

1941

Oscar W. Moyle and May P. Moyle v. Salt Lake City : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Moyle v. Salt Lake City*, No. 6328 (Utah Supreme Court, 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.

APPELLANT'S BRIEF

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FILED

MAR 13 1941

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In the Supreme Court of the State of Utah

OSCAR W. MOYLE and
MAY P. MOYLE,

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vs.

SALT LAKE CITY, a municipal
corporation,

Defendant and Appellant.

Case No. 6328

APPELLANT'S BRIEF

STATEMENT OF THE CASE.

This action was brought by Oscar W. Moyle and May P. Moyle, his wife, against Salt Lake City to recover damages alleged to have been suffered by them on account of the city depriving them of their water.

The background of the matters involved in which this litigation grows out of are as follows:

In 1848 there was constructed what is known as the Big Cottonwood Tanner Ditch and the waters were diverted through this ditch from the Big Cottonwood

Canyon Creek for use on the lands in and around 62nd South Street and the bench lands east of Murray City. The ditch was divided into several branches, all of which is fully illustrated by Exhibit I, which is a map prepared by Mr. Towler, one of the City Engineers. The Big Cottonwood Tanner Ditch diverts the water from the Big Cottonwood Creek just south of where 62nd South Street intersects Big Cottonwood Canyon Creek.

The water right developed through the Big Cottonwood Tanner Ditch was divided into 1795 units or shares, each unit or share representing one acre of water right. There was a corporation organized, known and designated as the Big Cottonwood Tanner Ditch Company and the owners of the water rights in the Big Cottonwood Tanner Ditch transferred to the corporation their water rights and received a share of stock for each unit of water right conveyed to the corporation. Some few of the owners of the rights in the ditch failed to turn their entire holdings in the Tanner Ditch to the corporation with the result that the major portion of the water rights of the Big Cottonwood Tanner Ditch is owned and controlled by the Big Cottonwood Tanner Ditch Company.

The plaintiffs claimed to own 22 $\frac{3}{4}$ shares of water rights in the Big Cottonwood Tanner Ditch that was not conveyed to the Big Cottonwood Tanner Ditch Company and this lawsuit involves that particular water right.

After the corporation was formed and on the 22nd day of January, 1920, a contract was entered into between the Big Cottonwood Tanner Ditch Company and

Salt Lake City, a copy of which contract was introduced as a part of Exhibit "A", and by the terms of that contract the Big Cottonwood Tanner Ditch Company granted, conveyed and transferred to the City the right to have, take and use perpetually from the Big Cottonwood Creek in Salt Lake County all of the portions of the water of said Creek to which the Big Cottonwood Tanner Ditch Company is or at any time may be entitled except 2.591 second feet of water during the months of April, May, June, July, August and September, and 1.436 second feet of water during the months of October, November, December, January, February and March, of each year, the City to provide suitable water mains over designated territory for the delivery of culinary water, the City to furnish and deliver to the Company water suitable for irrigation purposes during the months of April, May and June of each year a quantity of water equal to that quantity to which the Company is entitled to take from the Big Cottonwood Creek less the culinary water, and during the month of July, 30 second feet, and during the month of August, 28 second feet, and during the month of September, 26 second feet, and during the first fifteen days of October, 15 second feet.

That in pursuance of said agreement the City constructed the water mains and proceeded to deliver the culinary water in accordance with the terms of the agreement and made application (Exhibit "C") to the State Engineer for permission to change the point of diversion of the waters of Big Cottonwood Tanner Ditch Company from the Big Cottonwood Tanner Ditch to the mouth of

Big Cottonwood Canyon and into the city's conduit, the location of which is fully shown by Exhibit I, which application was granted by the State Engineer on the 3rd day of September, 1920.

The city constructed a pumping plant and a pipeline for the purpose of pumping the irrigation water from the gravity flow canal up to the intake of the Big Cottonwood Tanner Ditch, which pumping plant was used for the first time in 1926. (Tr. 269, Abs. 139) During the years 1927, 1928 and 1929 there was no foreign water pumped into the Big Cottonwood Tanner Ditch. In the year 1930 there was diverted into the head of the Tanner Ditch during April, May and June Cottonwood Creek water. During July, August and September a small part of the water was canal water that was mixed. (Tr. 270, Abs. 140) In the year 1931 during April, May and June the water was Cottonwood Creek water. During July and a part of August and five days in September canal water was added to the creek water; also some canal water added during the month of October. In 1932 during April, May, June and July the water in the Big Cottonwood Tanner Ditch was diverted from the Big Cottonwood Creek with no Lake water added. From the 4th day of August and until the 15th day of October there was some canal water added. (Tr. 270, Abs. 140)

In 1933 during April, May and June and until July 26th the water was from the Big Cottonwood Creek that was diverted in the Big Cottonwood Tanner Ditch. From July 26th to August 18th a portion of the water was

canal water. From August 26th until the 15th day of October the water was clear canyon water.

In 1934 during April, May, June and July and until August 27th the water was Big Cottonwood Creek water. From August 27th until October 15th, excepting five days in September, the water was partly from the canal. (Tr. 271, Abs. 141)

In 1935 during April, May, June and July and until August 10th the water was clear water from Big Cottonwood Creek. From August 10th until September 20th there was a portion of canal water and from the 20th of September to October 15th water was from Big Cottonwood Creek. (Tr. 271, Abs. 141)

In 1936, during April, May, June and July and until August 10th the water was Big Cottonwood Creek water. From August 11th to October 15th there was canal water in the Tanner Ditch.

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 and June and until the 28th day of July clear water was furnished to the Tanner Ditch.

In 1939 during April, May and June and until July 10th the water was clear in the Tanner Ditch. From July 10th until October 15th there was Lake water added.

On June 28, 1926, there was a case commenced by Salt Lake City in the District Court of Salt Lake County

entitled *Salt Lake City vs. Oscar W. Moyle and May P. Moyle, his wife*, case No. 38604, plaintiff's exhibit "A", in which case it was asked by Salt Lake City that it be allowed to take the water of the defendants, Oscar W. Moyle and May P. Moyle, and in lieu thereof furnish to them canal waters for irrigation and Big Cottonwood water in the pipeline for culinary use. Thereafter the defendants, Oscar W. Moyle and May P. Moyle, filed a demurrer and motion to strike. On the 2nd day of July, 1926, the court made the following order: That Salt Lake City is authorized to take all the water of Big Cottonwood Creek flowing into the Big Cottonwood Tanner Ditch and return to the Big Cottonwood Tanner Ditch water suitable for irrigation in lieu of the water taken and that as soon as possible Salt Lake City should in water pipes make available for the defendants, Oscar W. Moyle and May P. Moyle, for domestic and culinary purposes sufficient creek water from Big Cottonwood Creek.

Nothing further was done in the case until the 2nd day of October, 1937, when a notice was served calling up the demurrer and motion to strike, which thereafter was regularly heard by the court and the demurrer sustained. On the 7th day of January, 1938, the following order was made in case No. 38604, "Exhibit A":

"The court having sustained the demurrer imposed by the defendants in the above entitled case and the attorneys for plaintiff having stated in open court that they did not desire to amend their complaint but chose to stand on their com-

plaint without amendment, it is therefore ordered that the above entitled case be and the same is hereby dismissed.

“Done in open court this 7th day of January, A. D. 1938.

P. C. EVANS, *Judge.*”

On the 17th day of April, 1939, the Moyles presented their claim to the Board of Commissioners of Salt Lake City, claiming that the plaintiffs had been damaged in the sum of \$4,150.00, plaintiff's Exhibit “B”. On July 20, 1939, plaintiffs commenced the suit which resulted in a judgment in favor of the plaintiffs, Oscar W. Moyle and May P. Moyle, and against Salt Lake City, from which judgment this appeal is prosecuted.

II.

Appellant relies on all errors assigned and will restate the errors as they are argued in this brief and therefore deem it unnecessary to reprint the assignments of error collectively.

III.

The particular questions involved herein are substantially as follows:

A. Does the complaint state sufficient facts to constitute an action against Salt Lake City?

B. Can the plaintiffs recover a judgment for damages in any sum other than nominal damages without proving that damages have been suffered?

C. Can the plaintiffs waive a tort and sue on an implied contract and recover the reasonable rental value of a water right where the water has never been reduced to possession of the plaintiffs?

D. May you prove damages for the reasonable rental value of property by proving that the plaintiff believes that the property could have been sold for some stated amount and that the proceeds from the sale could be loaned at a rate of interest that would appear satisfactory to the plaintiffs and then take the yield from that multiplication or computation as the reasonable rental value?

E. May the plaintiffs prove a reasonable rental value by having a witness testify that the water from the average run-off over a period of eight years would amount to a definite number of gallons and that multiplied by the price per gallon charged for culinary use by Salt Lake City and the result divided by $22 \frac{3}{4}$ would give the reasonable rental value per share per year for the water rights claimed by Mr. Moyle?

F. May the court take judicial knowledge of the fact that the water flowing from Big Cottonwood Canyon Creek untreated is fit for culinary use?

G. May the plaintiffs, Moyles, use the culinary water through the pipes and all the irrigation water they need to maintain the growing of trees, shrubs and grass on their premises and still recover the full amount of the rental value of their water right?

H. May the plaintiffs recover the reasonable rental value of the water right for the years that the evidence conclusively shows there was no interference with plaintiffs' water right by Salt Lake City?

I. May a judgment stand which is not supported by the pleadings and the pleadings not supported by the evidence? May the judgment stand where it attempts to order delivery of an incorporeal right? May a judgment order the return of possession of corporeal property when the evidence shows that the city has not the property in its possession and the evidence shows that the property is not now in existence, that is at least under anyone's control?

IV.

BRIEF OF ARGUMENT.

Salt Lake City's general demurrer that plaintiffs' complaint did not state facts sufficient to constitute a cause of action should have been sustained. (Assignment of Error No. 1, Abs. 164)

The plaintiffs in their complaint allege (Abs. 1, 2 & 3) that the defendant is a municipal corporation; that the plaintiffs own $22 \frac{3}{4}$ shares of water right in the Big Cottonwood stream and entitled to the use thereof through the Big Cottonwood Tanner Ditch and that the water right is appurtenant to plaintiffs' land situated in Sec. 15, T. 2 S., R. 1 E., and that Salt Lake City on the 23rd day of July, 1926, procured an order of the District Court for the immediate possession of the water so owned

by the plaintiffs and that Salt Lake City on the 23rd day of July, 1926, entered into the possession of said water so owned by Oscar W. Moyle and May P. Moyle and has held possession continuously thereof from that day until the present time, and that on January 7, 1938, Salt Lake City without notice to the plaintiff procured an order of the court dismissing the action in which the order of possession had been entered and thereby terminating the order of possession, and notwithstanding such order of dismissal Salt Lake City has continued to use such water belonging to the plaintiffs and has failed and refused to deliver any part thereof to the plaintiffs. That the reasonable value of the use and possession of such water so withheld and possessed by the city from the plaintiffs from the time of the taking of possession to the time of filing the complaint is the sum of \$4,150.00 and that the plaintiffs on the 17th day of April, 1939, presented their claim to the Board of Commissioners of Salt Lake City in writing verified; that by reason of all of which the plaintiffs were damaged in the sum of \$4,150.00 and the plaintiffs pray judgment in that sum and for the return to the plaintiffs of the use and possession of the water and for their costs. There is no allegation in the complaint of any damages sustained or suffered by the plaintiffs.

Nor is there any allegation that the respondents would or could have put the water to a beneficial use. We must bear in mind the peculiar difference in a water right and the other property rights of which we deal with. If a man owns land or chattels he may use them

or not as he sees fit and his failing to use them does not give the right to someone else to use them. This is not true with a property right which is the right to use water from a public stream. With a water right a man must beneficially use it or failing to do so he cannot be heard to complain of someone else making a beneficial use of the water. It has always been the rule of law in Utah and other arid regions that the measure of anyone's water right is "beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State."

In the case of *Falkenberg, et al., vs. Neff*, 72 Utah 258, at page 265, the court approves this rule:

"At such times as a prior appropriator is not using the water under his appropriation for a beneficial purpose such waters are considered and treated under the doctrine of appropriations as unappropriated public waters and for such periods of time are subject to appropriation and use by others."

Hence the complaint must state that the plaintiff would have put the water to a beneficial use during the period in question except for the interference by the defendant. If the theory of the complaint is to recover damages under the allegations therein contained plaintiffs could not recover more than nominal damages. *Anna C. Rohwer vs. Abram Chadwick*, 7 Utah 382.

If the theory of the complaint is to waive the tort and sue on an implied contract, then the complaint fails,

as it is nowhere stated in the complaint that the waters taken were ever in the possession of the plaintiff or ever became their personal property, and the rule of law which permits one to waive the tort and sue on an implied contract is where personal property is involved. This situation was so completely and briefly stated in the case of *Parks Canal & Mining Company vs. W. W. Hoyt*, 57 California at page 44. I feel at liberty to set out the opinion of the court in full as follows:

“For the purposes of this decision, it may be admitted that water acquired by appropriation (to be sold to miners and others), by means of a ditch leading from a natural stream, becomes, after it has passed into the ditch, the personal property of the appropriator. Further, it may be admitted, that if water be taken or diverted from the ditch, without the consent of the appropriator, he may waive the tort and bring an action for the value of the water taken. Nevertheless, although such appropriator may be entitled to the flow of the stream undiminished, the water in the stream above his ditch is not his personal property. The stream as yet flows in its natural course—a part of the realty. The appropriator certainly does not become the owner of the very body of the water until he has acquired control of it in conduits or reservoirs, created by art, or applied to the purpose of leading or storing water by artificial means. It follows, that he cannot maintain an action for the value of the water—as for personal property sold and delivered — against one who, without his consent, has diverted the stream above the mouth of his ditch.

“The evidence tended to prove that plaintiff was owner of a ditch dug for the purpose of conducting water from the Cosumnes River to Squaw

Hollow Creek, and also of another ditch leading from Squaw Hollow Creek, at a point below the Cossumnes ditch. Defendant diverted water from the Squaw Hollow Creek at a place between the two ditches. There was evidence that, 'at the times the water was taken by the defendant there was not sufficient water in Squaw Hollow Creek to fill the 'Squaw Hollow Creek ditch.' But there was no evidence of the quantity of water then running from the Cossumnes ditch into Squaw Hollow Creek, or that any was flowing through that ditch. For aught that appears, all the water diverted by defendant was water naturally flowing in Squaw Hollow Creek. If this was the case, it is clear, from what has been said above, that an action for the value of the water, as personal property, cannot be maintained. The natural bed of Squaw Hollow Creek acquired the character of an artificial conduit to the extent, and only to the extent, that the waters of the Cossumnes River flowed through it. The water brought to Squaw Hollow Creek by the Cossumnes River ditch alone, if any water can be so considered, can be considered the personal property of the plaintiff.

"The defendant moved for a nonsuit, on the ground, amongst others, that 'the testimony utterly fails to show any contract, agreement, or promise by defendant to pay plaintiff for the alleged water.' If plaintiff relies upon the promise to pay reasonable value, which the law implies from the wrongful taking of personal property—the tort being waived—there is a complete failure to prove the facts from which the promise is implied (and therefore the promise itself), since the evidence fails to show that any personal property was taken.

"The view we have adopted renders it unnecessary to decide other questions presented. We

may suggest, however, first, the answer does not distinctly deny that the plaintiff was organized as an association under the laws of Pennsylvania; and second, the complaint fails to allege that the laws of Pennsylvania gave to plaintiff the power to sue, or any other corporate power.

“Judgment and order affirmed.

“Morrison, C. J., and Ross, J., concurred.”

The above case was cited with approval in the case of *Salt Lake City vs. Utah & Salt Lake Canal Company*, and others, reported in 24 Utah at page 249. At page 266 the court used this language: “Above his headgates, however, the water in the stream or lake is not his personal property and he does not become the owner of it until he acquires control of it in artificial ditches or reservoirs;” citing *Parks Canal & Mining Co. v. W. W. Hoyt*, 57 Cal. 44.

If the theory of the complaint is to secure redress under Sections 104-61-10 and 11 of the Revised Statutes of Utah, 1933, then it again fails to state facts sufficient to constitute a cause of action. The first section cited provides the authority for occupation of property during condemnation proceedings and the terms and conditions under which order of occupation may be granted and provides for the filing of a bond in the penal sum not less than double the value of the premises and the damages which will ensue from the condemnation in case the property is condemned and “to pay all damages arising from occupation before judgment in case the premises are not condemned.” If it is the contention of the plain-

tiffs that their action is based on the condemnation statute, they must allege damages in order to state a cause of action. This the complaint fails to do and as pointed out hereafter in this brief the plaintiffs' counsel in open court disclaimed any damages, which clearly indicates what the interpretation of the complaint is to be, that it does not allege damages suffered by the plaintiffs.

The majority of the cases take the view in the absence of statute imposing liability that as the state or subdivision thereof or a corporation on which the power of eminent domain has been conferred in commencing a condemnation proceeding is in the exercise of a legal right and since every person owns property subject to the exercise of such right or privilege and the public officers have to exercise discretion in deciding on the use of property for public purposes, the damages which he suffers by reason of proceedings subsequently abandoned does not give rise to an action on his part but is *damnum abseque injuria*.

D. & R. G. W. Co. vs. Mills,
147 Pac. 681; Ann. Cas. 1916-E, 985;

Ford vs. Parks Comrs.,
126 N. W. 1030; Ann. Cas. 1912-C, 940;

Sidelinker vs. Yorkshire Water Co.,
105 Atl. 122, 2 A. L. R. 327;

State, ex rel. St. Louis vs. Beck,
63 S. W. 2nd 814, 92 A. L. R. 373.

The above rule we think does not apply in respect to actual damages or loss suffered by the property owner

but actual damages must be alleged and proved and the loss or injury cannot be based upon speculative or contingent events. Annotation 31, A. L. R. 364.

The complaint in paragraph 3 states: "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. On the said 23rd day of July, 1926, said Salt Lake City entered into the possession of said water so owned by these plaintiffs."

We think plaintiffs should have alleged that the city procured a valid order for the possession of plaintiffs' water, for if a void order or just any kind of an order it would have no bearing on the case. We invite the court's attention to plaintiffs' Exhibit "A", the court files in the case about which the plaintiffs are complaining. The complaint was filed on June 28, 1926.

In paragraph 8 of the complaint there is set out what purports to be a resolution passed by the Board of Commissioners of Salt Lake City on June 9, 1926. On June 28, 1926, a notice was served and filed setting the date for hearing on the order for the 3rd day of July, 1926. From that situation it clearly shows the court did not have jurisdiction. This jurisdictional defect is sought to be corrected by an amendment to the complaint filed on July 12, 1926. This we think could not be done.

Section 15-7-4, Revised Statutes of Utah, 1933, provides how the city may acquire water by condemnation proceedings, which is to the effect that the city must pass a resolution or ordinance and publish the same, declaring it to be deemed necessary for the public good that the city bring condemnation proceedings. Then the city must wait thirty days to see if any taxpayer of the city protests the bringing of the condemnation proceedings and, if one-third or more of the taxpayers protest, the matter must be put to an election before the city can proceed with its condemnation proceedings. This matter was before the Supreme Court of the State of Utah in case of *Tremonton vs. Johnson*, and others, reported in 49 Utah, page 307. On page 310, the court states the law to be as follows:

“The general rule is that where the statute prescribed the procedure or steps to be taken by a municipal corporation in exercising the right of eminent domain, the procedure prescribed by the statute becomes a matter of substance and must be strictly followed by the condemnor as against the owner of the property sought to be condemned. It is further held that where the statute prescribe certain steps to be taken before *initiating* condemnation proceedings, such steps are jurisdictional and may not be disregarded.”

On page 311, the court quotes with approval from *Whitehead vs. Denver*: 56 Pac 913

“It is held that where a statute requires certain things to be done by a municipality before *initiating* condemnation proceedings, things re-

quired to be done constitute a condition precedent to the rights to *institute* the proceedings and must be alleged and proved.”

We think the amendment to the complaint was of no consequence. *Lewis vs. Fox*, 54 Pac. 823. Quoting from page 826:

“It is said by respondents, however, that ‘the deprivation of the thirty inches of water from the artesian wells, and ouster from the same reason of the foreclosure and sale and sheriff’s deed under the Donovan mortgage, is pleaded in their supplemental cross complaint.’ But this does not aid the original cross complaint. The cause of action must exist when the action—commenced by the cross complaint—was brought. If a suit be brought upon a promissory note before it becomes due, the complaint would not be aided by a supplemental complaint filed after it became due, alleging its maturity at a date subsequent to the commencement of the action.”

In the case of *Keeler vs. Parks*, 130 Pac. 111, at page 113, the court said:

“The motion for a judgment dismissing the action upon the pleadings was properly sustained. The pleadings show that the action was premature. A state of facts that had not ripened into a cause of action when the suit is commenced cannot be supplemented by a class of facts that came into being later so as to make a cause of action.”

The court never having had jurisdiction in the matter could not make an order and any order the court made was a nullity. In the case of *State vs. Bates*, 22

Utah 65, 61 Pac. 905, quoting from the opinion at page 906:

“A void judgment is really no judgment. It leaves the parties litigant in the same position they were in before the trial. It leaves them in exactly the same position as if no trial had taken place. Such a judgment confers authority upon no one to enforce it. ‘A void judgment,’ says Mr. Black, ‘is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever; it has no effect as a lien upon his property; it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title, nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But, whenever it is brought up against a party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral.’”

In the case of *Minnesota Thrasher Manufacturing Co. vs. L. 'Heureux*, 118 N. W. 565, at page 566, the court says:

“Now a void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid judgment, nor is it entitled to respect accorded to one. It

can neither affect, impair, nor create rights. As to the person against whom it proposes to be rendered, it binds him in no degree whatever."

This last proposition urged as a grounds for the complaint not stating a cause of action is equally appurtenant to the assignments of error Nos. 3, 4, 5, 7, 8, 15 and 17.

Assignment of Error No. 17 is that the court erred in admitting in evidence plaintiffs' Exhibit "A".

ASSIGNMENTS OF ERROR NOS. 2, 3 AND 4—ABSTRACT 165.

Assignment of Error No. 2 challenges the correctness of Finding of Fact No. 2 wherein the court found that the plaintiffs were the owners of 22.75 shares of water right in the Big Cottonwood stream. Assignment of Error No. 3 challenges finding of fact No. 3 wherein the court found that on the 23rd day of July, 1926, Salt Lake City procured an order of court for the immediate possession of the plaintiff's water, and in accordance with the order entered into the possession of the said water and has continuously had and held the possession thereof from the 23rd day of July until date of trial. Assignment of Error No. 4 challenges the finding of fact No. 4 wherein the court finds that Salt Lake City has continued to and does now use water belonging to the plaintiffs and has failed and refused to deliver any part thereof to the plaintiffs or either of them. The above three assignments of error will be argued together.

There is no evidence in the case that the Moyles or either of them are the owners of 22 3/4 shares of water

right in the Big Cottonwood stream. Mrs. Oscar W. Moyle testified (abstract 26, transcript 58) that he owned 22 3/4 shares of the total flow of the Big Cottonwood Tanner Ditch Company, which I think the witness meant to say, 22 3/4 shares of the total flow of the Big Cottonwood Tanner Ditch. Nowhere in his testimony does he testify that he owned 22 3/4 shares of water right in the Big Cottonwood stream. In plaintiffs' complaint, paragraph 2, the plaintiffs claim to be the owners of 22 3/4 shares of water right in the Big Cottonwood stream and entitled to the use thereof through the Big Cottonwood Tanner Ditch. We submit that this finding is erroneous and absolutely contrary to the evidence. It may be urged that the defendant, Salt Lake City, knew or ought to have known that the plaintiffs meant to say that they owned 22 3/4 shares of water right in the Big Cottonwood Tanner Ditch. This, however, I think would be unfair to the City, and condones poor pleading to the prejudice of the defendant.

If the plaintiffs, the Moyles, had alleged the facts in their complaint in accordance with the testimony given by Mr. Moyle, the City would then have had the opportunity to have denied the fact as alleged and to have put in issue the extent of the right which Mr. Moyle testified that he owned in the Big Cottonwood Tanner Ditch, but with the allegation of the Complaint as it is, this issue could not be raised.

In finding of fact No. 3 where the court finds that the City entered into possession of the water of plain-

tiffs, the Moyles, and had continued to hold possession thereof from the 23rd day of July, 1926, until date of trial, is contrary to all the evidence in the case. In the first place, there is no evidence that the City ever had possession of any water owned by Mr. Moyle. The finding of fact indicates that the court believed that Moyle had actual possession of the corpus of the water and that the City took the water from his possession, and there is not one scintilla of evidence in the record to that effect. The evidence does show that at some periods during the time in question the City diverted the Big Cottonwood Creek stream of water from its natural channel at the mouth of Big Cottonwood Canyon, and placed it in the Salt Lake City conduit; but the evidence conclusively shows that that was for only a short period of each of the years in question, and that it occurred the first time in 1926; that in 1927, 1928, and 1929 there was no interference at any time of the year by Salt Lake City with any water right of Oscar W. Moyle and May P. Moyle. The exact dates and length of time that the City interfered with the natural flow of the Big Cottonwood Creek are specified in Mr. Towler's testimony (Abs. 139, 140, 141; Tr. 269, 270, 271, 272) and the evidence shows that Mr. Moyle used the water as freely during the period in controversy as at any other time.

The testimony of Mr. Horace T. Godfrey (Tr. 219; Abs. 126) and George F. Smith (Tr. 259; Abs. 136) who were the water masters of the Big Cottonwood Tanner

Ditch during the time in question each testified that as water masters they issued a card to each of the water users, showing the time to take the water and the number of hours they would be permitted to use it, and these cards were delivered to Mr. Oscar W. Moyle the same as other water users of the Big Cottonwood Tanner Ditch, all of which is more fully explained and shown by Exhibits 4, 5, 6, and 7 (Testimony of Mr. Godfrey, Abs. 127-132 inclusive).

There is no evidence in the case that Salt Lake City did any act or acts pursuant to any order of any court. There is no evidence in the case, in fact the evidence is to the contrary, that no order of a court was ever served on the Big Cottonwood Tanner Ditch Company, or on McDonald, the court commissioner of the Big Cottonwood Canyon Creek, directing either of them to deliver the water under their jurisdiction to Salt Lake City, nor any evidence that either of them were directed by any court to deliver any water belonging to Oscar W. Moyle and his wife to Salt Lake City. There is no evidence that Oscar W. Moyle and May P. Moyle were ever enjoined or restrained from using any water.

Findings of Fact Nos. 2, 3 and 4 are wholly unsupported by the evidence and are contrary to the undisputed evidence which shows that for the larger portion of each year, and during the entire time of four of the years the water ran in the Big Cottonwood Tanner Ditch undisturbed and undiminished by Salt Lake City.

ASSIGNMENT OF ERROR No. 5—ABSTRACT 166.

The court in its finding of fact No. 5 found 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 the complaint to the time of judgment the sum of \$350.00, which, together with interest at the rate of 6% makes a total damage to the plaintiffs in the sum of \$4,769.75. This finding is contrary to the evidence and is not supported by the evidence. There isn't one scintilla of evidence in the record that Oscar W. Moyle and May P. Moyle or either of them suffered any damage, and their attorney in open court (Abs. 148) disclaimed any damages for any diminution of water after 1926.

How could the court then find any substantial damages had been suffered by them, and give to the Moyles a judgment as the court did? How could the Moyles have a water right and be deprived of it without suffering damages? The fact is that they either had no water right because they had not been putting water to beneficial use, or if they had been using the water beneficially, then they continued to receive the water and use it, or they would have been damaged.

There is no competent testimony in the record that \$15.00 per year per share is a reasonable rental value. Mr. Moyle testified (Abs. 37 and 38):

“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 be the reasonable value for the use of that water during that time?

“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 is in that vicinity?

“A. Yes.

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

In my humble opinion that would not furnish any basis upon which the court could find that \$15.00 per share per year was a reasonable rental value, as the evidence shows that the water right which Mr. Moyle claims is a fractional part of the North branch of the Big Cottonwood Tanner Ditch, which he receives by way of a water turn about once a week, and that the water as it comes down naturally from the Big Cottonwood Creek, and that the water as it comes down from Big Cottonwood Creek is unfit for culinary use without being first treated, and that kind of a water right has no relation to the value of culinary water piped to a residence, treated so as to be fit for culinary use and in a pressure pipe so it can be used in conjunction with modern household conveniences.

The other witness who testified for the Moyles as to rental value was Mr. Wyler, a civil engineer, who testi-

fied that he took the total flow for the entire year for which the Big Cottonwood Tanner Ditch would be entitled to, and then took the amount of that which Mr. Moyle would be entitled to and took the average of that quantity for the past eight years and calculated the number of gallons of water that would be the average yield and then divided that quantity in half and multiplied that result by the price per gallon which Salt Lake City charges for water delivered through its water mains in the City, and dividing that sum by $22 \frac{3}{4}$ shares gave the figure at which he said was the reasonable rental value per share per year. That isn't any evidence of the reasonable rental value or of any value of any water. There was nothing in his testimony that couldn't have been calculated by the court or by any Sixth grade pupil who could multiply, subtract and divide ordinary arithmetic problems. There isn't any evidence in the record that Mr. Moyle had a continuous flow right. The evidence is to the contrary.

There isn't any evidence nor any pleading that Mr. Moyle could have sold his water, which he claimed the **right to receive**, for culinary use, and no evidence as to what the cost would be to reduce it to possession, treat and chlorinate it, pipe it to prospective customers, and collect the rents. All of it is too speculative and imaginative to be given credit by a court as to the reasonable rental value of a water right.

All we have said concerning assignment of error No. 5 applies equally to assignment of error No. 6, which

assigns as error finding of fact No. 7, wherein the court found that the Moyles had been damaged in the sum of \$4,769.75. There is no evidence that the plaintiffs or either of them suffered any damage, and as has been pointed out, they, through their attorney, in open court, disclaimed any right to recover any damages, claiming that they were not seeking damages and did not attempt to allege or prove any damages, and this assignment of error is also supported by the cases cited in support of assignment of error No. 1.

ASSIGNMENT OF ERROR NO. 6—ABSTRACT 167.

The court erred in its finding of fact No. 7 wherein the court finds that plaintiffs have been damaged in the sum of \$4,769.75. This is contrary to the evidence and to the claim of plaintiffs, who stated that they were not claiming damages. Bearing in mind that the plaintiffs in their complaint are seeking a judgment covering a period from July 23, 1926 to date of filing complaint, and the only claim they make is for an equal amount each year for that period, that is, reasonable rental value for their water right; and the evidence conclusively shows that in the years '27, '28 and '29 there was no interference with their water right, but notwithstanding that the court gives them judgment as prayed for covering the entire period from July 23, 1926 to date of trial.

What would be the proper measure for the reasonable rental value of the water right? Assuming, but not admitting, that the plaintiffs were entitled to a reason-

able rental value, it surely would not be the rental value for the highest duty the water could be put to, but could only be the reasonable rental value for the use to which the water had been put to, which was for irrigation purposes; and the plaintiffs did not introduce any testimony pretending to prove the reasonable rental value of a water right used for irrigating trees and shrubs. The court did not take into consideration any beneficial use that the plaintiffs received from the water furnished them through the culinary pipes or the clear canyon water which was permitted to run to them part of every year, and all of some years, nor did the court consider the reduction in loss, if any, which the plaintiff sustained, by recognition of the lake water which was pumped into the Big Cottonwood Tanner Ditch during a part of some of the years.

Mr. Moyle's testimony is that he used culinary water from the pipe which was supplied by Salt Lake City since the year 1921, the year the pipes were placed in front of his place. Hence the plaintiffs could not have had any water rights of any kind during the non-irrigation season. He had not been applying any water to beneficial use after 1921 for a culinary purpose. He testified that the water was piped into his home and also into his corral and that he watered his livestock and lawns from the culinary pipeline.

The evidence shows by all of the witnesses that Mr. Moyle took his regular water turn in accordance with the cards issued him by the water masters, saving and excepting two years when water master Godfrey was

directed not to time the 22 3/4 shares of water right to Mr. Moyle.

The order of the court, plaintiffs' Exhibit "A", of which the Moyles complained, provided among other things, "ordered that as soon as possible plaintiffs shall in water pipes furnish to or make available for defendants for domestic and culinary purposes sufficient creek water from Big Cottonwood Creek," thereby showing that the city did not get an order for the taking of all of Moyles' water and under Section 104-61-11, Revised Statutes of Utah, 1933, the court in making up its findings should take into consideration the value of the portion not sought to be condemned and how much benefit the Moyles would derive by the delivery of culinary water in the pipes to the Moyle's premises. This provision of the statute the court ignored in its findings and in making up the judgment for damages.

By the complaint of Salt Lake City in case No. 38604, naming as defendants Oscar W. Moyle and May P. Moyle, if the city sought to take by the law of eminent domain water in the Big Cottonwood Creek and substitute therefor Utah Lake water. (Par. 10, Exhibit "A"). The complaint was filed June 28, 1926, and a general and special demurrer was filed by the defendants on July 16, 1926. On the 23rd of July, 1926, the court granted its order authorizing the city to take possession of the said water of Big Cottonwood Creek flowing in the Big Cottonwood Tanner Ditch and to turn into the Big Cottonwood Tanner Ditch other water suit-

able for irrigation in lieu and in place of the Big Cottonwood Creek water so taken therefrom. (See File 38604, Exhibit "A").

The above referred to order was never reviewed or otherwise assailed by the defendants except that defendants called up the demurrer above mentioned for argument some eleven years later on October 8, 1937, and the court sustained the demurrer and thereafter on January 7, 1938, ordered the complaint of plaintiff in said case No. 38604 to be dismissed. The city thereupon abandoned its action in case No. 38604 and did not further seek to condemn said water.

In the event that the plaintiff claims his right in the present action under the law of eminent domain his damages must be recovered in the action, case No. 38604, either for a taking in the event of condemnation or for damages arising from the occupation or possession of the property before judgment in case the premises are not condemned in accordance with Section 104-61-11, Revised Statutes of Utah, 1933.

In the event, however, that plaintiff is suing in tort or has waived the tort and is suing on an implied contract, then no suit would lie against Salt Lake City unless a claim is filed as is required by the provisions of Section 15-7-76, Revised Statutes of Utah, 1933. Further, said claim must be filed in the manner and within the time required by the provisions of said section.

Apparently plaintiff's theory was that he was suing either in tort or implied contract because he made no

attempt to obtain damages in the case, No. 38604, above referred to, and he filed a claim in an attempt to comply with the provisions of Section 15-7-76 above. However, the claim referred to in said section of the statute must be filed within one year after the accrual of the cause of action. If the plaintiff is suing in tort or for an implied contract, his cause of action accrued when the order of dismissal of the action was entered. Therefore, the claim under said statute must have been filed within one year from January 7, 1938. The claim was filed on April 17, 1939, one year and three months after the accrual of the action.

Now another point of view. If the order of possession in case No. 38604 was void, then no action can be maintained for any of the years from July 23, 1926, to April 17, 1938, for the reason that each of those years would constitute a separate transaction and no claim was filed for any alleged damage pursuant to said section 15-7-76, Revised Statutes of Utah, 1933, until April of 1939.

The right to institute an action in this class of cases against a municipal corporation is purely statutory. It did not exist at common law and therefore the condition precedent fixed by the said Section 15-7-76 must be complied with, or the action fails.

Hurley v. Bingham,
63 Utah 589, 228 Pac. 213.

It is within the power of the legislature to impose such conditions upon the right to sue cities and towns, which are merely arms of the state government, as in its judgment may seem wise and proper, and the conditions which are thus imposed are conditions precedent and cannot be ignored either by the claimants or by the court.

Berger v. Salt Lake City,

~~35~~ Utah 403, at 408, 191 Pac. ~~223~~ 233
56

ASSIGNMENT OF ERROR NO. 8—ABSTRACT 169.

This assignment of error challenges finding of fact No. 9 which finds that the plaintiffs, the Moyles, had not abandoned their water right nor any part thereof. This finding of fact is not supported by the evidence and is contrary to the evidence.

Mr. Moyle testified (Abs. 43. Tr. 90):

“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.”

He further testified (Tr. 84; Abs. 39) that he had built his new house in the year 1923 and provided it with culinary water piped for the upstairs and downstairs and connected to the main lines that were put in in front of his place by the Big Cottonwood Tanner Ditch and Salt Lake City; and that he has ever since used culinary

water from that source for his house, sprinkling his lawn, and watering his horses, and there is no evidence in the record which proves or tends to prove any other use, so that giving Moyle full credit for all of his testimony he only had a water right for irrigation during the irrigation season from the Big Cottonwood Tanner Ditch, and that his culinary water was received through the water mains laid by Salt Lake City.

ASSIGNMENT OF ERROR No. 9.

This assignment of error challenges finding of fact No. 9, which is to the effect that the water involved in this case is the same as that decreed to Oscar W. Moyle in the case of *Progress Company vs. Salt Lake City, et al.*, 53 Utah 556, 173 Pac. 705. This finding is contrary to the facts as pointed out in the argument to assignment of error No. 8, that the evidence shows the extent of the water right which Mr. Moyle claims and that is the only water right which Mr. Moyle could claim; and there is no evidence in the record as to what the water right was in the case of *Progress Company vs. Salt Lake City*. This finding of fact is not responsive to any issue in the case. There was no allegation in plaintiffs' complaint regarding the water right which Mr. Moyle owned in the *Progress Company vs. Salt Lake City*, and as this court pointed out in the case of *Shurtliff, et al., vs. Salt Lake City*, 96 Ut. 21, that evidence without pleadings was of no consequence.

There is no purpose in finding No. 9. Whether the water right which Mr. Moyle owns is the same as that water right decreed to him in the Progress case is wholly immaterial. The only question before the court is, what is Mr. Moyle's water right? And this court has repeatedly held, and the state statute declared the law to be that beneficial use is the measure of the right of a water right in this state.

This finding, if permitted to stand, is prejudicial to the City, in this, that it purports to find a water right or a fact against Salt Lake City in accordance with a historical document, without the matter having been placed in issue to determine whether it is or is not a fact, and makes the judgment and decree ambiguous in that any officer of the law attempting to enforce the judgment would have to peruse the records of the Third District Court to determine for himself what this decree purported to declare the water rights of Mr. Moyle to be.

ASSIGNMENT OF ERROR No. 10.

This assignment of error challenges the correctness of the conclusion of law which the court drew concluding that the plaintiffs were entitled to a judgment 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. What we have said concerning the assignments of error No. 1 to 6 inclusive and 8 and 9 applies with equal force to assignment of error No. 10 insofar

as the rendition of the judgment in the sum of \$4,769.75 is concerned.

Here again the court seems to have assumed that the Moyles had possession of the corpus of the water and that Salt Lake City took the personal property, the very corpus of the water from the possession of the Moyles. There is no evidence in the case from which the court could so conclude. All of the evidence shows conclusively that the City did not have possession of Moyle's water and that Moyle did not have possession of the corpus of the water.

How could the court enter a conclusion of law concluding that the plaintiffs were entitled to the return of the possession and use of their water? There is no evidence that Mr. Moyle or his wife had any water. The evidence is that they claim to have a water right, or that is to say, a right to use water, and they claim that the City interfered with their right of use; and the only legal thing the court could do would be by way of enjoining the City from interfering with plaintiffs' right to use water, if such issue had been put in issue by the pleadings, which it was not, and hence was not before the court.

The court apparently proceeded on the theory of replevin, directing the return of personal property. There is no evidence in the record that the City has taken any water from Mr. Moyle and stored it in any particular place where the court could order a return of the water, and hence such a conclusion is wholly er-

roneous and prejudicial to the defendant Salt Lake City, to decree that the City do something which the evidence shows it could not do; it has not the power, not having the possession of any personal property belonging to the Moyles.

ASSIGNMENTS OF ERROR No. 11, 12, 13, 14, 15
AND 16—ABSTRACT 171-176 INCLUSIVE.

These assignments of error are as follows:

11.

The court erred in entering its judgment herein in favor of the plaintiffs and against the 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).

12.

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 \$4,769.75 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 plaintiff's 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).

13.

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 *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; Abs. 14).

14.

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 $22\frac{3}{4}$ 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).

15.

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).

16.

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 the 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 \$4,769.75. 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).

The arguments and authorities cited in support of assignments of error No. 1 to 10 inclusive, are equally pertinent to assignments of error 11 to 16 inclusive, and we submit them on the arguments already made, with this addition.

How could the decree which the court entered be enforced? No officer or court could tell where to find or how much water $22\frac{3}{4}$ shares of water right in the Big Cottonwood stream in Salt Lake County, Utah is. What amount of water is that? How would the court determine when the judgment or decree in the instant case had been complied with? How could anyone read the decree in the instant case and know whether or not it was complied with or violated? How could the court determine what a reasonable rental value for $22\frac{3}{4}$ shares of water right in the Big Cottonwood stream would be worth?

Lost Creek Irrigation Co. vs. Ren, et al.,
26 Utah 485.

The evidence not only shows that the plaintiffs suffered no damages, but on the contrary, proves that the Moyles were materially benefitted by the additional water that was made available to them by reason of the City furnishing more water under the contract of exchange agreement than would have been without the

contract, and the compliance with it on the part of Salt Lake City.

The testimony of Richard C. Towler (Abs. 142 to 144 inclusive) and exhibit 9 shows the quantity of water that Moyle would have received under his claim right and the amount of water which he actually did receive. This testimony is uncontradicted, and demonstrates that the Moyles were benefitted and not damaged.

The court erred in not granting defendant a new trial. (Assignments of Error Nos. 15 and 16). The evidence establishes the following facts:

1. That from 1926 to date of trial the water has been delivered to the Moyles in the same manner that it was in all previous years. It is interesting to note that in paragraph 4 of plaintiffs' complaint they allege that notwithstanding the order of dismissal Salt Lake City has continued to and does now use such water belonging to the plaintiffs and the evidence shows that the water had been handled in the same manner from the inception of the exchange agreement up to the date of the trial, which demonstrates that the conduct of the parties was not governed by the order of the court.

2. The evidence shows that the Big Cottonwood Tanner Ditch Company was decreed the right to distribute the water of the Big Cottonwood Tanner Ditch to the stockholders as well as to the owners of water rights who were not in the corporation. (Defendant's exhibit 2, files in case No. 14230.) (Abs. 87).

3. The evidence shows that the Big Cottonwood Tanner Ditch Company was never directed by the court or anyone else to cease delivering water to Oscar W. Moyle.

4. The evidence (witness Towler) is conclusive that the water delivered to Moyle during the period of 1926 until 1930 was clear mountain water coming from the Big Cottonwood Canyon Creek and thereafter for only a short period of time during irrigation season was there any Lake water co-mingled with the water of the Big Cottonwood Tanner Ditch.

5. The evidence demonstrated that during the period in question Moyle actually used his full term as allotted to him by the Big Cottonwood Tanner Ditch Company, including the $22\frac{3}{4}$ shares in question. (Witnesses Godfrey and Smith).

6. It is uncontradicted that there was an abundance of clear chlorinated water piped to Mr. Moyle's property and three large openings from the city mains connecting with the Moyle property and that he had used all the clear water he desired through these connections which were unmetered and under a pressure of approximately thirty pounds.

7. The evidence shows that the court taking judicial knowledge of the character of the water flowing in Big Cottonwood Creek was improper and contrary to the evidence in the case and demonstrates that the court was biased and prejudiced against the defendant Salt Lake City.

8. The evidence shows that the users of water under the Big Cottonwood Tanner Ditch have not used the winter water for culinary or domestic purposes since the pipes were put in there by Salt Lake City about the year 1921.

9. There is no evidence in the record which proves or tends to prove any need or use for water on the Moyle lands during the winter months for any purpose other than culinary.

10. The evidence conclusively shows that the Big Cottonwood Tanner Ditch Company has furnished more water for irrigation and growing plants, trees and crops than would have been received had it not been for the exchange agreement. (Witness Towler).

11. The evidence shows that the plaintiffs, Oscar W. Moyle and wife, have not been damaged in any way, have suffered no monetary loss by reason of any conduct of Salt Lake City, but on the contrary the evidence shows they have been benefitted by having received more water for culinary, domestic and irrigation purposes than they could or would have received under their claimed rights had it not been for the actions of Salt Lake City and the Big Cottonwood Tanner Ditch Company.

The plaintiff, Mr. Moyle, filed a protest in the State Engineer's office, dated June 20, 1938, and while he was on the witness stand he was asked if the following from

that protest was correct, which he stated it was, quoting from the protest:

“3. 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.

“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.

“5. That protestant’s said land is valuable only for residential purposes and that all of protestant’s said water from Big Cottonwood Creek is necessary for culinary and residential purposes upon his said land.”

This clearly shows that plaintiffs have no water rights for Winter use other than for culinary and domestic purposes, which they have received through the water pipes furnished by Salt Lake City. If the plaintiff is seeking to recover damages by reason of the order of the court entered on June 23, 1926, he clearly is not entitled to such, as the court order was entirely void, and if it should be determined that the court order was not void then we are met by this situation. The court fixed the price and terms for the temporary possession of the water and until the further order of the court, and if the court had fixed a price for the water

for temporary purposes in a sum that was considered by the plaintiff Salt Lake City excessive the city would not be compelled to take the water at the price fixed. In other words, it is the universal rule that the condemnor does not have to accept the measure or amount of damages for property which it seeks to condemn if it deems the price excessive, but the court having fixed the price or terms upon which it might take the Moyle water, the city had the right to rely thereon so long as it paid the price fixed by the court and there is no evidence or claim by the plaintiffs in this case that they are seeking damages or compensation because of the city having failed to comply with the order of the court. 121 A. L. R. page 1.

Referring to the case of *Big Cottonwood Tanner Ditch Company vs. Shurtleff, et al.*, 49 Utah at page 578, the court lays down this proposition:

“It has been elementary doctrine in the arid region that no one is entitled to a greater quantity of water for any particular use or purpose than is reasonably necessary to supply the needs of the claimant for the specified purposes. This is true regardless of the quantity that has been used for such purpose and the length of time it may have been used.”

And again on page 582 the court states:

“Nor can they claim water for culinary, domestic and livestock purposes and then devote it or any considerable part of it to irrigating purposes; that they may not do that by law, as I have pointed out, is well settled.”

Wherein were the Moyles damaged? They had all the water they could use and more for culinary, domestic and irrigation purposes. The plaintiffs prayed for \$4,150.00 but the court felt they had not prayed for sufficient, possibly feeling that Mr. Moyle was bashful and did not like to ask for all the money that he was entitled to and gave him judgment for \$350.00 covering a period of time of which there was no allegation covering the same or any prayer for relief covering the period from the filing of the complaint to the date of trial. A novel situation in a lawsuit. No claim was filed with Salt Lake City seeking compensation for the period of time from the 17th day of April, 1939, to date of trial.

If the court was granting compensation for the reasonable rental value for the use of the property during the period it is alleged to have been held by the order of the court, on what theory of law then does the court conclude that the plaintiffs were entitled to damages or rent from the time the case was dismissed on the 7th day of January, 1938, to date of trial? That period of time surely could not have been for rental value of property held by an order of the court.

The evidence in this case shows that early in 1920 Salt Lake City made application to the State Engineer to change the point of diversion from the Tanner Ditch Company to the city's conduit at the mouth of Big Cottonwood Canyon and to give the Tanner Ditch water from the East Jordan canal. This application was ad-

vertised and the application granted on September 3, 1920. It is our contention that all those who wished to object to the arrangement and who could be affected by it were compelled to file their protests before the State Engineer and if they were dissatisfied, to take their appeal to the court. It is the only way that Salt Lake City, who wanted a change of place of diversion of waters, could compel the matter to be adjudicated before the expenditure was incurred or commenced; otherwise, an appropriator could simply refrain from taking any action, permit a large expenditure and then bring an injunction suit to enjoin the change of place of diversion and thereby greatly damage and retard progress.

The evidence of Mr. Moyle demonstrates that he knew of the exchange agreement and knew that the exchange of the company's water for other water would necessarily mean Lake water in the Big Cottonwood Tanner Ditch part of the time, and he sat supinely by never protesting the application for the change of the point of diversion of the waters of the Big Cottonwood Tanner Ditch.

I think Section 100-3-3 of the Revised Statutes of Utah gives the State Engineer original jurisdiction for the determination of the right to change the point of diversion or use and that anyone dissatisfied with the State Engineer's decision must accept it or appeal to the District Court. This makes an orderly procedure, gives everybody an opportunity to be heard and the right to their day in court and does not permit anyone to be what

we sometimes refer to as a "dog in a manger." In other words, an applicant for a change of diversion may know in advance whether he has a right to make the change and can rely upon the venture of large expenditures in effectuating the proposed change of diversion.

ASSIGNMENT OF ERROR No. 17.

The court erred in admitting in evidence plaintiff's Exhibit "A". (Abs. 176). Exhibit "A" consists of the files in the case of *Salt Lake City vs. Oscar W. Moyle and May P. Moyle*, filed June 28, 1926, wherein a certain order was made on July 23, 1926.

The first paragraph of the order is to the effect that Salt Lake City is a municipal corporation and enjoys the right of eminent domain and that the use Salt Lake City would make of Big Cottonwood water is a more necessary public use than the use to which the water is now applied.

Paragraph 2, "That said Salt Lake City, plaintiff is hereby authorized to take all the water of Big Cottonwood Creek now flowing in Big Cottonwood Tanner Ditch and to turn into said Big Cottonwood Tanner Ditch other water suitable for irrigation in lieu and place of the Big Cottonwood Creek water so taken therefrom by plaintiff, and it is further ordered that as soon as possible plaintiff shall in water pipes furnish to or make available for defendant for domestic and culinary purposes sufficient creek water from Big Cottonwood Creek. Dated July 23, 1926."

The only purpose of introducing Exhibit "A" would be if a valid order was therein made upon which Oscar W. Moyle and May P. Moyle were prejudiced and could be the basis of a cause of action. We objected to this as incompetent, irrelevant and immaterial, which objection was overruled. (Abs. 25) This order above set out is absolutely void. A judgment is void when it affirmatively appears from the inspection of the judgment roll that any one of three following jurisdictional elements are absent: first, jurisdiction over the person; second, jurisdiction of the subject matter; and third, judicial power to render the particular judgment. *Winona Oil Co. vs. Barnes*, 200 Pac. 981.

A void judgment is one which shows on face of record a want of jurisdiction in court assuming to render judgment, which want of jurisdiction may be either of the person or of the subject matter generally, or a particular question attempted to be decided, or relief assumed to be given. *New York Casualty Co. vs. Lawson*, 24 S. W. (2nd) 881.

Mr. Freeman in his work on Judgments, Fourth Edition, 116, in speaking of void judgments says that they must be so for one or more of the following causes: one, want of jurisdiction over the subject matter; two, want of jurisdiction over the parties, or some of them; three, *want of power to grant the relief contained in the judgment*. *Pitkin vs. Burnham*, 87 N. W. 160; 55 L. R. A. 280.

According to the order made by the court the city was to take water of Big Cottonwood Creek which was now flowing in the Big Cottonwood Tanner Ditch and turn into the Big Cottonwood Tanner Ditch water suitable for irrigation in lieu and place of the Big Cottonwood Creek water so taken therefrom, and furnish culinary water in pipes. I have been unable to find any law that would give the court authority to make such an order and without authority to make the order, it is void.

ASSIGNMENT OF ERROR No. 18.

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 of the water allotted to you under both sources of title?" (Abs. 177)

We think this called for the conclusion of the witness on one of the important material issues as to how much water he had been using and not to be concluded as a general statement of the witness that he had used all of the water allotted to him under both sources of title. We think the witness should have been required to state the use he had made of the water and let the court conclude as to whether or not he had used all the water allotted to him and let the court conclude as to what water he was using, that is from what source of title.

ASSIGNMENT OF ERROR No. 19.

The court erred in taking judicial notice of the fact that the natural flow of Big Cottonwood Creek is suitable water for culinary purposes. (Abs. 177) We think this was entirely erroneous on the part of the court and it was one of the material issues in the case as to the value of the water right in question for rental purposes.

It is our position that the court cannot take judicial notice of contraversional issues. The evidence in the case offered on behalf of defendant by the witnesses Amber Knight and Lynn M. Thatcher is undisputed, that the Big Cottonwood Creek water is not suitable for culinary purposes.

In the case of *State Ex Rel. Attorney General vs. Norcross*, reported in 112 N. W. at page 40, on page 43 of the opinion the Court had this to say:

“The affirmative position that a certain river is navigable may well be judicially noticed in many instances. That a river is not navigable may sometimes be the subject of judicial notice; but considering the various degrees of navigability, and the various kinds of navigation, and the various appliances for the purpose of navigation, and the different conditions along different portions of the same river, there must still remain a large class of cases in which to determine this question by judicial notice would deprive the party averring navigability or non-navigability, as the

foundation of his right, of the opportunity of trial and hearing.”

In *Varcoe vs. Lee, et al.*, 181 Pac. 223, quoting from the opinion at page 227:

“The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is: (1) Is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know? and (2) is it certain and indisputable? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required.”

ASSIGNMENT OF ERROR No. 20. (Abs. 177)

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?”

This error is self-evident. In what way can the issues in the instant case be affected by the price Salt Lake City or anyone else charges for culinary water piped to a house when the water right in question was a turn right for irrigation purposes? There is no relationship and one would have no bearing on the other.

ASSIGNMENT OF ERROR No. 21. (Abs. 177)

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 in culinary water or the four-fifths you got in irrigation water?"

This is obviously erroneous. It could make no difference what the witness's opinion was, as to what part of the rights he received from the certificate of stock made up the value to him, and a water right for culinary purposes through a pipeline and for water to irrigate has no relationship to the water rights in litigation in the instant case.

ASSIGNMENT OF ERROR No. 22.

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?"

Bearing in mind that witness had been testifying upon direct examination as to what he estimated the rental value of the 22 $\frac{3}{4}$ shares of water right which he claimed, was worth, on cross examination by the question asked it was clearly sought to test the knowledge

and competency of the witness and to ascertain what his value would be for the rental value of water used for irrigation water, irrigating trees and other crops such as the witness had testified that he used the water for, but the court would not permit it.

ASSIGNMENT OF ERROR No. 23.

The court erred in sustaining plaintiffs' objection to the following question put by the defendant to the witness Macdonald, 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?”

We think this is a proper question to have answered. It is our contention that the water could not be condemned and taken away from the Big Cottonwood Tanner Ditch without being approved by the State Engineer and by an order directing the court commissioner to recognize the change of the right to use and the place of use of the water of the Big Cottonwood Tanner Ditch.

WHEREFORE, by reason of the manifest errors of the court assigned and relied on for a reversal by the ap-

pellant, it hereby prays that the judgment by the lower court be reversed and for such other and further relief as to this court may seem proper.

Respectfully submitted,

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