comes now on for trial, T. D. Lewis and Oscar W. Moyle, Jr., attorneys appearing in

behalf of the plaintiff and E. R. Christensen, Assistant City Attorney appearing in behalf of Salt Lake City. Counsel for the plaintiff and the defendant make their opening statements to the court. Oscar W. Moyle is sworn and testifies in his own behalf. It now being the time for recess the further trial of this case is continued to Friday, January 19, 1940.

23 ENTERED ORDER August 12, 1940.

The issues in the within case having come on for trial and a trial having been had and the Court having taken the matter under advisement, the Court now orders that judgment be entered in favor of the plaintiff and against the defendant as prayed.

(Title of Court and Cause):

24 FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

This cause came on regularly for hearing before the Honorable Allen G. Thurman, Judge of the above entitled court, on the day of January, 1940, upon the complaint of plaintiffs and the amended answer and amendments thereto of defendant, plaintiff appearing and being represented by counsel, Messrs. T. D. Lewis, O. W. Moyle, Jr., Dan T. Moyle, David T. Lewis, and defendant

by its attorneys, Messrs. Harris, Christensen, and Irvine, and the testimony and evidence having been given and introduced and the court having tried and heard said cause and the testimony and evidence therein and having heard the arguments of counsel and having read and considered the briefs submitted, and said cause having been submitted and taken under advisement by the court, and the court having duly considered the same and being now fully advised in the premises, makes the following:

FINDINGS OF FACT.

1. That the defendant is a municipal corporation, being a city of the first class organized and existing under the laws of the State of Utah, and was such during all of the times hereinafter mentioned.

2. That the plaintiffs are now and were at all times hereinafter mentioned the owners of twenty-two and three-quarters (22.75) shares of water right in the Big Cottonwood stream and entitled to the use thereof through the Big Cottonwood Tanner Ditch and that said water is and at times hereinafter mentioned was appurtenant to plaintiffs' land situate in the Southeast Quarter of the Southeast Quarter of Section 15, Township 2 South, Range 1 East, Salt Lake Meridian in Salt Lake County, Utah.

3. That in an action then pending in this Court wherein the defendant herein was plaintiff and the complaining plaintiffs herein were defendants Salt Lake City as such plaintiff procured an order of this Court to be entered upon the 23rd day of July, 1926, for the immediate possession of said water so owned by the plaintiffs herein to be delivered to said Salt Lake City and that on said 23rd day of July, 1926, said Salt Lake City entered into the possession of said water so owned by the plaintiffs herein, and said defendant, Salt Lake City, has continuously had and held the possession thereof from the said 23rd day of July, 1926, until the present time and does now continue to withhold the possession and use thereof from the plaintiffs herein.

4. That on or about January 7, 1938, said Salt Lake City without notice to the plaintiffs herein or either of them, and without the knowledge of the plaintiffs herein or of either of them, procured an order of this Court to be entered dismissing said action in which said order of possession had been entered whereby said order of this Court for such possession became terminated and became of no further force or effect. That notwithstanding such order of dismissal said defendant, Salt Lake City, has continued to and does now use such water belonging to the plaintiffs herein and has failed and refused to deliver

the same or any part thereof to the plaintiffs herein or to either of them.

5. That the reasonable value of the use and possession of such water so withheld and possessed by defendant from the plaintiffs herein from the time of such taking of possession by said defendant until the time of filing the complaint herein is the sum of \$4,150.00 and from the time of filing said complaint to the time of judgment is the sum of \$350.00, which together with interest at the rate of 6% upon the said sum of \$4,150.00 from the date of the filing of said complaint to
26 the time of judgment herein makes the total amount of damage to plaintiffs the sum of \$4,769.75.

6. That the plaintiffs on the 17th day of April, 1939, duly presented their claim to the Board of Commissioners of said Salt Lake City, in writing and properly verified, and that at least ninety days elapsed after such presentation of said claim before the filing of the suit herein and that said claim had not been audited or allowed by said Board nor had said Board theretofore rejected said claim.

7. That by reason of all this the plaintiffs have been damaged in the sum of \$4,769.75.

8. That the plaintiffs' cause of action is not barred by any section of the statutes pleaded by defendant or otherwise or at all.

9. That the plaintiffs herein have not abandoned said water so wrongfully withheld nor any part thereof and neither of said plaintiffs have abandoned said water so wrongfully withheld nor any part thereof.

9. That the water involved herein is the same as that decreed to the plaintiff Oscar W. Moyle in the case of the *Progress Company v. Salt Lake City, et al.*, and also in Paragraph 7 of the decree in the case of *Big Cottonwood Tanner Ditch Company v. Shurtleff, et al.*, both filed in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah.

From the foregoing Findings of Fact the Court now makes the following:

CONCLUSIONS OF LAW.

1. That the plaintiffs are entitled to a judgment against the defendant in the sum of \$4,769.-75 and for the return to said plaintiffs of the possession and use of said water and the whole thereof and for their costs to be taxed herein.

Made and entered at Salt Lake City, Utah, this 13th day of September, 1940.

ALLEN G. THURMAN,
District Judge.

Filed in the Clerk's office Sept. 13, 1940.

(Title of Court and Cause):

27

JUDGMENT.

This cause came on regularly for hearing before the Honorable Allen G. Thurman, Judge of the above entitled court, on the day of January, 1940, upon the complaint of plaintiffs and the amended answer and amendments thereto of the defendant, plaintiff appearing and being represented by their attorneys T. D. Lewis, O. W. Moyle, Jr., Dan T. Moyle, and David T. Lewis, and the defendant by its attorneys Messrs. Harris, Christensen and Irvine, and the testimony and evidence having been given and introduced and the Court having tried and heard said cause and the testimony and evidence therein and having heard the arguments of counsel and having read and considered the briefs submitted, and said cause having been submitted and taken under advisement by the Court, and the Court having duly considered the same and having rendered its decision therein and having made and entered its Findings of Fact and Conclusions of Law therein.

Now, THEREFORE, on motion of attorneys for plaintiff and good cause appearing it is hereby ORDERED AND ADJUDGED that the plaintiffs herein have and recover of and from the defendant, Salt Lake City, the sum of \$4,769.75 and shall have and recover of and from the said defendant the use and possession of the water from the Big Cotton-

wood Stream described as twenty-two and three-quarters ($22 \frac{3}{4}$) shares of water right in the Big Cottonwood Stream in Salt Lake County, Utah, and entitled to the use thereof through the Big Cottonwood Tanner Ditch and being appurtenant to plaintiffs' land situate in the Southeast quarter of the Southeast quarter of Section 15, Township 2 South, Range 1 East, Salt Lake Meridian, in Salt Lake County, Utah, and being the same water as that decreed to the plaintiff Oscar W. Moyle in the case of *Progress Company vs. Salt Lake City, et al.*, and also in Paragraph 7 of the decree in the case of *Big Cottonwood Tanner Ditch Company vs. Shurtleff, et al.*, both filed in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah.

And it is further ORDERED AND ADJUDGED that the plaintiffs shall have and recover of and from the defendant, Salt Lake City, their costs herein taxed in the sum of \$.....

28 Done in open court this 13th day of September, 1940.

ALLEN G. THURMAN,
District Judge.

Filed in the Clerk's office Sept. 13, 1940.

(Title of Court and Cause):

29

NOTICE OF JUDGMENT.

*To the defendant and to its counsel, Messrs.
Christensen, Irvine and Kesler:*

You and each of you will please take notice that on the 13th day of September, 1940, Findings of Fact, Conclusions of Law and Judgment were duly signed, filed and entered by the above entitled court.

T. D. LEWIS, DAVID T. LEWIS,
O. W. MOYLE, JR., D. T. MOYLE,

Attorneys for Plaintiff.

Served and filed Sept. 13, 1940.

(Title of Court and Cause):

31

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

To the above named plaintiffs and to their attorneys, T. D. Lewis, O. W. Moyle, Jr., D. T. Moyle, and David T. Lewis:

You and each of you please take notice that the defendant Salt Lake City intends to move the Court to vacate and set aside the decision of the court rendered in the above cause and to grant

a new trial of said cause upon the following grounds, to-wit:

1. Irregularity in the proceedings of the court and orders of the court.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of the evidence to justify the decision or judgment and that said judgment is against law.

4. Errors in law occurring at the trial and excepted to by the defendant.

5. Insufficiency of the evidence to justify the decision of the court in this:

(a) That there is no evidence in the record which proves or tends to prove that the plaintiffs, or either of them, suffered any damages or was injured in any material way by any conduct of the defendant Salt Lake City.

(b) The evidence shows without contradiction that the plaintiffs have abandoned any water right or right to use water from the Big Cottonwood Tanner Ditch during the Winter season, and notwithstanding this evidence the court granted judgment and awarded damages to plaintiffs for an interference with plaintiffs' water right during
32 the entire year.

6. The court erred in making Finding No. 3 in this, that it is contrary to the evidence in this, that the evidence conclusively shows that plaintiffs used water from the Big Cottonwood Tanner Ditch and all the water that they desired to use without any hindrance or interference of the defendant Salt Lake City.

7. The court erred in making Finding No. 4 in this, that the court finds that Salt Lake City has failed and refused to deliver any water to the plaintiffs, or either of them, which is contrary to the evidence and there being no evidence before the court that Salt Lake City is under any obligation to deliver any water from the Big Cottonwood Tanner Ditch to the plaintiffs, or either of them.

8. The court erred in making Finding No. 5 in this:

(a) That the findings of fact therein stated are not within the issues of the case.

(b) That the finding that the reasonable value for the use and possession of the water is \$4,150.00 is contrary to the evidence and not supported by the evidence and said finding is not based upon any allegation in plaintiff's complaint.

(c) And that portion of Finding No. 5 wherein the court finds that the sum of \$350.00 is a proper judgment for damages from the time

of filing of said complaint to the time of judgment is contrary to the evidence and is no part of the claim filed with Salt Lake City and is in addition to and supplemental of the claim filed and proved in the above entitled case.

9. The court erred in finding No. 7 in this, that there is no evidence before the court from which it could be concluded that the plaintiffs have suffered damage in the sum of \$4,769.75 and that said finding is contrary to the evidence, the evidence conclusively showing that the plaintiffs did not suffer damages in that sum or any other sum.

10. The court erred in finding No. 8, the evidence conclusively showing that all of the damage plaintiff suffered, if any, prior to four years
33 from date of filing plaintiffs' complaint were barred by the Statute of Limitations.

11. The court erred in Finding No. 9 in this, that the evidence conclusively shows that plaintiffs have abandoned any water right or the right to the use of the water from Big Cottonwood Tanner Ditch during the non-irrigation season or commonly called the Winter months.

12. The court erred in the last finding of fact in this, that said finding of fact is contrary to the evidence and is not the basis of any issue in the cause. The facts stated in said finding do

not find support in any of the pleadings in the case.

13. The decision is against law in this, that the evidence in this action shows that plaintiffs were materially benefitted by the enlarged amount of water which was made available to the plaintiffs and used by them, both culinary and irrigation water.

14. The court erred in its judgment, wherein it adjudged that the plaintiffs should have and recover of and from the defendant the use and possession of the water from the Big Cottonwood stream described as 22 3/4 shares of water right in Big Cottonwood stream in Salt Lake County, Utah, in this that a water right is not the subject of an action in replevin. The water is gone and could not be replevined and if the plaintiffs have any water rights which have been interfered with by the defendant, the only remedy the plaintiffs could have would be an injunction enjoining the defendant from interfering in the future with the plaintiffs' right to use water from the Big Cottonwood Tanner Ditch and there is no issue joined on the right of an injunction or the right to have an injunction, and it is contrary to law for the court to adjudicate an injunction suit without it being based upon pleadings and evidence to support the pleadings.

15. The court erred in failing to take into consideration the duty of the plaintiffs to mitigate their damages, if any they sustain, in this, that the evidence conclusively shows that during the major portion of the time involved in this litigation the water flowing down Big Cottonwood Tanner Ditch were the natural waters coming from Big Cottonwood Creek uninterfered with in any way by Salt Lake City.

Said motion will be made upon the minutes and records of the court in the above entitled case.

CHRISTENSEN, IRVINE & KESLER,
Attorneys for Defendant.

Served and filed on Sept. 17, 1940.

35 MINUTE ORDER ENTERED October 19,
1940.

36 MINUTE ORDER ENTERED Nov. 18, 1940.

(Title of Court and Cause):

37 NOTICE OF APPEAL.

To the plaintiffs, Oscar W. Moyle and May P. Moyle, and to their attorneys, T. D. Lewis, David T. Lewis, O. W. Moyle, Jr., and D. T. Moyle:

You will please take notice that the defendant in the above entitled action known and design-

nated in the files of the County Clerk's office of Salt Lake County as Case No. 63302 hereby appeals to the Supreme Court of the State of Utah from the judgment therein entered in the said Third Judicial District Court in and for Salt Lake County, State of Utah, on the 13th day of September, 1940, in favor of the plaintiffs in said action and against the defendant Salt Lake City, and from the whole thereof, and also from the order denying defendant's motion for a new trial made and entered in the minutes of said Third Judicial District Court in and for Salt Lake County, State of Utah, on the 19th day of October, 1940.

Dated this 14th day of December, 1940.

E. R. CHRISTENSEN, GERALD IRVINE
and PRATT KESLER,

*Attorneys for Defendant Salt
Lake City.*

Served and filed December 14, 1940.

38 CLERK'S CERTIFICATE TO TRAN-
SCRIPT, dated Dec. 26, 1940.

TRANSCRIPT ON APPEAL filed in the Supreme Court on the 13th day of January, 1941.

Upon the foregoing pleadings and the issues thus framed, the foregoing action came on for

trial before the Honorable Allen G. Thurman, one of the Judges of the Third Judicial District Court of the State of Utah, in and for Salt Lake County, without a jury.

THE TRIAL

Commenced on the 18th day of January, 1940, and thereafter such proceedings were had as shown by the

BILL OF EXCEPTIONS

Appearance: For the plaintiffs were Messrs. T. D. Lewis, David T. Lewis, O. W. Moyle, Jr., and Dan T. Moyle. For the defendant, Messrs. Fisher Harris, E. R. Christensen and Gerald Irvine.

42 Whereupon T. D. Lewis informed the court that the action was brought by the plaintiff to recover from Salt Lake City the value of the use of certain water of the Big Cottonwood Creek from sometime in the middle of the year 1926 up to the time of the filing of the complaint and stated
43 he would claim up to the present time of trial and
44 then made brief explanation as to plaintiffs' theory of the case.

46, 47 Then explanation was made by Mr. Christen-
and 48 sen relative to the geography of the land and creeks and ditches involved in this litigation.

52 Judge Lewis asks for the claim that was filed by Mr. and Mrs. Moyle with the recorder of Salt Lake City, which was handed to him and admitted that the endorsements on it are proper; that it was filed on April 17, 1939, and presented to the Board of Commissioners the next day and the Board of Commissioners of Salt Lake City have never taken any action with reference to that claim except to refer it to the Legal Department of the city.

Plaintiffs offered in evidence the files in the Clerk's office in the case of *Salt Lake City vs. Oscar W. Moyle and wife*, filed June 28, 1926, No. 38604. Authenticity of the files were admitted. Judge Lewis then offered in evidence the complaint of Salt Lake City in that case, together with the exhibits attached to the complaint as a part thereof, and then offered a paper stating that he did not know what it was but it was in the files and has some relation to the pleadings. The court
53 suggested that it be identified. Judge Lewis stated: "Well, I do not know; it seems to be attached here. I am offering the entire file, however, so there will be no misunderstanding."

THE COURT: "All right."

Judge Lewis next offered the notice signed by the attorneys in the case for a motion asking to make an order permitting and authorizing the plaintiff to take possession and divert into the

city conduit from Big Cottonwood Creek all of the waters and water rights of defendant in and to certain privately owned waters of Big Cottonwood Creek taken therefrom by defendants through Big Cottonwood Tanner Ditch, and to deliver to defendants other water in lieu and place thereof for irrigation purposes by placing said canal water in said Tanner ditch at the head thereof, and to deliver to defendants through pipe line Big Cottonwood water for culinary and domestic use in lieu of culinary water heretofore taken by them from the said Tanner ditch in the amounts and manner provided in contract, "Exhibit A" attached to complaint of file herein. That is the contract between the Tanner Ditch Company and Salt Lake City, not between Mr. Moyle and Salt Lake City.

Then he offers the summons and return and amendment to the complaint filed by the plaintiff; and a motion made by the defendant to strike from plaintiff's complaint following parts, and setting out those parts; and the affidavit accompanying it on the part of Mr. Moyle; the demurrer interposed by the defendants; the order of the court granting possession and the right to divert to Salt Lake, signed the 23rd day of July, 1926, by Chris Mathison, Judge; and notice calling up the demurrer served on October 2, 1927; and the
 54 order dismissing the case signed by Judge Evans on January 7, 1938.

It was stipulated that the order signed January 7, 1938, dismissing the action was dismissed on plaintiffs' motion and without written notice regarding the same.

Defendant objected to the offer of the files as incompetent, irrelevant and immaterial.

55 The objection was overruled and they will be received.

Plaintiff offered in evidence the claim presented by the plaintiffs to Salt Lake City and filed on April 17, 1939. The claim was duly admitted.

56 OSCAR W. MOYLE, one of the plaintiffs, was called as a witness in his own behalf and testified as follows:

57 Name is Oscar W. Moyle, plaintiff in the case; had resided in Cottonwood for the last seventeen or eighteen years and had resided there a large part of the year for nearly forty years. He is acquainted with the Big Cottonwood Tanner Ditch and also Big Cottonwood Tanner Ditch Company. Have owned stock in the Big Cottonwood Tanner Ditch Company ever since it was incorporated and in addition to that stock have always claimed water appurtenant to my land at my place of residence that was not held by the Big Cottonwood Tanner Ditch Company in any way.

Q. What amount of water has that been that you have always claimed?

A. $22\frac{3}{4}$ shares of the total flow of the Big Cottonwood Tanner Ditch Company both before and since it has been incorporated.

58 Q. BY THE COURT: In other words, you claim and now claim to own twenty-two and three-fourths eighteen hundredths part of the flow of the Big Cottonwood Tanner Ditch?

A. Yes, assuming that the 1800 is the correct figure.

Q. (BY THE COURT); Is the total amount?

A. Yes.

Witness was shown copy of application No. 12943, application to appropriate water purporting to be signed by George D. Keyser, on behalf
59 of Salt Lake City, and was asked if that was served on the witness, plaintiff in the case, as a copy in the proceedings before the State Engineer.

A. Yes.

Application offered in evidence. Objected to as incompetent, irrelevant and immaterial. Document admitted to be a copy.

60 THE COURT: I will receive it; mark it as exhibit "C".

JUDGE LEWIS: We offer the whole matter; there may be various matters there.

JUDGE LEWIS: I will read now a portion of it; it purports to be an excerpt from the decree in the case of The Progress Company vs. Salt Lake City, et al.

It was objected to as not being the best evidence. If the decree could be of any value, then the decree would be the best evidence. Objection
61 is overruled.

Judge Lewis reads from excerpt as follows:

“So it is that Oscar W. Moyle is entitled to receive through the North Branch of the Big Cottonwood Tanner Ditch $22\frac{3}{4}/1795$ of the waters diverted by it during the time from January 1st to July 1st of each year and $22\frac{3}{4}/1768$ thereof from July 1st to December 31st and those proportions he is entitled and bound to receive in turns according to custom and necessity. Those turns must be and as a matter of fact are at such intervals and of such duration that there is delivered or made available to Oscar W. Moyle those proportions of the waters entitled to be diverted by the Big Cottonwood Tanner Ditch to which he is entitled as set forth above; but the lands of Oscar W. Moyle are not now and never have been susceptible of irrigation and the water, the right to the use of which for irrigation purposes was decreed to him as above set forth, and has never been used by him for that purpose or any other purpose.”

62 Objected to by Mr. Christensen.

Objection was overruled.

Q. Have you used the waters from Big Cottonwood Creek that is represented by these $22\frac{3}{4}$ shares, the equivalent amount of water to $22\frac{3}{4}$ shares of Big Cottonwood Tanner Ditch, up to the date of July 23, 1926?

Mr. Christensen objected as calling for his conclusion in this that he asked him if he used the water represented by some particularly designated $22\frac{3}{4}$ shares.

63 THE COURT: Objection is sustained.

MR. CHRISTENSEN: We move to strike that as a conclusion.

THE COURT: That part will go out; I do not think it is competent.

65 THE COURT: Of course, I do not think it prejudices the city to leave that in. It is just meaningless. I will let it stand. I withdraw the order striking it.

Q. (BY THE COURT); Do I understand you to say that you have owned thirty-two acres there?

A. Yes.

Q. Part of the water you have used there was represented by shares in the Big Cottonwood Tanner Ditch?

A. Yes.

Q. I will ask you if that part of the water used was allotted to you by the officers of the Big Cottonwood Tanner Ditch Company?

66 A. Yes, both of them were.

Q. And you were allotted by the Big Cottonwood Tanner Ditch Corporation water under your stock ownership in the company, and also for the 22¾ shares that were appurtenant to the land?

A. They were allotted ordinarily together; that is, your water turn is for so many hours and so many shares, say forty-three shares, putting them altogether.

Q. That included your stock ownership shares and the other?

A. Both of them together, always allotted that way.

Q. And did you use, prior to July 23, 1926, did you use all the water allotted to you under both sources of title?

A. Yes.

MR. CHRISTENSEN objected as calling for a conclusion of the witness.

THE COURT: Objection is overruled.

Q. What use did you make of that water?

A. I used it almost all the time on these thirty-two acres that is referred to in the evidence here, and part of the time on a ten acre tract I have further west, and also on another five acre tract that I have over there. One piece is about a mile west of my property here; the city canal runs through my five acres on the west.

67 Q. Now, after July 23, 1926, have you had or has there been allotted to you any water represented by the $22\frac{3}{4}$ shares that was appurtenant to your land?

Objected to as calling for a conclusion.

68 Objection was sustained to that.

69 A. I am familiar with the point of diversion of the conduit that takes water out of the Big Cottonwood Canyon Creek and conveys it to Salt Lake City at the mouth of Big Cottonwood Canyon. It is marked on exhibit No. 1 at the extreme right hand corner.

Exhibit No. 1 is offered and receive in evidence.

Salt Lake City pumps Jordan water into Big Cottonwood Creek at certain times of the year at a point that is marked on this map, exhibit 1, at substantially the center of the map and let the water run down the stream through my place.

70 It is pumped up through a pipeline which is fifty or sixty rods in front of my place and

the water pumped is dirty Jordan water not fit for domestic purposes. Sometimes the pumping is very early and sometimes not so early. I could not give the exact dates and some of the dryest years along in June they begin to pump and other years about July and continue to pump until about the middle of October. That has been the case continuously from the year 1926 until the present time. Previous to the city's pumping, the water was clear Big Cottonwood water fit for culinary purposes.

THE COURT: I will take judicial notice of the fact that the natural flow of Big Cottonwood Creek coming from Big Cottonwood Canyon is suitable water for culinary purposes.

MR. CHRISTENSEN: May we have an exception to the court's taking judicial notice of that?

THE COURT: Yes, for I think that is of common knowledge in this community.

From the time Salt Lake City begins each year to pump Jordan water into Big Cottonwood Creek until they cease to pump in October, there is no water from Big Cottonwood Creek available in the Big Cottonwood Tanner Ditch for culinary purposes.

Q. Has there been at any time during that part of the year since 1926?

A. No.

Q. Has Salt Lake City ever notified you that the water of Big Cottonwood Creek for which they obtained an order for possession was available to you?

A. No.

73 Q. Have you ever used any portion of the Big Cottonwood Creek coming through on the Tanner Ditch for irrigation or any other purpose other than water allotted to you by the Big Tanner Ditch Company for your shares of stock in the Big Tanner Ditch Corporation?

A. Not to my knowledge.

Q. And you would know if you had, wouldn't you?

A. Yes, I think I would. Of course, the water flows through my place there and I turn it out; I have some water that I take out to water a little lawn plot or grass plot in front of my house in addition to my lawn I take that water out; that is about an acre in extent. Were you speaking of clear water?

A. No, any water.

Q. Any water excepting the corporation?

A. Yes.

A. No, I use none excepting the corporation; I doubt whether I use all of that in the corporation.

74 I own certain shares of stock in the Big Cottonwood Tanner Ditch Corporation. The watermaster sent around a card, so many shares so many hours and a certain time of day or night, whenever it is we take it accordingly, and prior to 1926 they did the same way; they put them both together.

Q. Now, after July 23, 1926, have you used through the Tanner, Big Tanner Cottonwood Ditch Company any water other than that allotted to you by the Big Cottonwood Tanner Ditch Company on your corporate stock?

A. No.

Q. Mr. Moyle, did you keep those cards that were handed to you by the watermaster?

A. I have some of them.

Q. They would not go back as far as 1926?

75 A. Oh no; you see they change during the year.

Q. You did not keep those cards until now?

A. No, I haven't. I have perhaps a few of them.

Q. (BY THE COURT) Let me ask you this; do you recall the allotment made to you before the summer of '26 and after? The relative allotment I am talking about.

A. You mean as sent out by the watermaster to me?

Q. (BY THE COURT) Yes.

A. Well, now, Judge, it would take me some time to explain that.

Q. (BY THE COURT) I am asking you if you recall?

A. I am inclined to think that immediately after this condemnation suit the watermaster continued to give me the water that was condemned.

Q. (BY THE COURT) Wait a minute. By that you mean he gave you as much as he did other years?

A. He began that and I told him I have got no water.

76 Q. (BY THE COURT) In other words, as I understand your testimony it is that sometime after July, approximately, of 1926, the amount of water that had been previously allotted to you out of the Tanner Ditch was reduced by fifty per cent by the watermaster?

A. Approximately, they usually specified the number of shares before, after that they cut it down these $22\frac{3}{4}$. The percentage was nearly half; that is a half of what was allotted to me and Mrs. Moyle. I have had in mind that the water we were talking about was the joint or

combined water interests of me and Mrs. Moyle. My shares of stock in the Big Cottonwood Tanner Ditch Corporation has changed some. I bought some shares in 1926. I sold one share to a man on this ten acre piece, but otherwise my ownership is the same. That is to say within one or two shares.

A. I don't know when as a matter of fact, I think for sometime after '26 the watermaster didn't recognize this condemnation because I had took it up with them a lot of times and finally they did so; I say I don't know when they cut it down.

Q. (BY THE COURT) Have you any judgment as to approximately when they cut it down; would it be within a year or two years or three year, or what?

A. No, I don't; it was, I think, for sometime after 1926 they kept asking me to pay assessments on it and so forth and I would write them the city has got it, and a controversy with all the secretaries that came in.

Q. (BY THE COURT) I am trying to find out if you can approximate the time?

A. I wouldn't like to do it, Your Honor, without further information.

Q. (BY THE COURT) You don't think you can?

A. No.

Q. (BY THE COURT) You have no approximation?

A. I have here my memorandum as to the number of shares in the corporation.

Q. (BY THE COURT) Well, refresh your recollection and tell us exactly.

A. Twenty-three and one-third shares.

Q. Twenty-three and one-third shares in the corporation?

A. Yes.

Q. And the equivalent of $22\frac{3}{4}$ shares outside of the corporation?

A. Yes, sir.

Q. Now, each year since 1926 to the present time you have testified about the pumping of the Jordan water into the Big Cottonwood Creek at the point indicated, during that time that the water is pumped each year into Big Cottonwood Creek of Jordan water do you know whether or not Big Cottonwood stream has been dry or otherwise from the point of the diversion of the water to Salt Lake City's conduit down to the point of the pumped water into the stream?

79

A. Every time I have been up there it has been dry during that period. I have been up

there at least once or twice a season. I have been up to the intake of the Tanner Ditch at Ray Van Cott's place and it has been dry. After July 23, 1926, I never used water in excess of
80 the amount that was allotted to me under my stock appropriation, that I know of, and I think I would know.

Q. (BY MR. CHRISTENSEN) If I understand you right, what you mean is you tried to use the water at the time and for the length of time the ticket called for that was issued to you by the watermaster?

A. No, I never did over the twenty-two and three-fourths shares, I didn't use the water, no.

Q. Do you know what the value for the use of Big Cottonwood water, Big Cottonwood stream water is per year and has been from 1926 up to the present time?

A. I think I have a knowledge of it; I studied it, been acquainted with it during that time, bought and sold and know of other people buying and selling.

Q. What in your judgment would be the value of the water represented by the $22\frac{3}{4}$ shares not in the corporation and which the city obtained its order for possession on July 23, 1926, what would
81 be the reasonable value for the use of that water during that time?

MR. CHRISTENSEN objected to that on the ground that the witness has not shown any qualifications to answer that kind of a question, don't know whether it has any reasonable value or whether it is what he individually thinks it is or whether there is any known way of ascertaining it. I think it is incompetent, irrelevant and immaterial and not within the issues of the case.

Since the year 1926 there has been very small quantities of Big Cottonwood Creek water available to people in that community. The only water that is available to them for culinary purposes comes to them through the pipes belonging to Salt Lake City.

Q. And you know what the value of that water coming through the pipes of Salt Lake City is in that vicinity?

A. Yes.

MR. CHRISTENSEN: We object to that. It is immaterial, incompetent and irrelevant, no basis on which he could compare that water running in the stream and right for irrigation and or culinary and then wanting to put a price on it as water coming through the city meter proposition.

82 (BY THE COURT) Objection is overruled.

A. I would say \$15.00 per share per year is as near as I can figure its value.

83

CROSS EXAMINATION

(By Mr. Christensen).

A. In the year 1925 the city was not taking my water and I was residing at this place marked as my home on exhibit I, which I built in the year 1923 and provided it with culinary water piped for it upstairs and downstairs and connected to the main lines that were put in front of my place
84 by the Big Cottonwood Tanner Ditch and Salt Lake City and ever since 1923 have used culinary water from that source for my house; sprinkled my lawn from that source; always had horses there and watered them from the culinary water which was piped out to the barn. Sometimes the livestock was watered at the ditches which run through my place. Used part of the land as a pasture, let the horses run there in the summer time, fed them in the barn in the winter time.

85 I don't know exactly when the pipeline passed in front of my place. It was before I built my new home. I have some cottages down further west than my residence which were not connected with the city water. The first connection I made when I built my house. There are three connections now I think. I am inclined to think they
86 were all put in the same time.

Q. Let me see if we can refresh your recollection. Don't you remember at one time you

had a one inch connection and you asked them to put in a larger connection?

A. Yes.

Q. To start with when you first built your new home, didn't you have just a one inch pipe connection?

A. No, I don't think so. If I did they fooled me on it, for I have a one and a half inch pipe all through my home and out on the land.

Q. When you first started didn't you consider one one inch pipe or were there two one inch pipes?

A. There might have been. There was a wooden pipe there at first, they didn't like to make a two inch opening, because it would weaken it. So they made two one inch and then ran it into my pipe. They ran in, I don't remember exactly, but I do remember when they put in the steel pipe they put in two one inch openings.

Q. Didn't you have in addition to that two other openings of one inch? In other words, have you not three connections with that line now?

87 A. Yes, that is what I have always had.

Q. Did you have them from the beginning?

A. Yes.

Q. You had them all the time?

A. Yes. What I am referring to now, that place at the northwest corner, that is one of them, and these cottages I told you about we lived in for thirty years between the creeks, I put one in there, and then in my new house when I built it.

Q. But you are not sure as to the size of them?

A. No, I wasn't there when they put them in.

Q. Now, you said they were not metered and there is no charge made on you for that water you take through there, is there?

A. Oh, I pay my assessment every year, yes.

Q. That is on your water stock?

A. That is all anybody pays; that is all there is to pay. I pay my assessments every year on my water stock. Sometimes the assessments are larger than others.

88 Q. Now, take it in '24, after you had built your new home and got your service connections on there, you were getting some water in the ditch besides that?

A. Yes, I was getting all the water.

Q. That is you were getting whatever water was allotted to you as your proportionate share for the ownership you were claiming there; that is right, isn't it?

A. Yes.

Q. What did you do with that water so far as this tract of land is concerned?

A. Well, I have a better map than that one.

Q. I am not asking you about your map; can you tell me now what you did with it?

A. Yes.

Q. Tell me. Then, tell me.

Q. You said that you could tell me.

A. I can tell you.

89

Q. Go ahead.

A. Before '26, you see between these——

Q. Now, if you will listen to the question.

A. I am going to show you where I used the water.

Q. You are going to show me where you used the water in '24?

A. Yes, and I can't separate '24 from any year prior to '25; the only separation I mean is when they changed the water in 1924 and always before.

Q. I do not care anything about prior time.

A. All right; '24 then. I don't remember that year particularly from any other year.

Q. Did you use it one place one year and some other place the next year?

A. Not ordinarily.

Q. Tell me where you used it in '24?

A. I don't know where I used it in '24. I may have had a garden there in '24 and I might not have; I can't tell you.

Q. All right; let's assume this is one of the years you had a garden.

A. All right; I had about a half acre in there; I started it when the war was on.

Q. That would be back in 1919?

A. 1914.

THE COURT: If you can tell him how you used it in 1924, do so; and if you cannot answer him tell him you cannot.

90 A. I might not distinguish one year from another, but I put it during all those years, some of it there, some on my orchard and some of it on the ditch that runs on the east side of my property down there to water those trees, and I used it for that and in these ditches and in the orchard and then may have used it right in front there.

Q. What you used it for principally was to irrigate the trees and shrubs and bushes and things growing on that tract of land?

A. Principally, yes. I had a little garden there for some years.

Q. But you would not use very much of the twenty-two or twenty-three shares for a garden?

A. Very likely I used it for beautification of the property.

Q. In the main you used it for trees and shrubs?

A. And grass and lawn.

Q. Was that the use you had made of it principally all the time prior to '26?

A. Yes. Became the owner of the property in 1901. Don't remember when the Big Cottonwood Tanner Ditch Company was incorporated.

Q. In the water rights you claim they have been divided practically between these branches of this Big Cottonwood Tanner Ditch?

91 A. I have never divided them, no; they show on the record North Branch, South Branch and Main Branch. I have always had my water allotted at one time.

Q. Listen to the question. The $22\frac{3}{4}$ shares that you are claiming and that the city took, wasn't that decreed to be used in a particular branch in that Tanner Ditch?

A. It was described as out of the North Branch, but it wasn't decreed or prescribed to be used out of the North Branch. The decree says I am entitled to use $22\frac{3}{4}$ shares out of the North Branch of the Tanner Ditch.

Q. Isn't thirty per cent of the water decreed to the Tanner Ditch decreed to the North Fork?

92 A. Not that I know of.

Q. You do not know that is a fact?

A. No, not as I understand; I don't know.

Q. You spoke about the way you got your water turn ever since the corporation was incorporated; the watermaster of the Big Cottonwood Tanner Ditch, he brings to you as a water right user there a ticket on which it tells you the time that you shall take your water turn, whatever date and hour of the day and how long you shall keep it, doesn't he?

A. Yes.

Q. And it shows how many shares of stock you have?

A. Yes, ordinarily I think that is on it too.

Q. And in accordance with that when it comes the time you divert the water that you have used in this tract, you divert it out on this here, and when your time has expired that is on the card somebody ordinarily comes and takes it?

A. Yes, ordinarily they do.

Q. You knew something about that, didn't you?

A. Oh, absolutely sure, yes, that is the understanding.

Q. And that was true even after the incorporation, wasn't it?

A. Oh, yes.

Q. The corporation, they seemed to sort of run the whole ditch?

A. That was by common consent.

Q. I don't care about the common consent. They ran the whole ditch by fixing up the water turns and distributing the cards for the use of the water, both for water that is represented by stock in the corporation and that in the Tanner Ditch?

93 A. They have done that to an extent.

Q. And they did that with yours ever since the corporation came into existence up to '26?

A. Yes.

Q. And how long after '26?

A. Not at all, not on the outside; they may have issued tickets but I have never recognized if they did give those tickets I called attention that the water, I haven't a right to use it.

Q. Let's take 1926. Suppose it was thirty minutes a share that your turn amounted to; you had twenty-three shares in the corporation and $2\frac{3}{4}$ out of the corporation; if the ticket was issued for thirty minutes for each one both in and out of the corporation, how would you handle that?

A. How would I handle that? I handled it this way: I only used a small portion of water except to water my orchard and a little plot in front of it. I notified the Company—(Then withdrawn)

Q. I asked you how you handled the water?

Q. This is what I wanted to ask you: If your ticket was allotted for ten hours and that by calculation would include both the water in the corporation and out of the corporation, and ordered you to take it at six o'clock at night, and
94 you wanted to use the water you would turn it on at six o'clock?

A. Sometimes I would and sometimes I wouldn't. I didn't use the water, I wasn't entitled to it.

Q. You said you were a stockholder in the corporation?

A. Yes, I knew what that was.

Q. Now, if you will just please listen to the question. You did have some right as you claim to use water from the corporation stock?

A. Yes.

Q. And to use water outside of that too?

A. Yes.

Q. If your ticket showed it was for ten hours on your water turn, and it was calculated on the basis of the whole forty-four shares, and you wanted to use the water and it was to be taken at night, at six o'clock, wouldn't you go there at six o'clock?

A. No, I didn't, because I had no use for that water.

Q. You had no use for the water?

A. No, not that dirty water.

Q. I am not asking you about dirty water.

A. Oh, yes, in the spring.

Q. Let's take it in the spring when there is clear water in the ditch; you got your ticket for ten hours representing forty-four shares and it is your turn at six o'clock, don't you go out and turn it on?

A. Sometimes if I need it.

Q. Sometimes if you need it?

95 A. Yes.

Q. Well, let's assume this is when you need it; you would go out and turn it on at six o'clock?

A. Yes.

Q. What do you do with it, the water?

A. This is a little place.

Q. What ordinarily, do you leave it there until the party who follows you comes and takes it; isn't that the customary way?

A. No; not if it is used on my lawn here and my orchard; that is the only place I used the water after the city took the $22\frac{3}{4}$ shares.

Q. Sometimes you did not use the part you had a right to use?

A. Absolutely, and very often.

Q. So you did not use all this water all the time?

A. Which water?

Q. That you are claiming.

A. No.

Q. You didn't use the twenty-two shares that was in the corporation?

A. Not when it was muddy I didn't use it.

Q. Let's forget about the muddy part. Let's get it when it wasn't muddy. You often did not use all your twenty-two shares that was in the corporation?

A. I wouldn't say very often for when it was clear water I would just let it run.

Q. You would just let it run?

A. Until the other fellow took it. There would be cases of that especially after my turn.

96 Q. In that way you would get the benefit of both the water in the corporation and out of the corporation?

A. No.

Q. This water that the city condemned, was that water that would not wet ground after it was condemned?

A. I didn't pretend to water more than a two acre tract after the city took the water; theretofore I put it on the thirty-two acres.

Q. I didn't ask you about you didn't pretend; but did you?

A. I could not estimate how many hours the water would run on the land or whether it was in the day time. I had a boy there. We have some ditches in front of the home and it goes down into the orchard and it may go down to some oaks and other trees. It used to go down to Judge's place.

97 Q. I am asking now for what he considers the irrigation season. I think his testimony yesterday covered what he did with the water, but it was not fixed as to what season of the year it was.

A. I didn't water anything but this grass plot and orchard, and sometimes it needed—

Q. I didn't ask you what you did with the water. You told us yesterday. What season of the year was it?

98 A. In the summertime. It varies with the seasons.

99 I never did have a well. I sunk some pipes for test purposes. I did have a pipe that produced some water but never for house use.

Q. Now, you placed a value for the use of this water, \$15.00 per share per year. In fixing that value did you have in mind the continuous flow of the stream or a stream that came by turns?

A. I didn't have in mind any particular use of it excepting the use of the whole thing as I might want to use it or as anybody might want to use it, for the sales price of it, what it could be sold for.

100 Q. That is how you arrived at it, the sales price?

A. That is one of the methods.

Q. In order that we may understand, what kind of water right did you have in mind in placing that value, one of which was the continuous flow of culinary water or one of water turn coming every seven or eight days.

A. It was the water rights represented by the $22\frac{3}{4}$ shares of the water of the creek as adjudicated in a certain case.

Q. I haven't the slightest idea what kind of water right that is.

A. I haven't much idea myself, only I know the value of it and the use it could be put to.

Q. In order that I might ask somebody else about it I would have to inform them what kind of a water right it was.

A. I could not tell you what kind of water it is excepting it was an undivided interest of water allowed to that ditch.

Q. Did you have in mind the water whatever the right was and what its value would be to be used entirely for culinary purposes?

104 A. Does that include beautification?

Q. I am not an expert on culinary use.

105 A. I want to know what you mean. I base my value on that water for household purposes

and beautification, landscaping and growing trees, not growing any products for sale, farm products. And in addition, I don't think I got your statement before, whether it would be continuous use or not or in periods. Do you want to know in regard to that?

Q. I want that. Maybe we had better start over so you may have it in mind. In basing your value for use at \$15.00 per share per year, did you have in mind the right to use the water continuously or use it in turns about every seven or eight days?

A. I had this in mind, that I am not quite sure whether that right would permit a continuous flow or not. I think it would, but if it would not I have in mind it could be put in a tank and pumped over my land there and all used for culinary purposes and whenever I needed it.

Q. Then you are basing your value on what the water is worth to you?

A. No, not at all. I stated I think it could have been sold for much more. The value to me would be at least \$800.00 more.

Q. We are not interested in the value of the water only in what it would aid to fix the rental value.

A. I could not say what might be done. I could not build houses there because of this liti-

gation which has been going on for years. I am basing my opinion of the valuation of what I am quite sure it could have been sold for in the market, a reasonable income on it.

Q. A reasonable income. Do you mean what it could be rented for?

106 A. Sold or rented, both.

108 Mr. Moyle is shown Application No. 26 which was filed in the office of the State Engineer at the State Capitol on the 17th day of June, 1938. Identifies his signature.

109 Q. Do you remember using this language: "That protestant has at present use and prospective use for all of his said Big Cottonwood water for culinary, residential and stock watering purposes, and has no use for the Utah Lake or Jordan water proposed to be substituted for it." Paragraph 4, "That protestant's land in Holladay in Salt Lake County upon which he does now and has for many years used his said water from Big Cottonwood Creek, is not and never has been or will be used for farming purposes, and is valuable for and suitable and has been used only for residential purposes and not for farming, and is and has been for many years entirely platted to be used for residences. That protestant's land is valuable only for residential purposes and that all of protestant's said water from Big Cotton-

wood Creek is necessary for culinary and residential purposes upon his said land.”

Q. Do you remember making that or those statements?

A. Yes.

Q. Is it true?

A. It is entirely true except for doing any farming. I told you the other day I grew some little garden there. I grew some alfalfa in 1915, tried to with this water on the north part of my property, but it was so rocky and so many trees.

110 Q. I don't believe this is quite clear in the record. You testified there was during parts of the year since this order of court there was Lake water turned into the Big Cottonwood Tanner Ditch. You testified to that. You recall the Lake water doesn't run there all the year round?

A. In the latter part of the season ordinarily.

Q. What I want to ask you about is before the Lake water is turned in in the spring did you use the water that was running there coming from the Big Cottonwood stream?

A. I used some of it for these two little tracts there; you are talking about since 1926?

Q. Yes.

A. Yes, I used some of it. I don't think I used as much as I was entitled to for my stock in the corporation. I attempted not to use any of the water the city took away from me for I didn't have any right.

Q. What I want to know is, did you use it when the Lake water wasn't in the stream?

111 A. I used it for a little patch in front of my home, and we have an orchard, may be have altogether two acres.

Q. So you didn't use any part of the right represented by the $22\frac{3}{4}$ shares in the spring before the Lake water went in and in the Fall when it went out?

A. I certainly didn't; tried not to.

Q. In other words, you tried not to get the benefit of that water?

A. Absolutely.

112

REDIRECT EXAMINATION

(By Judge Lewis).

EXAMINATION BY THE COURT:

The land that may be irrigated by water from the Big Cottonwood Creek is used some for farming and some not. My land is not good for farming. It is a fact that the land in what they call

the Big Cottonwood Canyon area is available for residential purposes absolutely and nothing else and the water enhances materially the value of the land. The land would not be worth any more than land across the river without the water. Land has been increasing in value for residential purposes.

113 THE COURT: Does it make any difference what use Mr. Moyle put it to?

JUDGE LEWIS: I do not think so.

THE COURT: Isn't it a question of what it might be put to by people in that community.

JUDGE LEWIS: Yes, I think that is true.

114 (CONTINUED BY THE COURT).

Q. In your judgment is that water more valuable for residential purposes, flowers, shrubs and lot beautification than it is for farming?

A. It is worth ten times as much for those purposes.

Q. Let me ask this further question: There is a shortage of water for those purposes out there, isn't there?

A. Yes, Your Honor.

Q. What I mean is this: there is enough land and possibly on the market a sufficient demand for

residences of that type depending upon the availability of water. In other words, the demand is greater than the water is available?

A. Yes, Your Honor.

THE COURT: I thought those were matters that might be taken judicial notice of, but probably that would be stretching judicial notice too far. That is all.

REDIRECT EXAMINATION

(By Judge Lewis).

115 Identifies Exhibit "D" as a map of his premises.

Map offered and received in evidence.

116 RECROSS EXAMINATION

(By Mr. Christensen).

Q. I say, the ground where your home is and north along through the cottonwoods what you have referred to as a fine residential area is covered by exchange agreements similar to the one you have introduced in evidence here?

A. I don't know as to that; some have and some haven't; I have always been a contender and disputer. The Dreyfus property is not far from my place. It is along the north branch of the Tanner Ditch.

DIRECT EXAMINATION

(By Judge Lewis of M. R. WEILER).

I reside at 2682 Cottonwood Road which is directly south from the east portion of the Moyle property. I am familiar with the topography of his ground and the use that has been made of it. I am familiar with the quality of water that is in the Big Cottonwood Canyon stream in its natural condition and familiar with the quality and use of the water that is pumped into Big Cottonwood stream by Salt Lake City. I have been in the market to buy culinary water for use on my premises where I have lived for the past seven years.

121 By reason of my acquaintance and by reason of my being in the market to purchase culinary water I have become familiar with the market price of culinary water at that place. I am trained as a civil engineer. Am a stockholder in the Big Cottonwood Tanner Ditch.

122 I am familiar with the amount of water that a stockholder by reason of owning one share of stock in that company is entitled to use out of the mains belonging to Salt Lake City. I am familiar with the Big Cottonwood Canyon stream from the intake of the city conduit at the mouth of Big Cottonwood stream down past the intake of the Tanner Ditch. Have been along there two

or three times a week throughout the entire year. The city pumps Lake water into the Big Cottonwood Canyon stream, varying from June or July of each year, sometimes early in June and continues generally until October and during that time the Big Cottonwood Canyon stream is dry between the intake of the city conduit and the point where the Jordan water is pumped into the streambed. From probably the first of July until
 123 the water starts the run-off in the spring. I am acquainted with the market value of culinary water in that vicinity at the present time. I know the quantity of water that would come to the plaintiffs by reason of the $22\frac{3}{4}$ shares that are outside of the corporation shares.

Q. I will ask you what in your judgment would be the rental value per annum during the time you have been familiar with it of each of these the $22\frac{3}{4}$ shares, the rental value per annum?

MR. CHRISTENSEN: We will object as incompetent, irrelevant and immaterial; not material; not the measure of damages, and from his testimony as to the value of it as a culinary purpose isn't the right Mr. Moyle is entitled to.

124 THE COURT: I don't think he asked for it.

MR. CHRISTENSEN: I didn't understand the question then, Your Honor.

THE COURT: He was interrogating as to if he knew what the exchange agreement was for stock in the Tanner Ditch with the city water per share; as I got the question it is as I have stated. Read the question.

A. I would say fifty dollars a year would be conservative.

Q. Fifty dollars a year?

A. Yes, sir.

CROSS EXAMINATION

(By Mr. Christensen).

Q. You said you are familiar with the amount and quantity of water that Mr. Moyle would receive by virtue of the $22\frac{3}{4}$ shares; how much would he receive during the year 1938?

A. I averaged the run of it for a period of eight years and I don't have the figures as to each individual year, but I can tell you how much water he would be entitled to on the average flow of that stream for eight years.

Q. Did you measure the Big Cottonwood stream?

A. I obtained the figures from the engineer's office.

Q. And what did the engineer's office give you as the measurements of the stream of the Big Cottonwood Tanner Ditch?

A. 13.21/60th.

125 Q. And what percent of that stream did you
give to Mr. Moyle?

A. I gave him 22/34/17-1780/5ths.

Q. Did you figure that on the continuous
flow basis?

A. I figured it on the total gallonage, the
total run-off of the stream for the year.

Q. Did you take the average flow of the
stream of the Big Cottonwood for the entire year,
and did you reduce it down?

A. That is bigger than the other figure would
be, 13.21/60ths plus, April 1st to December 30th,
and March 1st to October 1st, 11.4/60ths would
apply.

Q. And you figured that stream all the winter
long?

A. Yes, sir.

Q. And took the winter water as well as sum-
mer water and put it all in one aggregate amount?

A. That is correct.

Q. And from that is what you concluded the
value of the water?

A. Yes, sir.

126 I have no information as to where the figures were taken on Big Cottonwood creek. There would be a water loss from the conduit at the mouth of Big Cottonwood Canyon down to the place where it is diverted into the Big Cottonwood Tanner Ditch.

127 I don't know the minimum amount.

128 I made an allowance for loss of water of practically fifty per cent between where it is measured and where Mr. Moyle receives it.

130 I have rented no water myself and don't know of anyone that has rented water up there.

131 A week ago water stock in the Big Cottonwood Tanner Ditch Corporation was selling for \$150.00 a share.

REDIRECT EXAMINATION

(By Judge Lewis).

132 There is approximately four times as much irrigation water delivered as culinary water per share of stock in the Big Cottonwood Tanner Ditch Company.

133 Q. Now, on the market value of the stock that you purchased, is that stock more valuable for the one-fifth that you get in culinary water or the four-fifths you get in irrigation water?

MR. CHRISTENSEN: We object as calling for a conclusion; not within the issues of this case.

THE COURT: Objection is overruled; he may answer.

A. It is much more valuable for the culinary water than for the irrigation water.

Q. In the stock that you purchased have you any use for the irrigation water on your premises at all?

A. No.

135 MR. MOYLE called for further direct examination by Judge Lewis.

136 There are three openings leading to that thirty-two acres. My daughter, Mrs. Rudine, has one of the openings and she has water of her own; but that is part of the thirty-two acres. She has stock in the corporation. That is the southwest part of the corner, and the other two openings are up here (indicating on the map). One is to the residence and the other to the cottages.

139 RECROSS EXAMINATION

(By Mr. Christensen).

Q. Would it make any difference in your judgment as to the reasonable rental value per year per share if it was a fact that you had only an irrigation right?

A. If my water was not culinary water?

Q. No.

140 A. No, it wouldn't make any difference if I had only an irrigation right or pure water.

Q. Would it make any difference as to your estimate of the reasonable value of the $22\frac{3}{4}$ shares if it were a fact that your right there was to use that $22\frac{3}{4}$ shares of water right out of the Big Cottonwood Tanner Creek during the irrigation season only?

A. If it were not contaminated with other water and the water was Big Cottonwood water I would say it would make no difference.

Q. Would it make any difference in your estimate of the rental value of the water if your water right was out of the Big Cottonwood Tanner Creek and not co-mingled with other waters, and you took your turn for whatever unit of time it was from six or seven days rather than in a continuous flow?

A. No, I don't think it would.

145 Q. Would you say that \$15.00 per share per year was a reasonable value for water used entirely for irrigation water, irrigating trees and some other crop?

Objected to as immaterial.

Objection sustained.

- 146 Q. If there is no drinking water right in the right you are now contending for, would you then make any different estimate of the reasonable value of the rent per year?

Objected to as immaterial.

Objection sustained.

- 147 Q. If you had considered that none of the water right that you have or claimed to have was to be used for culinary water, would your estimate as to the value for yearly rental been any different than what you have given us?

Objected to as immaterial and objection sustained.

The official files of the Third Judicial District Court, Case No. 14230, entitled The Big Cottonwood Tanner Ditch Company vs. Vincent Shurtleff, et al, filed August 21, 1911, are produced by Mr. Christensen and stipulated to as being the official files. Mr. Moyle testified he was a defendant in that case and filed answer in it that the $22\frac{3}{4}$ shares of water right in question here was involved in that case.

- 148 The case was tried and determined and a decree entered on the 5th day of October, 1914.

MR. CHRISTENSEN: If the court please, we offer in evidence the files in the case No. 14230,

and particularly the amended complaint of the plaintiffs, the answer of defendant Oscar W. Moyle and the Findings of Fact and Conclusions of Law and Decree signed by C. W. Morse.

150 THE COURT: All right, it will be received.

We will refer to it as Exhibit 2, or the Shurtleff case.

Exhibit 2 reads as follows:

(Title of Court and Cause):

AMENDED COMPLAINT.

Plaintiff complains of defendants and alleges:

-1-

That plaintiff is now and at all times herein mentioned was a corporation organized and existing under the laws of the State of Utah.

-2-

That the Big Cottonwood Tanner Ditch was constructed in the year 1848, and diverts water from Big Cottonwood Creek in Salt Lake County, State of Utah, for domestic, culinary and irrigation purposes, Thirteen and Twenty-one hundredths Sixtieths (13.21/60ths) of said stream when the flow of said stream does not exceed One Hundred Twenty (120) cubic feet per second, and

Ten and Twenty-three hundredths Sixtieths (10.23/60) during all other times; and that said Big Cottonwood Tanner Ditch diverts water from said Big Cottonwood Creek from the west side thereof in the Northwest Quarter of the Northwest Quarter of Section Twenty-three (23), Township Two (2) South, Range One (1) East, Salt Lake Meridian, and conducts water thence West-erly, Northwesterly and Southwesterly by main ditch and branches, and waters lands owned by the stockholders of the plaintiff and defendants herein. That all of the users of the water, and owners of water rights of said Big Cottonwood Tanner Ditch are stockholders in said Big Cottonwood Tanner Ditch Company, a corporation, plaintiff herein, except defendants herein.

-3-

That said The Big Cottonwood Tanner Ditch Company was organized for the purpose of owning, acquiring, controlling, managing, maintaining, and keeping in repair reservoirs, water ditches, canals, dams, flumes, weirs, head-gates, water pipes and other conduits and appurtenances necessary for the proper and systematic diversion of the waters of Big Cottonwood Creek and its tributaries belonging to said corporation, stockholders and owners in said Big Cottonwood Tanner Ditch in Salt Lake County, State of Utah, and for the purpose of distributing said water to the

stockholders of said corporation and owners thereof for irrigation of lands, for domestic, culinary and mechanical purposes.

Plaintiff further alleges that the questions involved are questions of general interest of many persons and plaintiff brings this action on behalf of itself and all the stockholders thereof, and persons similarly interested.

-4-

That for the purpose of fairly, effectively, and equitably distributing said water to the stockholders in said The Big Cottonwood Tanner Ditch Company, and owners in said ditch, it has been the custom ever since the construction thereof to distribute to each owner his proportion thereof by distributing to each owner all of the stream flowing in a branch or branches of said ditch for a **definitely stated** period of time, or a definite fractional part thereof for a definite period of time, which said custom is now and has been, a matter of necessary regulation in order that said water may be distributed equitably and be used beneficially.

-5-

That ever since the organization of said plaintiff corporation, the Board of Directors of said corporation, by authority delegated to them, have managed and controlled said ditch, elected water

masters, and thereby apportioned and distributed the water through said ditch to the stockholders of the corporation and the owners of water rights in said ditch who are not stockholders thereof, according to their respective shares and interests therein, and so as to secure a proper distribution, and beneficial use of said waters.

-6-

That there are owned and recognized by said Company and its stockholders and other owners of said ditch and water rights, and irrigated by them, about One Thousand Eight Hundred Sixty (1860) acres of land, and the water and water rights of said ditch as recognized by said Company and its stockholders is divided into One Thousand Seven Hundred Eighty-eight (1788) shares, all of which is owned by said Company, except Two Hundred Fifty-six and Nineteen Twenty-fourths ($256 \frac{19}{24}$) shares, which said shares are owned by defendants herein who are not members of said corporation, but draw water through said Big Cottonwood Tanner Ditch, and have received all the benefits of protection, supervision, distribution, regulation, and control of the water by and through said ditch by said Company, the same as other owners, whether stockholders of said corporation or not. Said defendants are entitled to the following number of

shares of water right in the branches of said ditch, as herein set forth, and not more, to-wit:

In the South Branch of said Big Cottonwood Tanner Ditch:

Vincent Shurtliff and Mary E. Shurtliff, from January 1st to July 1st, 41 shares and from July 1 to Dec. 31st 29 shares; Ray Van Cott, from January 1st to July 1st 4 shares and from July 1st to Dec. 31st 2 shares; Peter Erskine and A. Erskine, or the estate of A. Erskine, deceased, from January 1st to July 1st 14 shares and from July 1st to Dec. 31st $4\frac{1}{2}$ shares; J. A. C. Nielson from January 1st to July 1st 4 shares and from July 1st to Dec. 31st 3 shares.

In the North Branch thereof: Oscar W. Moyle, 22 $\frac{3}{4}$ shares; James H. Moyle and Alice E. Moyle, 74 shares.

In the Main Branch thereof: A. B. Harris, 1 share; the heirs of William Larson, to-wit: Rose Larson, Gladys Larson, Nellie Larson, Eva Larson, Owen Larson and William Larson, $1\frac{1}{4}$ shares; J. A. C. Nielson from January 1st to July 1st 4 shares and from July 1st to Dec. 31st 3 shares; M. A. Keyser, whose other and true name is to plaintiff unknown, from January 1st to July 1st 11 shares and from July 1st to Dec. 31st $7\frac{3}{4}$ shares; D. B. Jeremy, 10 shares; James A. Fowlks, $4\frac{1}{3}$ shares; G. F. Smith, Orson J. Smith, Thomas R. Smith, Florence E. Smith

Bringinghurst, Katherine D. Smith Gilbert, George E. Smith, 20 shares; A. O. H. Fowlks, 17 1/3 shares; the heirs of Gustaf Anderson, deceased, 1 1/2 shares.

-7-

Plaintiff is informed and believes that the interests herein referred to as that of Peter Erskine and A. Erskine, belong to the estate of A. Erskine, deceased, but no administrator has been appointed for said estate, but that said Peter Erskine and A. Erskine are two of the heirs of said estate; that William Larson is deceased, and no administrator has been appointed of his estate; that Gustaf Anderson is deceased, and no administrator has been appointed of his estate.

-8-

That defendants herein, and especially Vincent Shurtliff and Mary E. Shurtliff, have refused and do refuse to recognize and abide by the necessary regulations for the distribution of said water, and have interfered with and threaten to continue to take said water from said ditch in total disregard of any regulations prescribed for the use thereof, and claim the right to take and use water therefrom in disregard of the rights of the stockholders of plaintiff and others, and have interfered with and threaten to interfere with any regulations of plaintiff as to said ditch

and the waters thereof, which said interference utterly prevents the equitable distribution, and beneficial use of said water, which said claims are without foundation and are void. Plaintiff alleges that unless said defendants are restrained by an order of this Court, matters of regulation, equitable distribution, and the beneficial use of said water cannot be enforced, and irreparable damage will be inflicted upon plaintiff and the stockholders of said plaintiff corporation and users of water from said ditch. Plaintiff further alleges that it has no plain, speedy and adequate remedy at law.

(Usual prayer and verified).

(Title of Court and Cause):

ANSWER OF DEFENDANT O. W. MOYLE.

Comes now defendant Oscar W. Moyle and for answer to plaintiff's amended complaint herein, admits, denies and alleges as follows:

I.

Defendant admits that plaintiff is a corporation but denies that it was organized prior to the day of, 19.....

II.

Defendant admits that Big Cottonwood Tanner Ditch was constructed in the year 1848 and

diverts water from Big Cottonwood Creek in Salt Lake County, Utah, for domestic, culinary, irrigation and power purposes, and that the owners of the water diverted in said ditch own as defendant is informed and believes and alleges the fact to be, one fourth of the entire flow of said Big Cottonwood Creek during all seasons of the year, and admits that said ditch diverts water from said Big Cottonwood Creek from the west side thereof as stated in plaintiff's complaint, and conducts said water for the owners thereof to their lands located west of Big Cottonwood Canyon in Salt Lake County, State of Utah. As to whether or not all of the owners of the water of said Tanner Ditch are stockholders in plaintiff corporation or defendants in this action, this defendant has no knowledge or information thereof sufficient to form a belief, and for that reason denies the allegation that all owners of water in said ditch are parties to or represented in this suit.

III.

Defendant admits the allegations of paragraph 3 of said complaint.

IV.

Defendant admits that plaintiff has managed, controlled and distributed the water represented by the issued capital stock of said corporation.

V.

As to the allegations of paragraph 6 of plaintiff's amended complaint defendant admits that he is the owner of 22 3/4 shares of water right in the north branch of said Tanner Ditch.

As to each and every other allegation contained in said paragraph 6 this defendant has no knowledge or information thereof sufficient to form a belief and for that reason denies each and every allegation not specifically admitted as aforesaid.

VI.

For lack of information and belief with regard to the allegations of paragraph 7 defendant denies each and every of said allegations.

VII.

As to the allegations of paragraph 8 of said complaint defendant admits that he refuses to recognize or abide by any regulations made by plaintiff with regard to its distribution of this defendant's water, and denies the right of plaintiff to distribute, manage or control in any way the water belonging to said defendant, except water owned by this defendant represented by stock in said corporation.

As to each and every other allegation of said paragraph 8 defendant has no knowledge or infor-

mation thereof sufficient to form a belief and for that reason denies each and every allegation not herein specifically admitted.

VIII.

For further answer to plaintiff's said complaint defendant denies each and every allegation thereof not hereinbefore specially admitted.

For further answer to plaintiff's amended complaint and by way of counter claim and cross complaint against plaintiff and all other defendants in this action, this defendant alleges:

I.

That plaintiff is and has been for the last years a corporation existing under and by virtue of the laws of the State of Utah.

II.

That the defendant is the owner of, in possession and entitled to the possession of the three following pieces of property located in Salt Lake County, Utah, to wit:

10 Acre Piece: Commencing at a point 61-1/5 rods south of the northeast corner of the northeast 1/4 of Section 21, Township 2 South, Range 1 East, Salt Lake Meridian; thence west 72 1/5 rods; thence south 22 1/5 rods; thence east 72 1/5 rods; thence north 22 1/5 rods to place of beginning, consisting of 10 acres of ground.

6 Acre Piece: Beginning in the center of an east and west county road 14.25 chains east from the southwest corner of section 15, Township 2 South, Range 1 East, Salt Lake Meridian; thence north 2 deg. 50 min. east 10 chains more or less to the center of the main branch of the Tanner Ditch; thence west along the center of said ditch 5 chains; thence south 5 deg. 15 min. west 10 chains more or less to the section line; thence east 5.41 chains to beginning, constituting about 6 acres of ground.

32 Acre Piece: Beginning at the southeast corner of the southeast 1/4 of Section 15, Township 2 South, Range 1 East, Salt Lake Meridian, Salt Lake County, Utah; thence west 64 rods; thence north 80 rods; thence east 64 rods; thence south 80 rods to place of beginning, containing about 32 acres of ground.

That the soil of all of said tracts of land is sandy or gravelly and will not produce crops or vegetation without the application of water thereto.

III.

That Big Cottonwood Creek is a natural mountain stream rising in the mountains east of Salt Lake Valley, and flowing generally in a westerly direction through Big Cottonwood Canyon to Salt Lake Valley, and carrying water to lands on the east side of said valley, among which lands is the property above described.

IV.

That in the year 1848 for the purpose of diverting and appropriating the waters of said Big Cottonwood Creek the channel for the Big Cottonwood Tanner Ditch was constructed beginning at the west bank of Big Cottonwood Creek at a point about 20 rods east and 15 rods south of the southeast corner of said 32 acre tract above described, and from said point said Tanner Ditch run northwesterly, entering said 32 acre tract on the south side thereof, at a point about 12 rods west from the southeast corner of said tract, and from that point run northwesterly on said tract a distance of about 10 rods where the same divided into two channels, the north channel being known as the north branch, and the south channel as the main branch of said Big Cottonwood Tanner Ditch, and from said point of division said channels run in a general northwesterly direction cutting the west side of said 32 acre tract, the said main branch at a point about 25 rods north from the southwest corner of said tract and the said north branch at a point about 20 rods further north. From which westerly side of said 32 acre tract said main branch run westerly across the entire north end of said six acre tract. The channel of said south branch of said creek is and at all times has been about 15 feet wide and about 2 feet deep and the channel of said north branch about 10 feet wide and 2 feet deep, and from the

time that the channel of said ditches were constructed as aforesaid, that is in the year 1848 one fourth of all the waters of said Big Cottonwood Creek were by the predecessors in interest of this defendant and other parties to this suit appropriated and diverted to said channels from said Big Cottonwood Creek and ever since said time have flowed continuously through the said channels carrying said water to the lands of said appropriators and their successors in interest, and for great distances on either side of the channels of said Tanner Ditch Creeks through said lands of defendant and moistening and moderating the air in and around said creeks, and the flowing of said creeks through said lands as aforesaid has caused them to be and they are much more valuable for residence and other purposes than lands similarly located without said creeks. That defendant purchased said tracts of land relying upon said water so running in said creeks and planted trees, shrubs and other vegetation on the land adjoining said streams and cared for the same and all trees and vegetation growing thereon, and built residences on the banks thereof and over the channel of said streams.

V.

That said water flowing in said channels as aforesaid at all times fertilized, moistened and irrigated by percolation the banks of said creeks

and the lands adjoining the same, through said tracts of land for a distance of about 20 feet on either side thereof, and thereby caused shrubs, grass, flowers, trees and other vegetation to grow thereon, and there is now upon said premises adjoining said streams large trees as high as 50 feet in height and trees of many varieties such as oak, cottonwood, birch, alder, chokecherry and other kinds producing wood and continuous shade along the entire banks of said creeks and lands adjoining, and said water flowing as aforesaid has at all times moistened and moderated the air in and around said creeks and made the said lands more desirable and valuable on account thereof for agricultural, residence and other purposes, and said tracts of land are more valuable on account of said streams running through the same than other lands similarly located without said creeks passing through them, and said water has been so used during all of said period by defendant and his predecessors in interest, adversely, uninterruptedly, continuously, openly, peaceably and under a claim of right.

That defendant purchased said tracts of land relying upon said water so running in said creeks and irrigating the same as aforesaid, and likewise relying thereon defendant and his predecessors in interest have planted and cared for trees, shrubs, flowers and other vegetation on the land adjoining said streams and built residences on

the bank thereof and over the channels of said streams and said tracts of land through which said streams run as aforesaid have at all times since the year 1848 been so used.

That said waters flowing over said tracts of land owned by the defendant is suitable for the cultivation and maintenance of such and has at all times since the ditches were constructed contained valuable mountain trout and other fish owned by defendant and his predecessors in interest, and defendant and his predecessors in interest have at all times cultivated, cared for and planted fish in said streams, and said use is and at all times has been adverse, uninterrupted, continuous, open, peaceable and under a claim of right. And defendant claims and asserts the right and intends to at an early date install necessary fish screens wherever he may desire to place them; to plant, keep, maintain and propagate fish in said channels of said Tanner Ditch where they flow through defendant's said premises.

That in about the year 1893 the predecessors in interest of this defendant owning said 32 acre tract above described appropriated from the surplus waters of said Big Cottonwood Creek in said Tanner Ditches the amount of water hereinafter set forth, taking the same from said ditches at a point about 40 feet above the point of division of said Tanner Ditches on said 32 acre tract, and

ever since said year 1893 defendant and his predecessors in interest have used said water so appropriated on said 32 acre tract for the irrigation thereof, and producing crops and other vegetation thereon. The amount of water so appropriated and used since and including the year 1895 as near as the same can be determined is an amount of water 10 inches deep flowing continuously through a headgate 2 feet six inches wide, being a flow of inches per second, for four days out of every week from about the first day of March to about the 15th day of July of each year, the exact dates depending upon the period of high water in said Big Cottonwood Creek each year, and said water has been so used during all of said period by defendant and his predecessors in interest, adversely, uninterruptedly, continuously, openly, peaceably and under a claim or right.

That for more than 25 years last past defendant and his predecessors in interest have taken, diverted and used for culinary and domestic purposes and for cooling a milk house on said premises from the north branch of said creek by means of a small ditch taken out at a point immediately below where said creek divides on said 32 acre tract, a perpetual stream of water therefrom flowing through an opening about one foot wide and about 2 inches in depth, and said stream after passing by one of the residences of defendant on said premises and being used for culinary

and domestic purposes passes through the garden of defendant and after being used also for stock purposes is returned to the said creek from which it is taken, and said water has been so used during all of said period by defendant and his predecessors in interest, adversely, uninterruptedly, continuously, openly, peaceably and under a claim of right.

That for more than 25 years last past defendant and his predecessors in interest have taken from said main branch of said creek and used therefrom sufficient water to water all of the part of said 32 acre tract located south of said north branch of said creek, the same consisting of about six acres of ground, and said water has been used continuously during said period for the production of grass and other crops upon said land and defendant is the owner of sufficient water from said main branch for said purposes, and defendant and his predecessors in interest have used said water during said period adversely, uninterruptedly, continuously, openly, peaceably and under a claim of right.

That ever since the construction of said ditches in the year 1848 defendant and his predecessors in interest have used on said 32 acre tract sufficient of the waters of said creeks running through said ditches for culinary, domestic and stock purposes, and said water has been so

used during said period adversely, uninterruptedly, continuously, openly, peaceably and under a claim of right.

That ever since the construction of said ditches in 1848 defendant and his predecessors in interest have used the waters of said main branch of said creek flowing over the north part of said six acre tract at all seasons of the year for culinary, domestic and stock purposes and defendant is entitled to the use thereof, and said water has been so used during said period, adversely, uninterruptedly, continuously, openly, peaceably and under a claim of right.

That for more than 30 years last past the defendant and his predecessors in interest have used the waters of said south branch of said creek through a ditch, therefrom which passes through the northeast corner of said ten acre tract sufficient of the waters of said creek at all seasons of the year for culinary, domestic and stock purposes upon said tract and defendant is entitled to the use thereof and said water has been so used during said period, adversely, uninterruptedly, continuously, openly, peaceably and under a claim of right.

That the use by defendant and his predecessors in interest of all of the water above set forth on each and all of said tracts of land, and as therein set forth, is and at all times has been ad-

verse, uninterrupted, continuous, open, peaceable and under a claim of right, and said use is and at all times has been necessary for the proper cultivation and use of said tracts of land.

That the rights of this defendant in and to the waters of said Tanner Ditches as above set forth is in addition to the waters represented by the stock owned by this defendant in said plaintiff corporation, and also in addition to the 22 3/4 shares of waters owned by this defendant out of the north branch of said Big Cottonwood Tanner Ditch as set forth in plaintiff's amended complaint.

(Usual prayer and verified).

(Title of Court and Cause):

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE.

This cause being called regularly for trial before the Court without a jury, David W. Moffat, appearing as attorney for the plaintiff, and Stewart, Stewart & Alexander, as attorneys for the defendants, Vincent Shurtliff and Mary E. Shurtliff, and Moyle & Van Cott, Hurd & Hurd, and Weber & Olson, appearing for other defendants, and the Court having heard the proofs of the respective parties, and received the admissions and stipulations of

the parties hereto, and considered the same, and the records and papers in the cause and the arguments of the respective attorneys thereon, and the cause having been submitted to the Court for its decision, the Court now finds the following facts:

1st. That the plaintiff is, and ever since the 2nd day of March, 1904, has been a corporation duly organized and existing under and by virtue of the Laws of the State of Utah.

2nd. That the Big Cottonwood Tanner Ditch was constructed in about the year 1848 and diverts water from Big Cottonwood Creek in Salt Lake County, State of Utah, for domestic, culinary and irrigation purposes, and receives through said ditch its proportion of all of the waters of Big Cottonwood Creek, which waters are diverted from the west side thereof, in the Northwest Quarter of the Northwest Quarter of Section Twenty-three (23), Township Two (2) South, Range One (1) East, Salt Lake Meridian, and conducts water thence westerly, northwesterly and southwesterly by main ditch and branches, and the water of said ditches is used by the owners of land and stockholders of the plaintiff for the irrigation of land and for domestic and culinary purposes; and that a very large majority of all of the owners of water rights in the said Big Cottonwood Tanner Ditch, are stockholders of said The Big Cottonwood Tanner Ditch Company, plaintiff herein.

3rd. That the said The Big Cottonwood Tanner Ditch Company was organized for the purpose of owning, acquiring, controlling, managing, maintaining and keeping in repair reservoirs, water ditches, canals, dams, flumes, weirs, head-gates, water pipes and other conduits and appurtenances necessary for the proper and systematic diversion of the waters of Big Cottonwood Creek and its tributaries belonging to said corporation, stockholders and owners in said Big Cottonwood Tanner Ditch in Salt Lake County, State of Utah, and that said organization is necessary for the proper and economic distribution of the water flowing through said Big Cottonwood Tanner Ditch for the irrigation of lands and for domestic, culinary and irrigation purposes.

4th. That for the purpose of fairly, effectively and equitably distributing said waters to the stockholders in the said The Big Cottonwood Tanner Ditch Company and owners in said ditch, it has been the custom ever since the construction thereof to distribute to each one his proportion thereof by distributing to each one all of the stream flowing in a branch or branches of said ditch for a definitely stated period of time or a definite fractional part thereof for a definite period of time, which said custom is now and has been a matter of necessary regulation in order

that the said water may be distributed equitably and be used beneficially.

5th. That ever since the organization of said The Big Cottonwood Tanner Ditch Company, the Board of Directors of said corporation, by authority delegated to them by the stockholders of said corporation and the owners of water rights in said ditch who were not members of said corporation, have managed and controlled said ditch, elected water masters, and thereby apportioned and distributed the water of said ditch to the stockholders of the said corporation and the owners of water rights in said ditch who were not stockholders thereof, according to their respective shares therein, so as to secure a proper distribution and beneficial use of said waters.

6th. That there are about Eighteen Hundred Sixty (1860) acres of land irrigated under the said Big Cottonwood Tanner Ditch, and the water rights of said ditch are divided during the period of time from the 1st day of January, to the first day of July, into about Seventeen Hundred Ninety-five (1795) shares, and during the period of time from the first day of July to the 31st day of December, of each year, into Seventeen Hundred Sixty-eight (1768) shares; and that a share of water originally was recognized as the quantity of water that an owner received to irrigate an acre of land, but that because of increased effi-

ciency from time to time, the same quantity of water that an owner originally had has been required to do a greater duty, so that now the number of acres does not necessarily determine the number of shares of water right.

7th. The Court further finds that Peter Erskine, Adam J. Erskine, Archibald Erskine, James P. Erskine, John M. Erskine, Jessie Erskine Hunter and Annie Erskine Dangerfield and Mrs. Archibald Erskine, whose true and correct name is Annie Erskine, are the sole and only heirs at law of Archibald Erskine, deceased.

8th. The Court further finds that Rose Larson, Gladys Larson, Nellie Larson, Eva Larson, Owen Larson and William T. Larson, are the sole and only heirs at law of William T. Larson, deceased.

9th. The Court further finds that since the commencement of this action, J. A. C. Nielson has become the successor in interest and owner of the water rights in the Big Cottonwood Tanner Ditch heretofore owned by Joseph Marriott, one of the defendants set out in plaintiff's Amended Complaint.

10th. The Court further finds that the respective interests of Edward Smith and Reinhold Gustafson have been agreed upon between the parties hereto, and they have become members of

the plaintiff corporation, and no decree as to their respective rights need be entered, they having been defined by agreement between the parties.

11th. The Court further finds that the interests of M. A. Keyser have been agreed upon between the parties hereto, and he has become a member of the plaintiff corporation, and no decree as to his rights need be entered, they having been defined by agreement between the parties.

12th. That since the commencement of this action, the parties alleged as G. F. Smith, Orson J. Smith, Thomas R. Smith, Florence E. Smith Bringham, Catherine D. Smith Gilbert and George E. Smith, have agreed and stipulated between themselves that out of the twenty (20) shares they are jointly entitled to, Orson J. Smith is entitled to three (3) shares thereof.

That since the commencement of this action, George E. Smith has died; that his estate has been probated, and G. F. Smith, as his sole and only heir at law has become the owner of the interest of the said George E. Smith, deceased, in said water rights.

13th. That at the time of the commencement of this action, as alleged in plaintiff's complaint, James A. Fowlks was entitled to Thirty-one (31) shares in the South Fork of the Big Cottonwood Tanner Ditch, but that since the commencement

of this action, James A. Fowlks and Bertha Fowlks, his wife, have conveyed to Ray Van Cott five (5) shares out of said Thirty-one (31) shares theretofore owned by said James A. Fowlks.

14th. The Court further finds that Vincent Shurtliff and Mary E. Shurtliff, his wife, have received and are entitled to receive through the South Branch of the Big Cottonwood Tanner Ditch, from the first day of January until the 30th day of June of each year Forty-one (41) shares of water right, and from the first day of July to the 31st day of December of each year, Twenty-nine (29) shares of water right.

15th. That Ray Van Cott is entitled to receive through the South Branch of the Big Cottonwood Tanner Ditch, from the first day of January until the 30th day of June of each year, Nine (9) shares of water right, and from the first day of July to the 31st day of December of each year, Seven (7) shares of water right.

16th. That Peter Erskine, Adam J. Erskine, Archibald Erskine, James P. Erskine, John M. Erskine, Jessie Erskine Hunter, Annie Erskine Dangerfield and Mrs. Archibald Erskine, whose true and correct name is Annie Erskine, the sole and only heirs at law of Archibald Erskine, deceased, are entitled to receive jointly, through the South Branch of the Big Cottonwood Tanner Ditch, from the first day of January until the 30th

day of June of each year, Fourteen (14) shares of water right, and from the first day of July to the 31st day of December of each year, Four and one-half ($4\frac{1}{2}$) shares of water right.

17th. That James A. Fowlks is entitled to receive through the South Branch of the Big Cottonwood Tanner Ditch, Twenty-six (26) shares of water right during the entire year.

18th. That J. A. C. Nielson is entitled to receive through the South Branch of the Big Cottonwood Tanner Ditch, from the first day of January until the 30th day of June of each year, Four (4) shares of water right, and from the first day of July to the 31st day of December of each year, Three (3) shares of water right.

19th. That Oscar W. Moyle is entitled to receive, through the North Branch of the Big Cottonwood Tanner Ditch, Twenty-two and Three-fourths ($22\frac{3}{4}$) shares of water right during the entire year.

20th. That James H. Moyle is not entitled to any of the waters and owns no interest whatever in the Big Cottonwood Tanner Ditch.

21st. That Alice E. Moyle is entitled to receive, through the North Branch of the Big Cottonwood Tanner Ditch, Seventy-four (74) shares of water right during the entire year.

22nd. That A. B. Harris is entitled to receive, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, one (1) shares of water right during the entire year.

23rd. That Rose Larson, Gladys Larson, Nellie Larson, Eva Larson, Owen Larson and William T. Larson, the sole and only heirs at law of William T. Larson, deceased, are entitled to receive jointly, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, One and one-fourth ($1\frac{1}{4}$) shares of water right during the entire year.

24th. That J. A. C. Nielson is entitled to receive through the Main or Center Branch of the Big Cottonwood Tanner Ditch, from the first day of January until the 30th day of June of each year, Four (4) shares of water right, and from the first day of July to the 31st day of December of each year, Three (3) shares of water right.

25th. That D. B. Jeremy is entitled to receive through the Main or Center Branch of the Big Cottonwood Tanner Ditch, Ten (10) shares of water right during the entire year.

26th. That James A. Fowlks is entitled to receive, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, Four and one-third ($4\frac{1}{3}$) shares of water right during the entire year.

27th. That G. F. Smith, Thomas R. Smith, Florence E. Smith Bringham, Catherine D. Smith Gilbert are entitled to receive through the Main or Center Branch of the Big Cottonwood Tanner Ditch Seventeen (17) shares, jointly, during the entire year.

28th. That Orson J. Smith is entitled to receive, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, Three (3) shares of water right during the entire year.

29th. That A. O. H. Fowlks is entitled to receive, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, Seventeen and one-half ($17\frac{1}{2}$) shares of water right during the entire year.

30th. That since the commencement of this action Harriet E. Turner, wife of Amos H. Turner, has become the successor in interest of the heirs of Gustaf Anderson, deceased, and is entitled to receive through the Main or Center Branch of the Big Cottonwood Tanner Ditch one and one-half ($1\frac{1}{2}$) shares of water right during the entire year.

31st. The Court further finds that the plaintiff, The Big Cottonwood Tanner Ditch Company, is the owner of all of the water rights of the Big Cottonwood Tanner Ditch, except those owned by defendants to whom specific shares are awarded, as set out in these Findings.

32nd. The Court further finds that regulations should be adopted and provided so that the owners of water right, including the defendants herein to whom water is awarded, shall take all or such portion as they may be entitled to in as nearly a continuous flow as is reasonably possible, taking into consideration the necessity of rotation of turns for the purpose of increasing the efficiency and beneficial use of said water, in order that the owners thereof may have such part of the same as is necessary for their culinary, domestic and stock purposes.

33rd. The Court further finds that the claims of the several parties to water in excess of the shares to which the Court has found them entitled, for culinary purposes, cannot be allowed, as it appears from the evidence that all of the waters to which the Big Cottonwood Tanner Ditch is entitled, is apportioned and divided to the owners of such waters in shares, so that when an owner has received his shares, it is applied by him to irrigation, culinary, domestic or stock purposes, as a matter of application of his share and not the establishment of a different right.

34th. Upon the claim of the defendant Ray Van Cott to have decreed to him the exclusive right to fish in the Big Cottonwood Tanner Ditch, as set out in his Cross-Complaint, or to use the said ditch for a passage through his land for the

propagation of fish, or to have awarded to him the right to take from the Tanner Ditch certain of the waters flowing therein and use the same for power purposes, the Court finds that said claims are not supported by the evidence and finds the issues against said defendant, Ray Van Cott.

35th. Upon the claim made by the defendant, Oscar W. Moyle, for exclusive fish privileges and for the right to use the Big Cottonwood Tanner Ditch for a passage through his farm for the propagation of such, and for the right to divert through small ditches, waters flowing through the Big Cottonwood Tanner Ditch, or to divert any of the water flowing through said Big Cottonwood Tanner Ditch in addition to the water represented by the number of shares to which he is found to be entitled to as set out in these Findings, the Court finds that said claims are not supported by the evidence and finds the issues against said defendant, Oscar W. Moyle.

36th. Upon the claims of the defendant, A. O. H. Fowlks, to have decreed to him the right to take water from the Big Cottonwood Tanner Ditch and carry it through a small ditch and return it to the Big Cottonwood Tanner Ditch, and to have awarded to him an additional quantity of water from the Big Cottonwood Tanner Ditch in exchange for seepage and percolating water accumulated by him upon his farm, and discharge

into the Big Cottonwood Tanner Ditch, the Court finds that said claims are not supported by the evidence, and finds the issues against said defendant, A. O. H. Fowlks.

37th. The Court further finds that the claims of defendants to this action, claiming water in addition to the number of shares to which they have been found to be entitled, for culinary, domestic or stock purposes, are not supported by the evidence, and therefore said claims cannot be allowed, and the Court finds the issues against such claims.

38th. The Court finds from the evidence that there are no estoppels operating against any party to the action.

39th. The Court further finds from the evidence that no parties to the action have acquired any rights by adverse use.

40th. The Court further finds from the evidence that there are no waivers by any parties to the action in favor of any other parties.

As Conclusions of Law from the foregoing Facts, the Court now finds:

1st. That all of the water rights to which the owners of the Big Cottonwood Tanner Ditch and its rights, are entitled, have, by the owners thereof, been divided for convenience into about Eighteen Hundred Sixty (1860) shares, the same

being approximately the number of acres irrigated under the said Big Cottonwood Tanner Ditch.

2nd. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, Vincent Shurtliff and Mary E. Shurtliff, his wife, are entitled, through the South Branch of said ditch, to Forty-one (41) shares of water right from the first day of January to the 30th day of June of each year, and Twenty-nine (29) shares of water right from the first day of July, to the 31st day of December of each year.

3rd. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, Ray Van Cott is entitled through the South Branch of said ditch, to Nine (9) shares of water right from the first day of January to the 30th day of June of each year, and Seven (7) shares of water right from the first day of July to the 31st day of December of each year.

4th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, Peter Erskine, Adam J. Erskine, Archibald Erskine, James P. Erskine, John M. Erskine, Jessie Erskine Hunter, Annie Erskine Dangerfield and Mrs. Archibald Erskine, whose true and correct name is Annie Erskine, the sole and only heirs at law of Archibald Erskine, deceased, are entitled through the South Branch of said ditch, to Fourteen (14) shares of water right from the

first day of January to the 30th day of June of each year, and Four and one-half ($4\frac{1}{2}$) shares of water right from the first day of July to the 31st day of December of each year.

5th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, James A. Fowlks is entitled, through the South Branch of said ditch, to Twenty-six (26) shares of water right during the entire year.

6th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, J. A. C. Nielson is entitled, through the South Branch of said ditch, to Four (4) shares of water right from the first day of January to the 30th day of June of each year, and Three (3) shares of water right from the first day of July to the 31st day of December of each year.

7th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, Oscar W. Moyle is entitled, through the North Branch of said ditch, to Twenty-two and three-fourths ($22\frac{3}{4}$) shares of water right during the entire year.

8th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, James H. Moyle is not entitled to any of the waters and owns no interest whatever in the Big Cottonwood Tanner Ditch.

9th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, Alice E. Moyle is entitled, through the North Branch of said ditch, to Seventy-four (74) shares of water right during the entire year.

10th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, A. B. Harris is entitled, through the Main or Center Branch of said ditch, to One (1) share of water right during the entire year.

11th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, Rose Larson, Gladys Larson, Nellie Larson, Eva Larson, Owen Larson and William T. Larson, the sole and only heirs at law of William T. Larson, deceased, are entitled, through the Main or Center Branch of said ditch, to One and one-fourth ($1\frac{1}{4}$) shares of water right during the entire year.

12th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, J. A. C. Nielson is entitled, through the Main or Center Branch of said ditch, to Four (4) shares of water right from the first day of January to the 30th day of June of each year, and Three (3) shares of water right from the first day of July to the 31st day of December of each year.

13th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, D.

B. Jeremy is entitled, through the Main or Center Branch of said ditch, to Ten (10) shares of water right during the entire year.

14th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, James A. Fowlks is entitled, through the Main or Center Branch of said ditch, to Four and one-third ($4 \frac{1}{3}$) shares of water right during the entire year.

15th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, G. F. Smith, Thomas R. Smith, Florence E. Smith Bringhurst and Catherine D. Smith Gilbert are jointly entitled, through the Main or Center Branch of said ditch, to Seventeen (17) shares of water right during the entire year.

16th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, Orson J. Smith is entitled, through the Main or Center Branch of said ditch, to Three (3) shares of water right during the entire year.

17th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, A. O. H. Fowlks is entitled, through the Main or Center Branch of said ditch, to Seventeen and one-half ($17\frac{1}{2}$) shares of water right during the entire year.

18th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, Harriet E. Turner is entitled, through the Main or Center Branch of said ditch, to One and one-half ($1\frac{1}{2}$) shares of water right during the entire year.

19th. That out of the shares of water to which the Big Cottonwood Tanner Ditch is entitled, The Big Cottonwood Tanner Ditch Company, plaintiff herein, for the benefit of its stockholders, is entitled, from the first day of January to the 31st day of December of each year, to all of the water rights of all of the branches of the Big Cottonwood Tanner Ditch not in these Findings and Conclusions specifically found to belong to the other parties to this action.

20th. That on said ditch there is no such thing as a culinary right, domestic right, stock watering right, fish right, or power right separate and distinct or different from an irrigation right, but that all of such so-called rights are mere uses to which the various owners of rights in said ditch have applied the shares of water to which they are respectively entitled.

21st. That such regulations should be adopted and provided as will enable the parties to whom water is awarded, as aforesaid, to take all or such portion as may be necessary in as near a continuous flow as is reasonably possible. In order that

they may have such part of the same as is necessary for their culinary, domestic and stock purposes.

22nd. That the claims of the several parties to water in excess of the shares to which the Court has found them entitled, for culinary purposes, the Court finds cannot be allowed, as it appears from the evidence that all of the waters to which the Tanner Ditch is entitled is apportioned and divided to the owners of such water in shares; and if it is deemed advisable by the parties that the term "shares" should be made more definite, the Court will in the findings and decree to be entered under this decision, designate the fractional proportion of the waters to which the Big Cottonwood Tanner Ditch is entitled represented by one share.

23rd. The Court further finds that the plaintiff is entitled to a decree enjoining and restraining all of the defendants in this action from interfering with the distribution of the waters of the Big Cottonwood Tanner Ditch in accordance with the rules and regulations adopted from time to time by the owners of the water rights of said Big Cottonwood Tanner Ditch.

24th. The Court further finds that the plaintiff is entitled to a decree perpetually restraining the defendants from taking or using a larger quantity of water than the proportion to which

their respective shares would entitle them, in accordance with the regulations in the next preceding Conclusion referred to.

WHEREFORE, the premises and the foregoing Findings of Fact and Conclusions of Law being by the Court duly considered,

IT IS ORDERED, ADJUDGED AND DECREED:

First: That except the shares hereinafter decreed to the defendants in the above entitled cause, the plaintiff, The Big Cottonwood Tanner Ditch Company, for the benefit of its stockholders, is the owner of and entitled to the use through the various branches of the Big Cottonwood Tanner Ditch, of all of the water rights of said Big Cottonwood Tanner Ditch, consisting of approximately Sixteen Hundred Twenty-five (1625) shares, and its title thereto is hereby quieted and confirmed.

Second: That the defendants, Vincent Shurtliff and Mary E. Shurtliff, his wife, are the owners of and entitled to the use, through the South Branch of the Big Cottonwood Tanner Ditch, of Forty-one (41) shares of water right from the first day of January until the 30th day of June of each year, and Twenty-nine (29) shares of water right from the first day of July to the 31st day of December of each year, and their title thereto is hereby quieted and confirmed, and said

defendants are hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendants are entitled by virtue of the ownership of said Forty-one (41) and Twenty-nine (29) shares of water right, respectively.

Third: That the defendant, Ray Van Cott, is the owner of and entitled to the use, through the South Branch of the Big Cottonwood Tanner Ditch, of Nine (9) shares of water right from the first day of January until the 30th day of June of each year, and Seven (7) shares of water right from the first day of July to the 31st day of December of each year, and his title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said Nine (9) and Seven (7) shares of water right, respectively.

Fourth: That the defendants, Peter Erskine, Adam J. Erskine, Archibald Erskine, James P. Erskine, John H. Erskine, Jessie Erskine Hunter, Annie Erskine Dangerfield and Mrs. Archibald Erskine, whose true and correct name is Annie Erskine, the sole and only heirs at law of Archibald Erskine, deceased, are the owners of and

entitled to the use, through the South Branch of the Big Cottonwood Tanner Ditch, of Fourteen (14) shares of water right from the first day of January until the 30th day of June of each year, and Four and one-half ($4\frac{1}{2}$) shares of water right from the first day of July to the 31st day of December of each year, and their title thereto is hereby quieted and confirmed, and said defendants are hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendants are entitled by virtue of the ownership of said Fourteen (14) and Four and one-half ($4\frac{1}{2}$) shares of water right, respectively.

Fifth: That the defendant, James A. Fowlks, is the owner of and entitled to the use, through the South Branch of the Big Cottonwood Tanner Ditch, of Twenty-six (26) shares of water right during the entire year, and his title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said Twenty-six (26) shares of water right.

Sixth: That the defendant, J. A. C. Nielson, is the owner of and entitled to the use, through

the South Branch of the Big Cottonwood Tanner Ditch of Four (4) shares of water right from the first day of January until the 30th day of June of each year, and Three (3) shares of water right from the first day of July to the 31st day of December of each year, and his title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said Four (4) and Three (3) shares of water right, respectively.

Seventh: That the defendant, Oscar W. Moyle, is the owner of and entitled to the use, through the North Branch of the Big Cottonwood Tanner Ditch of Twenty-two and three-fourths ($22 \frac{3}{4}$) shares of water right during the entire year, and his title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said Twenty-two and three-fourths ($22 \frac{3}{4}$) shares of water right.

Eighth: That the defendant, James H. Moyle, is not entitled to any of the waters and

owns no interest whatever in the Big Cottonwood Tanner Ditch.

Ninth: That the defendant, Alice E. Moyle, is the owner of and entitled to the use, through the North Branch of the Big Cottonwood Tanner Ditch of Seventy-four (74) shares of water right during the entire year, and her title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said Seventy-four (74) shares of water right.

Tenth: That the defendant, A. B. Harris, is the owner of and entitled to the use, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, of One (1) share of water right during the entire year, and his title thereto is hereby quieted and confirmed and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said one (1) share of water right.

Eleventh: That the defendants, Rose Larson, Gladys Larson, Nellie Larson, Eva Larson, Owen Larson and William T. Larson, the sole

and only heirs at law of William T. Larson, deceased, are the owners of and entitled to the use, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, of One and one-fourth ($1\frac{1}{4}$) shares of water right during the entire year, and their title thereto is hereby quieted and confirmed and said defendants are hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendants are entitled by virtue of the ownership of said One and One-fourth ($1\frac{1}{4}$) shares of water right.

Twelfth: That the defendant, J. A. C. Nielson, is the owner of and entitled to the use, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, of Four (4) shares of water right from the first day of January until the 30th day of June of each year, and Three (3) shares of water right from the first day of July to the 31st day of December of each year, and his title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said Four (4) and Three (3) shares of water right, respectively.

Thirteenth: That the defendant, D. B. Jeremy, is the owner of and entitled to the use, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, of Ten (10) shares of water right during the entire year, and his title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said Ten (10) shares of water right.

Fourteenth: That the defendant, James A. Fowlks, is the owner of and entitled to the use, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, of Four and one-third ($4 \frac{1}{3}$) shares of water right during the entire year, and his title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity of water to which the said defendant is entitled by virtue of the ownership of said Four and one-third ($4 \frac{1}{3}$) shares of water right.

Fifteenth: That the defendants, G. F. Smith, Thomas R. Smith, Florence E. Smith Bringham and Catherine D. Smith Gilbert, are the owners of and entitled to the use, through the

Main or Center Branch of the Big Cottonwood Tanner Ditch, of Seventeen (17) shares of water rights during the entire year, and their title thereto is hereby quieted and confirmed, and said defendants are hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity of water to which the said defendants are entitled by virtue of the ownership of said Seventeen (17) shares of water right.

Sixteenth: That the defendant, Orson J. Smith, is the owner of and entitled to the use, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, of Three (3) shares of water right during the entire year, and his title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity of water to which the said defendant is entitled by virtue of the ownership of said Three (3) shares of water right.

Seventeenth: That the defendant, A. O. H. Fowlks, is the owner of and entitled to the use, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, of Seventeen and one-half (17½) shares of water right during the entire year, and his title thereto is hereby quieted

and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said Seventeen and one-half ($17\frac{1}{2}$) shares of water right.

Eighteenth: That Harriet T. Turner, the successor in interest of the heirs of Gustaf Anderson, deceased, is the owner of and entitled to the use, through the Main or Center Branch of the Big Cottonwood Tanner Ditch, of One and one-half ($1\frac{1}{2}$) shares of water right during the entire year, and her title thereto is hereby quieted and confirmed, and said defendant is hereby enjoined and restrained from taking, using or claiming any of the waters or water rights of the said Big Cottonwood Tanner Ditch in excess of the quantity to which the said defendant is entitled by virtue of the ownership of said One and One-half ($1\frac{1}{2}$) shares of water right.

Nineteenth: That the plaintiff have and recover its costs herein, taxed at..... Dollars.

BY THE COURT:

C. W. MORSE,
Judge.

Dated this 5th day of October, A. D. 1914.
Attested by G. P. Palmer, Clerk,

By Jos. W. Curtis, Deputy Clerk.

151 Judge Lewis offers in evidence Exhibit "E",
being certified copies of the proceedings in what
is entitled "Exchange Application No. 26" in the
State Engineer's office.

153 Objected to as incompetent, irrelevant and
immaterial.

THE COURT: I will receive it as admissions of Salt Lake City, and for that purpose only.

Plaintiff rests.

THOMAS F. McDONALD called as a witness for the defendant.

DIRECT EXAMINATION

(By Mr. Christensen).

Mr. Christensen offers in evidence Exhibit 3,
which is a certified copy of the application from
the State Engineer's office for a change of point
of diversion of the Big Cottonwood Tanner Ditch
Company's water rights.

156 THE COURT: I will reserve ruling upon it
and he may refer to that to refresh his memory
to give definite information.

My name is Thomas F. McDonald, reside at Murray. I am a civil engineer. I am court commissioner of Big Cottonwood Creek and have been since 1916.

161 Until the State Engineer gave Salt Lake City permission to make the change of the Big Cottonwood Tanner Ditch Company, which is about 1921, I regulated the ditches of the Big Cottonwood Creek according to the decree. I measured the head of each ditch practically every day during the irrigation season, and in the winter months about twice a week. That was my custom until the application to make the point of diversion of the use of the Tanner Ditch Company.

162 Since the change was made a great deal of the time the water as apportioned to the Big Cottonwood Tanner Ditch Company, and I might as well add the Green Ditch, have been diverted at the mouth of the Big Cottonwood Canyon according to the State Engineer's application and certificate. Since diverting the water at the mouth of Big Cottonwood Canyon I have not contacted Mr. Moyle, nor has he contacted me.

164 Mr. Moyle never complained to me that he was not getting his water from Big Cottonwood Canyon Creek or the Tanner Ditch.

Q. Were you ever served with any order from the court telling you that Salt Lake City had com-

demned part of the water rights in the Big Cottonwood Tanner Ditch and from then on not to deliver that water to the Big Cottonwood Tanner Ditch?

Objected to as immaterial.

Objection is sustained.

Exhibit 3 offered and received in evidence.

165

NO CROSS EXAMINATION

(By Mr. Lewis).

QUESTIONS BY THE COURT:

After the exchange agreement, part of the time water was pumped into the head of the Big Cottonwood Tanner Ditch and the point of diversion where Salt Lake City took the water from the Big Cottonwood Canyon Creek was up near the mouth of the canyon. All I do is to regulate the amount of water that is taken out of the Big Cottonwood Canyon Creek and put it into the Tanner Ditch.

167

CROSS EXAMINATION

(By Judge Lewis).

Water was first pumped into Big Cottonwood Creek bed above the Tanner Ditch inlet approximately in 1921.

168

169

170

171 REDIRECT EXAMINATION

(By Mr. Christensen).

There was never any Lake water in the Tanner Ditch until after the pumping plant on 62nd South was completed. I think it was finished in 1921. I may be wrong.

174 Witness excused until tomorrow morning.

EDWARD C. BAGLEY called as a witness for defendant.

DIRECT EXAMINATION

(By Mr. Christensen).

My name is Edward C. Bagley. Reside at 5601 Highland Drive, and have for the past 50 years.

175 I am familiar with the ground represented by the map, designated as Exhibit 1. I own property about a mile west of Mr. Moyle's and I use water from the Big Cottonwood Tanner Ditch and have done for fifty years. I rent about forty acres east of my property and adjacent to Mr. Moyle's property, adjoining his on the west and to the north of Mr. Moyle. I got water rights for that property out of the Big Cottonwood Tanner Ditch. The land is covered with groves and some of the
176 land has been plowed, used principally for pasturage. Has trees similar to those on the Moyle property. I have leased the property about the

last eight years. I got thirty-three shares of the Big Cottonwood Tanner Ditch Company water with the land.

177 Q. How much do you pay per year for the
rental of that forty acres of land and thirty-three
shares of water?

Objected to as immaterial.

178 Objection sustained.

I have used the Big Cottonwood Tanner Ditch water for fifty years. The Big Cottonwood Tanner Ditch Company was incorporated about 1924.
179 I transferred my water rights in the Big Cotton-
180 wood Tanner Ditch to the Big Cottonwood Tan-
181 ner Ditch Company. Before the water rights
were incorporated they sold for approximately
182 fifty dollars per share. After the incorporation
the market value went up. It has increased until
now it is worth \$150.00 a share, that is the stock
183 in the Big Cottonwood Tanner Ditch. On the
184 North Branch of the Big Cottonwood Tanner
185 Ditch we take the entire stream of that branch
during our water turn.

Q. Now, what is the custom on the ditch and how has it been for the past ten or twelve years; for instance, if it were your turn to take the water today at ten o'clock, where would you go to take your water so you could take it?

A. On this rented portion I would have to go to Mr. Moyle's place.

Q. In other words, you take it from the man just above you on the ditch?

A. Yes, sir.

Q. And that is the way you have been doing during ten or twelve years you have had this land adjacent to Mr. Moyle's?

A. Yes, sir.

Q. And Mr. Moyle is the man who uses the water of the North Branch of the Big Cottonwood Tanner Ditch before you?

A. Yes, sir.

186 Q. During those eight years and during the irrigation season when you have been using water to irrigate that, have you on each occasion gone up the ditch yourself to get your water in turn?

A. That is the rule.

Q. And each occasion when you went up there did you find the water diverted from the Big Cottonwood Tanner Ditch onto Mr. Moyle's land?

A. Yes, sir.

Q. And that has been each irrigation season during the past eight years?

A. Yes, sir.

Q. When you didn't have this water right and land adjacent to Mr. Moyle's then you would not go up as far as Mr. Moyle's place to get your turn of water?

A. I would quite often have to go there to get my water.

Q. Where would you find the water?

A. Mr. Moyle would have the water turned off.

Q. Where would he have it turned to?

187 A. Into his place.

Q. That was before the eight years?

A. Yes, sir.

During the last six or eight years the water-master issues me a ticket for the number of hours and the time of my turn. The ticket shows the number of shares and the number of hours per share and the time of day that I should take the water. That has been the custom all the time that I have lived out there. I am acquainted with the manner in which Mr. Moyle uses the water on his tract of land represented on Exhibit 1 adjacent to 62nd South. I know the water is turned in there, into his ditches. That has been ever since I lived out there. During the past thirty

188 years I have observed what Mr. Moyle did with
the water. He irrigates his trees or garden or
anything he has there. Runs it out on to the land.

189 CROSS EXAMINATION

(By Judge Lewis).

Mr. Moyle used his water to turn on to the
land. Before the pipeline was put in by the city
there was some culinary water had from wells.
My principal use for water and in my neighbor-
hood is for irrigation and we received our culi-
190 nary water through the pipeline.

REDIRECT EXAMINATION

(By Mr. Christensen).

I used my irrigation water to raise hay, grain
191 and fruit, fruit trees of all kinds.

RECROSS EXAMINATION

(By Judge Lewis).

We use both kinds of water on our lawn. The
Jordan leaves a scum on the lawn.

When their lots are burning up then they are
glad to get any kind of water.

192 We use pipeline water to sprinkle and we also
use culinary water.

EXAMINATION

(By the Court):

I was living out there in 1890 before the exchange agreement. In a very dry season as in 1890 very little water reached there and the Cottonwood trees died.

193 JOHN B. ERICKSON, a witness, testified.

DIRECT EXAMINATION

(By Mr. Christensen).

I reside at 5419 South 9th East and I own property there, along the center branch of the Big Cottonwood Tanner Ditch. Have lived there since 1920. Previous to that I lived a little west of there. I am president of the Big Cottonwood Tanner Ditch Company. Have been since 1931.

194 I am acquainted with the value of the stock in the Big Cottonwood Tanner Ditch Company. At the present time it is worth from \$125.00 to \$150.00 per share. Ten years ago it was approximately the same price. There hasn't been much change during the last twenty years. I am acquainted with the value of the stock in the Big Cottonwood Tanner Ditch previous to the time they made the exchange agreement with Salt Lake City and then it was worth around \$70.00 per share.

195 I don't know the rental value of the stock of the water rights in the Big Cottonwood Tanner Ditch which are not in the incorporation.

196 Q. Now, as president of the Big Cottonwood Tanner Ditch Company had you at any time been served with any notice from any court asking your company to divert the water in any way, manner or form?

OBJETED TO AS IMMATERIAL.

OBJECTION sustained.

Q. Do you know whether or not the company has been served with any orders from the court directing the company how it should divert or fail to divert the water claimed or owned by Mr. Oscar W. Moyle?

197 A. I don't remember; it seems to me there was such a thing occurred, but I don't remember just the details of it.

WITNESS directed to get the information and testify later concerning that subject.

198 I have fifty acres and twenty-five shares of the Big Cottonwood Tanner Ditch Company. I use the water to irrigate various crops, such as hay, grain and corn. My place is west of Highland Drive. I know where Mr. Moyle's property is.

199

CROSS EXAMINATION

(By Judge Lewis).

I live about three miles west from Mr. Moyle's property in a farming region. Water is used for irrigation. The Utah Lake water does not injure the crops. I get my culinary water through the pipeline.

200

RAY E. HUFFAKER, a witness for defendant.

DIRECT EXAMINATION

(By Mr. Christensen).

202

I live at 5100 South 9th East. I have a farm of about one hundred acres. I have forty-five shares in the Big Cottonwood Tanner Ditch Company. The property I have owned for thirty years. It is under the center branch of the Big Cottonwood Tanner Ditch. I know where Mr. Moyle's property is.

204

Before the incorporation the water rights were sold for \$60.00 a share.

205

Since the incorporation and the trade with Salt Lake City it is selling for about \$150.00 per share.

206

CROSS EXAMINATION

(By Judge Lewis).

We get the same quantity of water down on my farm as those who do that live at the head of the ditch. My ground is useful for farming. I have favored the exchange agreement of Salt Lake City, think it is beneficial.

207

REDIRECT EXAMINATION

(By Mr. Christensen).

The culinary right goes with the irrigation right on my shares of stock. Before the exchange agreement we didn't get as much water as we get now.

AMOS H. TURNER, a witness, called.

208

DIRECT EXAMINATION

(By Mr. Christensen).

I am living in Salt Lake City, formerly lived at 13th East and Vine Street, where I always lived until 1929. I was farming all the time I was out there and observed the use of water and trades of water for a number of years in the Cottonwood District. I am acquainted with the tract of land where Mr. Moyle lives. Have been acquainted with that ever since I was twenty and

I am now sixty-two years of age. I own water
209 in the Big Cottonwood Tanner Ditch and have
owned it ever since 1900. I bought and sold water
in that company and know of other water rights
210 in Big Cottonwood Tanner Ditch that have been
sold.

WITNESS examined as to his qualifications.

213 In my opinion the rental value per share of
water right represented in the Big Cottonwood
Tanner Ditch, not in the corporation, is two and
a half or three dollars per share per year.

CROSS EXAMINATION

(By Judge Lewis).

214 I base my valuation on my experience and
upon the use for irrigation purposes.

215 THOMAS F. McDONALD recalled for fur-
ther direct examination by Mr. Christensen.

I went through my records and refreshed my
recollection. The only time that Utah Lake water
216 was used in the Tanner Ditch before July 1st that
I could find my records on was in 1931.

CROSS EXAMINATION

(By Judge Lewis).

219 JOHN B. ERICKSON called for further DI-
RECT EXAMINATION by Mr. Christensen.

I was asked to make a search of the records and inquire as to whether or not the Big Cottonwood Tanner Ditch Company had ever been served by any order of court directing it not to deliver 22 3/4 shares of water right to the North Branch of the Big Cottonwood Tanner Ditch to someone other than Mr. Moyle and I don't find any such order.

HORACE T. GODFREY, a witness, called.

DIRECT EXAMINATION

(By Mr. Christensen).

220 I live on 64th South and 13th East. Have lived there since 1916. Two years previously I lived a mile north. I was born and raised in Murray. My business is farming and cattle raising. It has been all of my life. I am the water-master for the Big Cottonwood Tanner Ditch Company. Have been such since February, 1929. I have owned water rights in that company since '28 or '29.

221 I am acquainted with the Big Cottonwood Tanner Ditch and all of its branches. I am familiar with the pumping plant on 62nd South, just above Highland Drive, and with the pipeline that runs easterly and up to Big Cottonwood Creek and on up to the canal.

220 As watermaster I issue a card and deliver it to the water owner. The card shows the time to take the water and the number of hours and minutes each share holder has and I keep a duplicate of that card.

223 I generally deliver the cards personally through the irrigation season.

224 WITNESS showed Exhibit 4.

States that it is a card delivered to Mr. O. W. Moyle for his time in the early irrigation season from April to the first of July. It is for one of the years that I was watermaster. I cannot identify this card as to the particular year. The secretary of the company furnished me a list of the stock and each year notified me of any change in the ownership. This included stock in the corporation and water rights in the ditch, not in the corporation. And I treated the shares of water rights out of the corporation in the same manner as to delivering time tickets as I did those in the corporation.

EXHIBIT 4 offered and received in evidence.

225 Exhibit 4 is a time ticket of the Big Cottonwood Tanner Ditch Company and has the name O. W. Moyle on it in my handwriting. Branch N refers to the North Branch. Shares 26, that denotes the number of shares Moyle has in the North Branch and Hours 13, that is thirty minutes

to the share. That is for April 20th. That would be his first turn commencing at 6:35 P. M.

Q. That would mean that so far as you, as watermaster were concerned you had issued a ticket to him to give him the right to use the water thirteen hours from the full stream on the North Branch beginning at 6:35 P. M.?

A. Yes, sir.

Q. Here is the 30th of April?

A. Yes, sir.

226

Q. And the turn again commences at 6:35?

A. A. M., yes sir.

Q. And the next turn commences on May 9th?

A. Yes, sir.

Q. And commences at 6:35?

A. P. M., yes sir.

Q. And on May 19th, commences at 6:35 A. M.?

A. That is right.

Q. And again on May 28th?

A. That is correct.

Q. And the same interpretation would be read into the rest of these figures?

A. That is right.

Q. Now, during the time that you have been water master there from '29 until to date, have you always during that period of time issued a card to Mr. Oscar W. Moyle for twenty-six shares in the North Branch of the Big Cottonwood Tanner Ditch?

A. No.

Q. What years do you have a difference there from that, if any?

A. '36, '37 and '38.

227 A. Three and a fourth.

Q. That was for each turn during that year?

A. And '37?

Q. Same amount.

A. And '38.

Q. How about '39?

A. I again issued the 26 shares again.

Q. Did you retain copies of all the cards you issued during the time you were watermaster?

A. And have them now?

Q. Yes.

A. I don't think I have them now. I issued them each year and I filed them away in the cedar

chest and when the Shurtliff case was on a lot of them were brought here and never returned to me.

228 Q. I show you now what has been marked defendant's exhibit 5, consisting of six cards, and ask you to examine them and tell us what they are.

A. Those are tickets delivered to Mr. Moyle for his water turn.

Q. Is it the same explanation in each and every one of these cards the same as you explained in exhibit 4?

A. Yes, sir.

EXHIBIT 5 offered in evidence and received in evidence.

229 Q. I show you what is marked Exhibit 6, and ask you what that is.

A. That is the card I delivered for the second half to Mr. Moyle for 1936.

Q. According to this card how many shares in the North Branch did it represent?

A. Three and a quarter.

I delivered a similar card for the first half which also represented three and a quarter.

230 I don't recall who I delivered the ticket to but I recall going there after the ticket was de-

livered and saw Mrs. Moyle. She asked me to come to see her as to why this reduction in the stock at this time, why they didn't get the same amount of water and I told her Mr. Moyle had contacted me and didn't want his water out of the corporation time to him any more.

EXHIBIT 6 offered and received in evidence.

231 I issued tickets while I was watermaster covering all the water rights in the Big Cottonwood Tanner Ditch and in 1939 I issued tickets to Mr. Moyle in the sum of 26 shares.

Exhibit 7 is in my wife's handwriting. It is a copy of the ticket I delivered to O. W. Moyle covering the first part of the season for the sum of 26 shares in the North Branch of the Big Cottonwood Tanner Ditch.

232 EXHIBIT 7 is offered and received in evidence.

233 During the years '36, '37 and '38 these 22 3/4 shares of stock that were taken off from the Oscar W. Moyle's 26 shares, leaving him three and a quarter was timed during that period to James H. Moyle.

234 The 26 shares that I have been talking about, excepting the three years, was delivered in the North Branch of the Big Cottonwood Tanner Ditch and during the same period of time I issued tickets for other corporate stock owned by Mr.

Moyle in other branches of Big Cottonwood Tanner Ditch. As I remember it, it was about twenty-four shares, and I issued tickets for those 24 shares all the time and at the same time that I was issuing tickets for the 26 shares. I have observed Mr. Moyle using the water on his place facing on 62nd South. I think he used it pretty much all the time. There are some culinary water
 235 ter piped into Mr. Moyle's place. I have observed the water running from those pipes into Mr. Moyle's property. I have observed the water running on Mr. Moyle's lawn, also a tap running into a ditch, about one and a quarter or one and a half inches in diameter. I have observed that on many occasions.

236 I have observed Mr. Moyle watering his lawn from a sprinkling system.

WITNESS was shown Exhibit 8.

That is a letter I received from Mr. Moyle handed to me in his office on the date it bears date.

EXHIBIT 8 offered and received in evidence.

237 I am familiar with the reasonable rental value of the water in the neighborhood of Mr. Moyle's property. I have observed the use of it on Mr. Moyle's particular place and on similar places. I am familiar with the Big Cottonwood Tanner Ditch and its water rights. I know the reason-

able rental value per year per share of the Big Cottonwood Tanner Ditch water.

238 I will say a reasonable rental value was \$3.00 per share per year. The water in the Big Cottonwood Tanner Ditch is divided into the various branches. Thirty per cent goes to the north branch. There is a self dividing head-gate which
239 puts about one-third of the water in the North Branch. No one has changed from the North Branch into the other branches during the time I have been watermaster and I have issued all the tickets for the use of that water while I have been watermaster.

240 The user on the North Branch gets the full stream of water from the North Branch for the number of days or hours that is represented by the number of shares he has.

CROSS EXAMINATION

(By Judge Lewis).

I am not employed by Salt Lake City. Have not been since 1929. I have never been employed by Salt Lake City. I have done some work for the city on the lawsuit which is to come up regarding the Utah Lake and I have received witness fees in the Shurtliff case. Mr. James H. Moyle is the father of Henry D. Moyle.

241 I used water out of the South Fork of the Big
Cottonwood Tanner Ditch near 13th East.

242 Before the exchange agreement the water
running in the ditches was exposed. After the
exchange agreement the people received culinary
water through the pipes which was a valuable
consideration in the exchange agreement.

243 I base my opinion as to the rental value of
the water of the Tanner Ditch as used for irriga-
tion purposes.

244 Mr. Moyle used culinary water out of the
pipes and he was the owner of some stock in the
corporation which would entitled him to culinary
use.

245 WITNESS was shown Exhibit F.

Witness states it is his signature.

I sent that card to Mr. Moyle.

246 EXHIBIT F offered and read in evidence.

MR. CHRISTENSEN: We move to strike
it out, it is wholly immaterial, irrelevant and in-
competent.

OBJECTION overruled.

247 Q. From whom did you get your information
with reference to the fact that Salt Lake City was
charging for the excess water?

MR. CHRISTENSEN: We object to it as not proper cross examination.

248 THE COURT: Objection is overruled; he may answer.

A. In a communication from Salt Lake City to the president of the Company.

Q. You read that communication?

A. I did.

256 REDIRECT EXAMINATION

(By Mr. Christensen).

Q. Mr. Godfrey, that weir we have called attention to once or twice is just where the first division or fork of the Big Cottonwood Tanner Ditch divides; what is the nature of the weir so
257 far as its construction is concerned?

A. It is not really a weir; it is a dividing head-gate; that was there when I took hold. It is of concrete. It has been there to my knowledge since '29.

RECROSS EXAMINATION

(By Judge Lewis).

The weir is not adjustable. It is made of
258 concrete. The weir is on the property of Mr. Moyle.

259 GEORGE F. SMITH, witness for defendant.

DIRECT EXAMINATION

(By Mr. Christensen).

I reside at 1725 East Vine Street. Have lived there for sixty years. I am a farmer. Have been all my life. I own water in the Big Cottonwood Tanner Ditch and in the Big Cottonwood Tanner Ditch Company. I was watermaster on the Big Cottonwood Tanner Ditch from '23 to '29. Horace Godfrey succeeded me as watermaster. I am acquainted with the Big Cottonwood Tanner Ditch and all of its branches. While I was watermaster in the early part of the season when there was lots of water we notified the users verbally when to use the water. When the water became scarce I issued tickets, so many shares and gave them their length of time that they should use the water. I didn't preserve copies of the tickets. I am acquainted with Oscar W. Moyle. I issued tickets to Oscar W. Moyle for the use of water on the North Branch of the Big Cottonwood Tanner Ditch during the time I was watermaster. As I remember it I issued to him tickets covering 23 shares on the North Branch. He also had some on the Main Branch. I am familiar with Mr. Moyle claiming to have 22 3/4 shares of water right on the North Branch of the Big Cottonwood Tanner Ditch that was not turned over to the cor-

puration. During the time I was watermaster from '23 to '29 I timed that water right to Mr. Moyle and Mr. Moyle used it.

263

CROSS EXAMINATION.

RICHARD C. TOWLER, witness for defendant.

DIRECT EXAMINATION

(By Mr. Christensen).

264

265

I reside in Salt Lake City. I am a civil engineer. Have been since 1908. I am employed by Salt Lake City and have been since 1921. I was formerly employed by the Progress Company. My assignment while working for Salt Lake City is assistant engineer in charge of water supply. I have supervision especially over the water supply of the exchange contracts which are principally Mill Creek, Little Cottonwood and Big Cottonwood. I have been in charge of that department since 1924. While employed by the Progress Company my duties was to study the waters and especially the waters in Big Cottonwood Creek. During the years I was with the Progress Company and Salt Lake City I have been on the grounds and the property that used water from the Big Cottonwood Creek almost continuously. Exhibit 1 was prepared under my supervision and direction.

266 I am familiar with the Big Cottonwood Tanner Ditch and all the branches of it. Exhibit 1 fairly represents those branches which are divided as far as Highland Drive. The names printed on the Branches are the names by which the ditches are known. I am familiar with the pumping plant that is just above Highland Drive and just south of 62nd South and the pipeline that runs easterly from there up to the Upper Canal. I was working for Salt Lake City when they were installed. The pumping plant was installed in 1924 and the pipeline the same year. I am familiar with the contract that exists between Big Cottonwood Tanner Ditch Company and Salt Lake City.

267 It is my duty to supervise the rights of the city and its obligations under that contract. The contract was executed in 1921.

MR. CHRISTENSEN: May it be stipulated that the contract is part of the exhibit which you introduced; may it be considered in evidence for the purpose of proving the terms of the contract?

JUDGE LEWIS: Yes, we offered that as an admission by them that it was.

MR. CHRISTENSEN: If it may be understood that it is the contract between the parties—

JUDGE LEWIS: Yes, I will not require any evidence as to what that contract is.

268 The pipeline was put in along 62nd South by Salt Lake City in the year 1921. The water for these pipes is supplied by diversion into what is known as the Big Cottonwood Creek conduit at the mouth of the canyon, and from that conduit directly above 62nd South there is an outlet that goes to the so-called Green and Tanner Ditch reservoir, a reservoir from which pipelines will be supplying the Green Ditch and Upper Ditch and canal exchanges. The conduit is represented on Exhibit I. The water supplied through the Big conduit and on through the little reservoir is treated at the entrance of the Big Cottonwood conduit.

269 During April, May and June of 1926, there was clear water supplied to the head of the Tanner Ditch; during July, August and September and to the 15th of October part of the water was Lake water. In 1927 the water supplied at the head of the Big Cottonwood Tanner Ditch was entirely clear water throughout the whole year, that is throughout the irrigation season from April 1st to October 15th. It is water that comes naturally down the Big Cottonwood Creek. In 1928 the water supplied during the whole irrigation season was clear water from Big Cottonwood Creek. During 1929 the water supplied and diverted into the Tanner Ditch was the Big Cottonwood Creek water again. In 1930 there was di-

270 verted into the head of the Tanner Ditch during April, May and June, clear water; during July, August and September a small part of the water was canal water, it was a mixture. During the years '27, '28 and '29 there was no Lake water put into the head of the Big Cottonwood Tanner Ditch. In '31, during April, May and June the water was again clear water, that is water from Big Cottonwood Creek; during July and August, or a part of August, about half the mouth of August and five days in September, there was canal water added. During the latter part of September the water was clear water and during October. During the latter part of October there was some canal water diverted in it. In 1932 during April, May and June and July the water was diverted from Big Cottonwood Creek to the Tanner Ditch, no Lake water. Beginning the 4th day of August during the month of August and during twenty days of September and until the 15th day of October the diversion was part canal water. In '33, during April, May and June, and until July 26th, the water was Big Cottonwood Creek water. From July 26th to August 18th a portion of the water was canal water. From August 26th, the remainder of August it was clear water. All of September and to the 15th day of October, the first fifteen days in October was clear water.

271 In 1934, during April, May, June and July and until August 27th, the water was clear water from Big Cottonwood Creek. From August 27th until October 15th, except five days in September, the water was a part of canal water.

In 1935, April, May, June and July and until August 10th, the water was clear water; from August 10th until September 20th there was a portion of canal water, part canal and part Lake water, the balance of the year. That is I mean by that, from the 20th of September to October 15th the water was clear water.

In 1936 during April, May, June and July and until August 10th the water was diverted from Big Cottonwood Creek with no Lake water. From August 11th to October 15th there was canal water in at the head of the Tanner Ditch; in times part and in times all.

In 1937, in April, May, June and July and until August 23rd, the water was clear water at the head of the Tanner Ditch.

In 1938, during April, May, June and July, and until July 28th the water was clear water at the head of the Tanner Ditch. Beginning July 28th Utah Lake water was used at the head of the Tanner Ditch until October 15th.

272 In 1939, during April, May, June and until July 10th, the water was clear water. From July

10th until October 15th there was Lake water added to make up the share.

The water is generally low during September and August.

I have prepared a graph showing the proportions of water that would be received under the decreed rights during these lean months and the quantity of water and proportionate share of water they did receive under the exchange agreement.

Witness was shown what has been marked Exhibit 9, consisting of five sheets.

273 They are graph sheets covering from 1926 to 1939 inclusive of the amount of water actually received by the Tanner Ditch, or rather the amount of water Mr. Moyle would have received, based on the Morse decree from the Tanner Ditch and the amount of water he did receive through the exchange contract.

EXHIBIT 9 offered and received in evidence.

274 Exhibit 9 has on the upper part, July, August, September and October, in the upper left hand corner is 1926. The four graphs or blocks represent the water during those four months. The
275 solid blocks the amount of water based on the Morse decree on Big Cottonwood Creek and the other block, the checked block, would be the

amount of water actually made available to Moyle, each one representing a different year. The same way through all the sheets contained in exhibit 9. These graphs are constructed from the figures calculated by taking from the stream the daily flow through these various years that they cover.

276 The water allotted to the North Branch of the Big Cottonwood Creek in low water would be less than now flows into the pipeline. During that year the amount of water which would be available to the North Branch of the Tanner Ditch would be figured on the basis of the amount of water available at the head of the various ditches according to the decree. That measurement is different than the measurement at the head because you have to take in the factor of losses down the Big Cottonwood channel; so available to the Big Cottonwood Tanner, the North Branch of the Tanner your factors would be, the Tanner Ditch share of that, eight second feet, and then the North Branch of the Tanner Ditch would be thirty per cent plus eleven.

Q. Now did you calculate in 1934 whether as much water came, that is if it had come down, was there enough water in Big Cottonwood Creek naturally to flow down or run down to the point of diversion of the Big Cottonwood Tanner Ditch so it would be as much as 2 1/2 second feet?

277 A. No, it would not have been that much.

Q. And under the terms of the exchange agreement there is at all times under that agreement, at least—how much reserved for the Big Cottonwood Tanner Ditch Company?

A. 2.593 during the summer season.

Q. So, in '34 there was more water available in the culinary pipes to the Big Cottonwood Tanner Ditch than its decreed rights?

A. That is right.

The water doesn't always get that low. During the period of 1926 to 1939 we did have three years that were rather critical, 1931, 1932 and 1934.

I am acquainted with Oscar W. Moyle personally and where he resides at 62nd South. I have had occasion to observe his place during the past few years.

278 I have observed him using water for irrigation. There are three connections with the city water mains in front of Mr. Moyle's place. One connection is four one inch connections into a two inch connection; one is a two inch connection and the other is a one inch connection into a two inch. The first connection was ordered July 11, 1923; the other two subsequently.

279 The water mains in front of Mr. Moyle's place carries from thirty to forty pounds pressure.

280 I have observed the development of the homes that have taken place in the Cottonwood area during the last twenty or twenty-five years. And practically all of the homes have been built under one of the city's exchange agreements.

281 I have been consulted by a great many people who have gone into that district for location. They want to know first of all the character of the soil; secondly, they want to know of water rights and most of all they want to know if they can be protected in their water supply under pressure as they are in Salt Lake City. In other words, they want to get where they can be under pressure lines.

282 115,200 gallons is the quantity of water a two inch pipe would furnish under a forty pound pressure, and a second foot of water will yield 646,000 gallons per twenty-four hours.

285 In my opinion \$2.50 per share per year is a reasonable rental value per share of Big Cottonwood Tanner Ditch water right that has not been transferred to the Big Cottonwood Tanner Ditch corporation. From the conduit in the mouth of Big Cottonwood Canyon down to where the Big Cottonwood Tanner Ditch takes out from the Big Cottonwood Canyon Creek there are several small summer cottages that are very near the creek channel and have been for a number of years. The Old Mill Club is also near the stream channel.

286 In my opinion the water at the point where
the Salt Lake City conduit diverts the water at
the mouth of the Big Cottonwood Canyon is not
fit and unsafe for culinary use, and it has been
unfit for culinary use since 1909.

287 CROSS EXAMINATION
(By Judge Lewis).

299 I measured the pressure of the water at one
300 of the Moyle faucets. I do not base my estimate
of rental value at \$2.50 per share on the culinary
water. This water of Mr. Moyle has never been
in the pipeline.

301 I base my opinion on the rental value on the
basis of Mr. Moyle using the water there.

302 After October 15th there is water in the Tan-
ner Ditch only occasionally until April of the
year.

303 Before the exchange agreement there was a
continuous flow in the Tanner Ditch during the
whole of the year and the stockholders in the
Tanner Ditch Company received their culinary
water either from that or from wells.

304 REDIRECT EXAMINATION
(By Mr. Christensen).

I am acquainted with the property where Mr.
Weiler lives and the water will not run by gravity
out of the Tanner Ditch to his property.

RECROSS EXAMINATION

(By Judge Lewis).

305 I think Mr. Weiler got the water by coming through Ray Van Cott's property or from the pipeline where the water passes through from the pump up to the bed of the Big Cottonwood stream.

EXAMINATION

(By the Court).

306 I consider the Big Cottonwood Tanner Ditch water in the corporation, which includes the irrigation and culinary water, to be worth about twice that which hasn't those assets. I base that on two conclusions; first, the culinary water, and secondly, if it had not been for the increased water which has been given to the Tanner Ditch through this exchange in a year such as 1934 tree growth such as on the Moyle property and other places would probably not now existed. It would have had to have been restored. There would have been no crops at all under the Tanner Ditch in the years 1931 and 1934 if it had not been for this exchange.

I think the corporate stock has a larger rental value than the unit of water right owned in the Tanner Ditch but not in the corporation.

307 I think the water outside the corporation is worth about one half of what it is in the corporation, both as to rental value or sale property.

309 RECROSS EXAMINATION

(By Mr. Lewis).

312 JUDGE LEWIS: We have not claimed it; we have not set it out in the complaint; we have not set out special damage in the complaint.

THE COURT: In view of Judge Lewis' statement that they are not claiming damages for any diminution after '26 of the water that was used prior to '26 for the purpose of irrigating the trees, shrubs, lawns, vegetable garden and property—

JUDGE LEWIS: We have not gone that far. We are not seeking damages, to recover damages for that, not that we have not suffered. You remember Mr. Moyle's testimony was that after '26 he had only the water that was represented by his stock in the corporation and that he used that on his place, but did no more farming after that time of any kind; not that he suffered damages by not doing any farming. I think if he went into that he would show a loss every year he did farm on that ground, that he didn't put it in for farming purposes.

THE COURT: If you do not go as far as I have indicated this evidence is material.

JUDGE LEWIS: That he wasn't claiming damages for not having water for farming purposes?

THE COURT: Isn't that statement sufficient to avoid the necessity of proving what they are attempting to prove now? He says they are not claiming any damages for being deprived of the water as a result of his farm being damaged; that is his farm or estate or whatever you might call it. If this is true aren't you relieved of the burden of showing that the water was the same after '26 as prior thereto?

MR. CHRISTENSEN: It seems to me it almost relieves us of everything.

313 THE COURT: Of course, that is a matter on which people may differ, but let's confine ourselves to that one point. In other words, we spent a lot of time here, it seems to me, introducing evidence on something that is not at issue, as Judge Lewis says they are not claiming damages for having the water taken away from him because of not having the water on the farm for use on that particular piece of property.

MR. CHRISTENSEN: Well, that is probably right.

THE COURT: I am trying, in other words, to reduce the issues to those on which you rely and limit the evidence to those; limit the case to the matter at issue which is in controversy. No injury to the tract of land on which his residence is located, is there anything claimed as to that?

JUDGE LEWIS: We have not alleged it and we haven't tried to prove it. Now I could set out things that are not in this case; we haven't put in any evidence along those lines.

THE COURT: Yes, that is true. It seems to me the only matter in issue is whether Mr. Moyle can claim damages for being deprived of that water; just being deprived of it and nothing more.

JUDGE LEWIS: Our theory is that it is general damages in this case. If it had a market value during all these years we would be entitled to a reasonable rate of interest on it, on that money we could have sold it for; if we could have sold it in 1926 for a thousand dollars a share, we are entitled to interest on \$22,750.00 from that
 314 time to this time because he could have converted it into money and used that money. That is one theory, and if it had a rental value during all those years we would be entitled to the reasonable rental value.

THE COURT: And it is your theory that the mere fact that you have been unable to rent

it because of that is all the evidence you have to put in as to that. You have merely to say it has a rental value, it is a rental commodity or salable, one or the other? And then what the salable value and rental value was?

JUDGE LEWIS: Yes.

THE COURT: That is all you have to show; that is your theory?

JUDGE LEWIS: That is my theory; that is all we have to show.

THE COURT: Now, if that is his theory can't this case be decided on these two points: questions of law as to whether that theory with respect to this particular commodity is sound; if it is not sound the case is out. Second: if it is sound then what is the market value of the property; and evidence as to whether it had a market value and if so what was that market value either to sell or to lease, and the nature of the water, quality of it and all those other features are immaterial.

MR. CHRISTENSEN: I think they are material.

THE COURT: Why do you think they are material?

MR. CHRISTENSEN: I think it goes to what he suffered in damages, if any.

THE COURT: He claims no special damages; he claims no damages for injury to his residential estate by being denied that water. He
 315 claims no special damages for injury to any tract of land or for being deprived of culinary water or water of any character.

316 JUDGE LEWIS: We could hardly claim damages for it (the water) if we used it or at least to the extent that it would mitigate the damage; that would be competent evidence. We claim we have not used it at all, not a drop.

319 Prior to 1926 there was some Lake water put into the head of the Tanner Ditch, in '24. In '25 it was clear water.

320 RECROSS EXAMINATION

(By Judge Lewis).

323 J. R. ALLEN, a witness, called.

DIRECT EXAMINATION

(By Mr. Christensen).

I reside at Crescent and have for the past four years. Previous to that at Draper. I am a farmer and stock raiser. Have been since 1890.
 324 Farmed at Draper. I have used water from Utah Lake. Have had forty years experience using Utah Lake water for the purpose of irrigating

trees, shrubs, flowers and lawn. In my opinion it is good water for that purpose.

AMBER KNIGHT, a witness.

DIRECT EXAMINATION

(By Mr. Christensen).

- 325 I reside at 1237 Laird Avenue, Salt Lake City. Employed by Salt Lake City. Have been for twelve years. I am a water purification engineer. I have had twelve years experience in my profession. I am acquainted with the water that flows down the Big Cottonwood Creek and have been for ten or eleven years. There are daily samples taken of the raw water of Big Cottonwood Creek and those samples are analyzed bacteriologically and the records of those analyses are kept and filed in the water department office and various plats and graphs are computed from those analyses. This work is done under my supervision. I personally go out on the stream at least once a week in the winter time and three or four
- 326 times in the summer time. In my opinion the water from Big Cottonwood Creek untreated is not good water for culinary use. In fact, it would not meet the U. S. standards for drinking water. It has been that way for the past eleven years to my knowledge. The bacteriological analysis show *B. coli communis*. Where *B. coli* is present in wa-

ter, that is an indication of fecal contamination. Any water that contains fecal matter is not good drinking water because coli as we know comes from the intestines of either man or animal.

327

CROSS EXAMINATION

(By Judge Lewis).

The signs posted along the creek were actually posted by Salt Lake City but were printed and furnished by the State Board of Health.

328

The water in Big Cottonwood Creek is 80% worse than Parley's.

330

LYNN M. THATCHER, a witness.

DIRECT EXAMINATION

(By Mr. Christensen).

I reside at 549 So. 7th East, Salt Lake City. I am director of the engineering and sanitation division of the State Board of Health. I am a trained sanitary engineer. Have been with the Board of Health for about six years. I am acquainted with the water that comes down Big Cottonwood Canyon Creek. In my opinion the water from Big Cottonwood Canyon Creek untreated is unfit for culinary use. It is highly contaminated and unsafe for drinking unless treated.

CROSS EXAMINATION

(By Judge Lewis).

331 MR. CHRISTENSEN: I offer an amendment to the answer in setting out the Statute of Limitations.

The amendment may be filed.

MR. CHRISTENSEN: We rest.

332 OSCAR W. MOYLE called on rebuttal.

JUDGE LEWIS: I offer in evidence Exhibit "G", being the files in case No. 31665 entitled *Oscar W. Moyle, et al., vs. Big Cottonwood Tanner Ditch Corporation*, filed February 5th, 1922. We offer in evidence the complaint in that case, all the papers that would go into the judgment roll of that case and also the Register of Actions.

We offer also Exhibit "H", being No. 51 of the Register of Actions at page 365.

OBJECTED to as incompetent, irrelevant and immaterial, not pertaining to the issues in this case.

333 OBJECTION IS OVERRULED. Exhibit received in evidence.

Exhibit "I" is a letter I wrote and mailed to the Big Cottonwood Tanner Ditch Company on

or about February 20, 1931. It bears my signature.

EXHIBIT "I" offered in evidence.

OBJECTED TO.

334 OBJECTION OVERRULED. Exhibit received.

Exhibit "J" is a letter I mailed to the Big Cottonwood Tanner Ditch Company about September 12th, 1933.

EXHIBIT "J" offered in evidence.

OBJECTED TO AND RECEIVED.

335 Exhibit "K" is a letter bearing my signature mailed to the Big Cottonwood Tanner Ditch Company about April 6, 1934.

EXHIBIT "K" offered in evidence.

OBJECTED to as incompetent, irrelevant and immaterial.

OBJECTION IS OVERRULED and Exhibits "J" and "K" will be received.

336 Exhibit "L" is a letter I wrote together with Mr. Ray Van Cott and mailed or delivered it to Salt Lake City about the date it bears.

338 Whenever I received a statement from the company I would go up and tell them I had nothing to do with the water.

343 A. I asked the city to put in a pipe and they said they would, and they did do it and I paid them for it, and it goes in about, it is about two inch pipe. It is a big one. It goes in there at my fence may be six inches. It is about two or three feet down in the ground. The opening is there still as they made it, and there has never been a drop of water come through it. *I expect to use it when I get my water back.*

344 Q. (BY THE COURT): You may have used what you had in the corporation and out?

A. I may have.

Q. Would the pipes carry that?

A. No, I don't think so.

347 THE COURT: Case taken under advisement.

348 REPORTER'S CERTIFICATE, dated September 23, 1940.

350 DEFENDANT'S MOTION FOR A NEW TRIAL

The grounds for motion for new trial are as follows:

1. Irregularity in the proceedings of the court and orders of the court.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of the evidence to justify the decision or judgment and that said judgment is against law.

4. Errors in law occurring at the trial and excepted to by the defendant.

351 5. Insufficiency of the evidence to justify the decision of the court in this:

(a) That there is no evidence in the record which proves or tends to prove that the plaintiffs, or either of them suffered any damages or was injured in any material way by any conduct of the defendant Salt Lake City.

(b) The evidence shows without contradiction that the plaintiffs have abandoned any water right or right to use water from the Big Cottonwood Tanner Ditch during the winter season, and notwithstanding this evidence the court granted judgment and awarded damages to plaintiffs for an interference with plaintiffs' water right during the entire year.

6. The court erred in making Finding No. 3 in this, that it is contrary to the evidence in this, that the evidence conclusively shows that plaintiffs used water from Big Cottonwood Tan-

ner Ditch and all the water they desired to use without any hindrance or interference of the defendant Salt Lake City.

7. The court erred in making Finding No. 4 in this, that the court finds that Salt Lake City has failed and refused to deliver any water to the plaintiffs, or either of them, which is contrary to the evidence and there being no evidence before the court that Salt Lake City is under any obligation to deliver any water from the Big Cottonwood Tanner Ditch to the plaintiffs, or either of them.

8. The court erred in making Finding No. 5 in this:

(a) That the findings of fact therein stated are not within the issues of the case.

352 (b) That the finding that the reasonable value of the use and possession of the water is \$4,150.00 is contrary to the evidence and said finding is not based upon any allegation in plaintiffs' complaint.

(c) And that portion of Finding No. 5 wherein the court finds that the sum of \$350.00 is a proper judgment for damages from the time of filing of said complaint to the time of judgment is contrary to the evidence and is no part of the claim filed with Salt Lake City and is in addition

to and supplemental of the claim filed and proved in the above entitled case.

9. The court erred in Finding No. 7 in this, that there is no evidence before the court from which it could be concluded that the plaintiffs have suffered damage in the sum of \$4769.75 and that said finding is contrary to the evidence, the evidence conclusively showing that the plaintiffs did not suffer damages in that sum or any other sum.

10. The court erred in Finding No. 8, the evidence conclusively showing that all of the damages plaintiffs suffered, if any, prior to four years from the date of filing plaintiffs' complaint were barred by the Statute of Limitations.

11. The court erred in Finding No. 9 in this, that the evidence conclusively shows that plaintiffs have abandoned any water right or the right to the use of the water from Big Cottonwood Tanner Ditch during the non-irrigation season or commonly called the winter months.

12. The court erred in the last finding of fact in this, that said finding of fact is contrary to the evidence and is not the basis of any issue in the cause. The facts stated in said finding do
353 not find support in any of the pleadings in the case.

13. The decision is against law in this, that the evidence in this action shows that plaintiffs were materially benefited by the enlarged amount of water which was made available to the plaintiffs and used by them, both culinary and irrigation water.

14. The court erred in its judgment, wherein it adjudged that the plaintiffs should have and recover of and from the defendant the use and possession of the water from the Big Cottonwood stream described as 22 3/4 shares of water right in Big Cottonwood stream in Salt Lake County, Utah, in this that a water right is not the subject of an action in replevin. The water is gone and could not be replevined and if the plaintiffs have any water rights which have been interfered with by the defendant, the only remedy the plaintiffs could have would be an injunction enjoining the defendant from interfering in the future with the plaintiffs' right to use water from the Big Cottonwood Tanner Ditch and there is no issue joined on the right of an injunction or the right to have an injunction, and it is contrary to law for the court to adjudicate an injunction suit without it being based upon the pleadings and evidence to support the pleadings.

15. The court erred in failing to take into consideration the duty of the plaintiffs to mitigate their damages, if any they sustain, in this, that

the evidence conclusively shows that during the major portion of the time involved in this litigation the water flowing down Big Cottonwood Tanner Ditch were the natural waters coming from Big Cottonwood Creek uninterfered with in any way by Salt Lake City.

MOTION IS DENIED.

MR. CHRISTENSEN: Save us an exception.

REPORTER'S CERTIFICATE dated October 24, 1940.

355 STIPULATION agreeing to a settlement of bill of Exceptions dated November 18, 1940.

356 BILL OF EXCEPTIONS SETTLED, SIGNED AND ALLOWED November 18, 1940, by Judge Allen G. Thurman.

EXHIBITS.

Plaintiffs' Exhibit "A" — Third District Court File 38604.

Plaintiffs' Exhibit "B"—Petition No. 291.

Plaintiffs' Exhibit "C"—Copy of Application No. 12943.

Plaintiffs' Exhibit "D"—Map of Moyle property.

Plaintiffs' Exhibit "E"—Copy of records Exchange Application No. 26, State Engineer's office.

Plaintiffs' Exhibit "F"—Post card to O. W. Moyle.

Plaintiffs' Exhibit "G" — Third District Court File No. 31665.

Plaintiffs' Exhibit "H"—No. 51, Register of Actions, page 365.

Plaintiffs' Exhibit "I" — Letter 2/20/31, Moyle.

Plaintiffs' Exhibit "J"—Letter Sept. 12/33, Moyle.

Plaintiffs' Exhibit "K"—Letter April 6/34, Moyle.

Plaintiffs' Exhibit "L"—Letter July 29/34, Moyle.

Defendants' Exhibit 1—Map.

Defendant's Exhibit 2—Shurtliff File No. 14230.

Defendant's Exhibit 3—Certified copy of Application for Change of Point of Diversion.

Defendant's Exhibit 4—Time Ticket Tanner Ditch.

Defendant's Exhibit 5—Time Tickets (6).

Defendant's Exhibit 6—Time Ticket.

Defendant's Exhibit 7—Time Ticket.

Defendant's Exhibit 8—Letter of O. W. Moyle.

Defendant's Exhibit 9—5 graph sheets.

(Title of Court and Cause):

ASSIGNMENTS OF ERROR.

Comes now the defendant and appellant and says that in the above entitled cause the court erred to the prejudice of the substantial rights of the appellant and prevented it from having a fair trial of said cause, and appellant assigns the following errors committed by the trial court and, upon the errors thus assigned, and each of them, will rely on for a reversal of the judgment in said cause and for a new trial thereof, viz:

I.

The court erred in overruling appellant's general demurrer to respondent's complaint. (Tr. 4, 8; Abs. 4, 5).

II.

The court erred in its Finding No. 2, wherein the court finds that the plaintiffs were the owners of 22.75 shares of water right in the Big Cottonwood stream and that said water was appurtenant to plaintiffs' land, for the reason that said Finding is not supported by the evidence and appellant specifies that there is no competent evidence in the record to support that finding. (Tr. 24; Abs. 8).

III.

The court erred in its Finding No. 3 to the effect that the plaintiff Salt Lake City procured an order for the immediate possession of the Moyle water to be delivered to Salt Lake City and that the City entered into possession of said water of plaintiffs herein, and also wherein said Finding holds that the City continuously had and held the possession thereof from the 23rd day of July, 1926, until the present time and does now continue to withhold the possession and use thereof from the Moyles for the reason that said Finding is contrary to the evidence. All of the evidence conclusively shows that Moyle used the water in question all of the irrigation season of each year excepting in the Fall of the year when, the evidence shows, Lake water was substituted for the mountain water, then the evidence is in

dispute whether Mr. Moyle used the Lake water. However the overwhelming weight of the testimony is to the effect that Mr. Moyle used the Lake water for his regular turn the same as the mountain water. There is no evidence in the case that Salt Lake City did any of the acts complained of pursuant to any order of court. (Tr. 25; Abs. 10).

IV.

The court erred in its Finding No. 4 to the effect that Salt Lake City has continued to and does now use such water belonging to the plaintiffs herein and has failed and refused to deliver the same, or any part thereof, to the plaintiffs herein, or to either of them, for the reason that said Finding in that respect is contrary to all the evidence in the case. The undisputed evidence is that for the larger portion of each year and that during the entire time of four of the years the water ran in the Big Cottonwood Tanner Ditch undisturbed or undiminished by Salt Lake City and there is no competent evidence upon which the court could base a finding to the contrary. (Tr. 25; Abs. 10).

V.

The court erred in its Finding No. 5 to the effect that the reasonable value of the use and possession of the water is the sum of \$4,150.00

and from the time of filing said complaint to the time of judgment the sum of \$350.00, together with interest thereon at the rate of 6%, making a total damage to plaintiffs in the sum of \$4769.75, for the reason that there is no competent evidence in the record upon which the court could find a reasonable rental value of the water right claimed by Mr. Moyle. Mr. Moyle's testimony to the effect that the water right was worth \$15.00 per year per share is based on a calculation of 6% interest on what he arbitrarily believed or thought he could have sold a share of water right for and the plaintiff's other witness, Mr. Weiler, simply testified to what a sixth grade pupil could have said, that so many gallons of water at a certain price per gallon would amount to so many dollars and cents; and there is no evidence in the record that the plaintiffs ever filed any claim for any money by reason of damages, or otherwise, between the date of filing their complaint and the date of judgment, and there is no evidence in the record that plaintiffs or either of them were damaged at all. On the contrary the plaintiffs' attorney, Judge Lewis, in open court disclaimed any damages of any kind or nature. (Tr. 25; Abs. 11).

VI.

The court erred in its Finding No. 7, wherein the court finds that plaintiffs have been damaged

in the sum of \$4769.75, it being contrary to the evidence, and there is no evidence in the record that the plaintiffs, or either of them, suffered any damage at all; and the record shows that the plaintiffs' attorney disclaims any right to recover any damages, stating in open court that they were not seeking damages and did not allege or attempt to prove any damages. (Tr. 26; Abs. 11).

VII.

The court erred in its Finding No. 8 to the effect that plaintiffs' cause of action is not barred by any section of the Statutes pleaded by the defendant, or otherwise, or at all, said finding being contrary to the facts, the evidence showing conclusively that some of the damages awarded were for conduct twelve years previous to the trial and each year thereof up until the time of trial, and that no claim was filed with Salt Lake City until the 17th day of April, 1939, contrary to the Statute of Limitations as plead by defendant in its amendment to defendant's amended answer, (Tr. 13, Abs. 7) and in this record appellant specifies that the evidence in the case shows that the acts and conduct complained of by the plaintiff's were barred by the various respective sections of the Statutes of the State of Utah as plead by appellant. (Tr. 26; Abs. 11).

VIII.

The court erred in Finding No. 9 to the effect that plaintiffs had not abandoned their water right or any part thereof and appellant specifies that said Finding was contrary to the evidence in the case. All of the evidence uncontradicted shows that the plaintiffs have not used any of the water from the Tanner Ditch for culinary use, or during the Winter months, or non-irrigation season, since the pipeline was placed in front of Mr. Moyle's place in 1921, and the evidence shows that he had no use for any water in the Winter other than what he used for culinary purposes through the pipeline, and the evidence conclusively shows that the plaintiffs had abandoned any right to the use of the water during the non-irrigation season and there is no evidence in the record that shows Salt Lake City wrongfully withheld any part or portion from the plaintiffs' water rights. (Tr. 26; Abs. 12).

IX.

The court erred in its second Finding No. 9 to the effect that the water involved in this case is the same as that decreed to Oscar W. Moyle in *The Progress Company vs. Salt Lake City, et al.*, said finding being contrary to the facts in the case; the evidence conclusively showing that Mr. Moyle has no water right during the Winter

months, and said Finding is wholly outside of the issue and has no purpose in the case as a matter of law, and said Finding is prejudicial to said defendant if permitted to stand in that it purports to find a water right or a fact in accordance with some historical document which the reader of this decree could not know about without searching beyond the records of this case. (Tr. 26; Abs. 12).

X.

The court erred in its Conclusion of Law in this, that there are no facts in the case upon which the court could conclude that the plaintiffs were entitled to judgment in the sum of \$4769.75. There is no evidence in the case from which the court could conclude that Salt Lake City had possession of the plaintiffs' water. In fact, all of the evidence shows that the city has not the possession of it and if the city has not the possession of the plaintiffs' water the court could not conclude that the city should return to the plaintiffs the possession of plaintiffs' water and for that reason the court's conclusion of law that the plaintiffs were entitled to a judgment for money for damages they had suffered and for the return of which the court assumes is in the possession of Salt Lake City is wholly erroneous. (Tr. 26; Abs. 12).

XI.

The court erred in entering its judgment herein in favor of the plaintiffs and against this appellant for the reason that the great preponderance of the evidence established all material facts in favor of the defendant and contrary to the plaintiffs and that under the law defendant was entitled to a judgment in its favor. (Tr. 27; Abs. 13).

XII.

The court erred in entering its judgment, to the effect that the plaintiffs have and recover from the defendant Salt Lake City the sum of \$4769.75 and shall have and recover of and from the said defendant the use and possession of the water from the Big Cottonwood stream described as $22\frac{3}{4}$ shares of water right in the Big Cottonwood stream and the appellant specifies that there is no evidence in the record from which the court could conclude to find or enter its judgment that the plaintiffs were entitled to that amount of money. And appellant specifies that there is no evidence in the record to indicate that Salt Lake City has possession of the plaintiffs' water and therefore could not be subject to a judgment to return possession of something of which it has not the possession and appellant specifies that the evidence conclusively shows that any water rights Mr. Moyle has or claims are

water rights in the Big Cottonwood Tanner Ditch and not in the Big Cottonwood stream and there is no evidence in the record which shows that plaintiffs, Oscar W. Moyle and wife, are the owners of $22\frac{3}{4}$ shares of water right in the Big Cottonwood stream. (Tr. 27; Abs. 13).

XIII.

The court erred in entering its judgment and decree, wherein it adjudged and decreed that the plaintiffs' water rights were the same water as that decreed to Oscar W. Moyle in the case of The Progress Company vs. Salt Lake City, and in paragraph 7 of the decree in the case of Big Cottonwood Tanner Ditch Company vs. Vincent Shurtliff, et al., and appellant specifies that there is no evidence in the record to prove that the water rights claimed by Mr. Moyle at the date of this hearing were the same as the water rights decreed to him in the case mentioned. In fact, the evidence is all to the contrary. (Tr. 28; Ab. 14).

XIV.

The court erred in entering its decree in the form and manner in which it is drawn in this respect, that the decree or judgment other than the amount therein specified is so indefinite and uncertain, ambiguous and meaningless that it should be held for naught, and the appellant

specifies that the decree could not be enforced as no officer of the law could tell where to find or how much water 22¾ shares of water right in the Big Cottonwood stream in Salt Lake County, Utah, is. No other court could determine whether or not this judgment was being violated or complied with, and appellant specifies that no law enforcing officer could take the judgment and determine whether or not the water right litigated in this case is the same as the water right adjudicated in some other case without going beyond the judgment of this case and taking the testimony to determine what this judgment might mean. (Tr. 28, 29; Abs. 15).

XV.

The trial court erred in overruling and denying defendant's motion for a new trial:

1. Excessive damages having been given.
2. Insufficiency of the evidence to justify the decision and judgment, and the judgment being against law, there being no competent evidence in the record to justify or support the Findings of Fact and Conclusions of Law or Judgment. (Tr. 31; Abs. 15).

XVI.

The trial court erred in overruling and denying defendant's motion for a new trial:

(a) For the reason that there is no evidence in the record which proves or tends to prove that the plaintiffs or either of them suffered any damages or were injured in any material way by any conduct of commission or omission of Salt Lake City.

(b) The evidence shows that without contradiction the plaintiffs have abandoned any water right or right to use water from Big Cottonwood Creek or the Big Cottonwood Tanner Ditch during the Winter season and notwithstanding this evidence the court granted judgment to plaintiffs for an interference with plaintiffs' water rights during the entire year.

(c) The evidence conclusively shows that the plaintiffs used water from the Big Cottonwood Tanner Ditch and all the water they desired to use without any hindrance or interference of the defendant Salt Lake City.

(d) Appellant specifies that there is no evidence in the record from which the court could conclude or find that Salt Lake City was under any obligation to deliver any water to the plaintiffs or either of them.

(e) And appellant specifies that the court erroneously gave judgment in the sum of \$350.00 for damages from the time of filing the complaint to the time of judgment, and there is no evidence

proved or claim that the plaintiffs or either of them suffered any damages during that period of time and there is no evidence in the record that the plaintiffs or either of them filed any claim with Salt Lake City claiming damages for that period of time, and appellant specifies that there is no competent evidence from which the court could enter its judgment to the effect that the plaintiffs or either of them had suffered damages in the sum of \$4769.75. The evidence conclusively shows that the plaintiffs did not suffer any damage.

(f) And the evidence shows that the plaintiffs claimed and received damages for twelve years, when in law they could not receive judgment for damages received beyond four years from the date of filing their complaint.

(g) And appellant specifies that the court gave its judgment for an all year round use of water, when the evidence conclusively shows that the plaintiffs have abandoned any water right or the right to the use of the water from Big Cottonwood Tanner Ditch during the non-irrigation season.

(h) Appellant specifies that the decision is against law in this, that the evidence shows that plaintiffs were benefited and received a larger amount of water, both culinary and irrigation water, than they could have received had it not

been for the exchange agreement with Salt Lake City.

(i) And the appellant specifies that the court could not grant judgment giving the plaintiffs the right to recover from Salt Lake City the possession of a water right from the Big Cottonwood stream described as $22\frac{3}{4}$ shares, as a water right is not a subject of replevin and the water is gone and could not be replevied, and it is contrary to law for the court to issue an injunction or adjudicate an injunction without it being based upon the pleadings and evidence to support the pleadings.

(j) And appellant specifies that the court erred in failing to take into consideration the duty of the plaintiffs to mitigate their damage, if any they sustained, and the court failed to take into consideration the fact that the evidence showed that in a portion of the time involved in this litigation the water flowed down the Big Cottonwood Tanner Ditch uninterfered with in any way, shape or form by Salt Lake City. (Tr. 31 to 34; Abs. 15).

XVII.

The court erred in admitting in evidence plaintiffs' Exhibit "A". (Tr. 52, 54, 55; Abs. 23).

XVIII.

The court erred in overruling defendant's objection to the following question put to the witness Moyle:

Q. And did you use prior to July 23, 1926, did you use all the water allotted to you under both sources of title? (Tr. 66; Abs. 29).

XIX.

The court erred in taking judicial notice of the fact that the natural flow of Big Cottonwood Creek is suitable water for culinary purposes. (Tr. 71, 72; Abs. 31).

XX.

The court erred in overruling defendant's objection to the following question put to the witness Moyle:

Q. And you know what the value of that water coming through the pipes of Salt Lake City is in that vicinity? (Tr. 82, 83; Abs. 38).

XXI.

The court erred in overruling defendant's objection to the following question put to the witness Weiler:

Q. Now on the market value of the stock that you purchased, is that stock more valuable for

the one-fifth that you got in culinary water or the four-fifths you got in irrigation water? (Tr. 123; Abs. 60).

XXII.

The court erred in sustaining the plaintiffs' objection to the following question put to the witness Moyle on cross examination:

Q. Would you say that \$15.00 per share per year was a reasonable value for water used entirely for irrigation water, irrigating trees and some other crops? (Tr. 145; Abs. 65).

XXIII.

The court erred in sustaining plaintiffs' objection to the following question put by the defendant to the witness McDonald, who was the court's watermaster over all the waters of Big Cottonwood Canyon Creek:

Q. Were you ever served with any order from the court telling you that Salt Lake City had condemned part of the water rights in the Big Cottonwood Tanner Ditch and from then on not to deliver that water to the Big Cottonwood Tanner Ditch? (Tr. 164; Abs. 114).

WHEREFORE, by reason of the manifest errors of the court assigned hereinbefore and relied upon for a reversal by the appellant, it

hereby prays that the judgment by the lower court be reversed and that a new trial of this action be ordered, or, at the discretion of this court, that the judgment of the court below be reversed and judgment entered in favor of the defendant and against the plaintiffs, as prayed for in defendant's answer filed herein, and for such other and further relief as to this court may seem proper.

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Assignments of Error served and filed, January 21, 1941.
