

1941

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

Utah Supreme Court

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IN

The Supreme Court

OF THE

State of Utah

OSCAR W. MOYLE and
MAY P. MOYLE,

Plaintiffs and Respondents,

vs.

Case No. 6328

SALT LAKE CITY, a municipal
corporation,

Defendant and Appellant.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

The present action of Oscar W. Moyle and May P. Moyle against Salt Lake City grows out of a special proceeding instituted by Salt Lake City as plaintiff and Oscar W. Moyle and May P. Moyle as defendants filed in the District Court of the Third Judicial District for Salt Lake County, Utah, early in July, 1926. To that complaint the Moyles interposed a general and special demurrers. Those special proceedings may possibly be referred to as condemnation proceedings or intended as

such, but they were peculiar in nature and certainly were sui generis. The City claimed that by reason of a jam they were in under a contract with the Big Cottonwood Tanner Ditch Company it was necessary that the City acquire the water rights owned by the Moyles and which waters the Moyles diverted through the Tanner Ditch. This water was not water of the Big Cottonwood Tanner Ditch Company but water owned by the Moyles otherwise than as stockholders in said Company and the Moyles used the Tanner Ditch as a tenant in common with the Company in the ownership of the Tanner Ditch or at least as such tenant in common for that portion of the Ditch located on and above the Moyle property.

On those proceedings and on July 23, 1926, on motion of Salt Lake City, the Court ordered that Salt Lake City "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 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 or make available for defendants for domestic and culinary purposes sufficient water from Big Cottonwood Creek." The City in its complaint had alleged that the other waters to be turned into the Tanner Ditch were Utah Lake waters, not potable but fit for irrigation while the Big Cottonwood waters were potable.

The case rested in the District Court until the de-

murrer of the Moyles was noticed Oct. 2, 1937, for hearing, duly argued, and the general demurrer of the Moyles was sustained and on Jan. 7, 1938, and on motion of the plaintiff therein, (Salt Lake City) and without notice to the Moyles, the Court ordered the case dismissed. Whether the Court in that case erred in sustaining the demurrer or in granting the order of possession of the water we submit is wholly immaterial to the present action. The Court had jurisdiction of the subject matter, of the parties, and of the special proceedings, and there was no appeal by the City.

The present action was brought by the Moyles against the City to recover the reasonable value of the use and possession of the water so taken under the order of July 23, 1926, from the time of such taking and also for the return of the waters to the plaintiffs (Moyles) herein and alleged their damages for the taking and withholding of the water in the sum of \$4150.00 (Abs. p. 3). The Defendant herein, Salt Lake City about one-half dozen times has repeated in its brief that counsel for the Moyles in open court disclaimed any damages to the plaintiffs. This, of course, is not correct. No counsel for plaintiffs ever at any time disclaimed any damages to the plaintiffs. What was said by counsel was that we were not claiming special damages but only general damages as set out in the complaint. See appellants brief pp. 15-24-27 and Abs. 148 and other places throughout the brief of appellants.

The Moyles in addition to the water involved in this

litigation owned stock in the Big Cottonwood Tanner Ditch Company during all the time since July 1926, and for some time before. It will be necessary for the Court to keep this in mind all the time while reading the testimony in this case. They owned something over 23 shares in the Corporation and were entitled as such stockholders to use the water represented by such shares. That water and the use thereof is not involved in this case but it is frequently referred to in the evidence. The water involved in this case is described as $22\frac{3}{4}$ shares of water right in the Tanner Ditch (not in the Corporation) and the water right was appurtenant to land owned by the Moyles in the $SE\frac{1}{4}$ of Sec. 15, T 2 S, R 1 E, S. L. M. in Salt Lake County. The water diverted by the Tanner Ditch is described as 1860 shares of which the Moyles own $22\frac{3}{4}$ shares for use during the entire year; other independant owners own about 227 shares and the Big Cottonwood Tanner Ditch Company owns substantially 1625 shares of the water so diverted. (Abs. 104 to 112). The figures do not quite reconcile but that is immaterial here. The fact to keep in mind is that Moyle owned two water rights, one by virtue of his ownership of stock in the Corporation and the other (the one involved here) by ownership of a water right appurtenant to his land.

Another fact to keep in mind to determine the weight to be given the witnesses on the question of value of the use of the water taken by the City is the place on the Tanner Ditch that the witnesses reside. The Moyles reside and took their water from the upper end of the

Tanner Ditch and only a short distance below its intake at the Big Cottonwood Creek. The water there was a large stream running only a short distance in the Tanner Ditch and very desirable for household purposes. Realizing this, the Moyles refused to participate in the organization of the Corporation and refused to transfer their water rights in the Tanner Ditch to the Corporation. The people one to three miles further west more generally participated in the organization of the Corporation and transferred their water right or at least the control of it to the Corporation. When the City and the Corporation were negotiating the exchange agreement by which Utah Lake water from the City Canal was to be pumped into Cottonwood Creek bed and to be delivered to the Tanner Ditch at its intake, the Moyles, as stockholders of the Corporation, and some others on the upper part of the Tanner Ditch opposed the entering into of the exchange agreement by the Corporation. But the water users far down the Tanner Ditch had to conduct the water a long distance in the Tanner Ditch and very often a long distance in ordinary private irrigation ditches carrying only a small stream of water and such water was not desirable for household purposes. Those people were farming people and wanted irrigation water and for this purpose Utah Lake water was practically as good as Big Cottonwood Creek water and piped water for culinary purposes was most persuasive to them and they therefore desired the Corporation to enter into the exchange agreement. These facts enter in a large way into the attitude and opinion of the witnesses for Salt Lake

City on the question of the value of the use of the water taken by Salt Lake City and their opinions are all on the theory that Utah Lake water is just as valuable as Big Cottonwood stream water; in most instances, however, those witnesses expressed no opinion whatever on the value of Big Cottonwood stream water but only upon the value of any kind of water for irrigation.

Prior to the order for immediate possession of the water in question Moyle put to a beneficial use the entire amount of water he was entitled to use under his ownership of the $22\frac{3}{4}$ shares in question and also under his ownership of shares in the Big Cottonwood Tanner Ditch Company. Abs. 29-30. After the order of possession, July 23, 1926, he used no part of the water owned by him and represented by the $22\frac{3}{4}$ shares not represented by stock in the Corporation but used only the water allotted to him on his shares of stock in the Big Cottonwood Tanner Ditch Corporation. Abs. 32-3; also Abs. 55-6. In 1926, and frequently since 1926 during the dry season Salt Lake City has diverted at the City's conduit the entire flow of Big Cottonwood stream and all the water entering the Tanner Ditch at those times is Jordan River water. At other times during the dry season the water entering the Tanner Ditch is a mixture of Big Cottonwood stream water and pumped Jordan River water and at all such times there is no water in the Tanner Ditch fit for culinary purposes; that has been the case continuously since 1926 to the time of the trial (Abs. 30-31.) Prior to the pumping by the City, the water in the Tanner

Ditch was clear Big Cottonwood water fit for culinary purposes. (Abs. 31.)

Prior to 1926, when the water was taken by the City, Moyle used the Tanner Ditch as a tenant in common with the Big Cottonwood Tanner Ditch Company as far down as he diverted the water described as $22\frac{3}{4}$ shares from the Tanner Ditch. Because of that common use he paid to the Corporation each year an amount agreed upon as his share as such tenant in common of the upkeep of the Tanner Ditch. When the City took the water in 1926 shortly thereafter Moyle notified the Company he would not pay any such upkeep because he did not have the possession of the water as it was taken from him by the City.

See Exhibit I, Mr. Moyle's letter to Amos H. Turner, Secretary of Big Cottonwood Tanner Ditch Company, dated February 20, 1931, wherein he stated:

“When you were in my office the other day and went over the items of expense constituting this \$1.64 per share. I considered them reasonable, and as far as that is concerned, think they are a reasonable charge to be made for the $22\frac{3}{4}$ shares of stock and I would be glad to pay the total \$38.41, which you requested if it were not for the fact that Salt Lake City has condemned this water right. Going over my files I find my letter of July 31, 1926 directed to Big Cottonwood Tanner Ditch Co., Amos H. Turner, Sec., R.D. 3, Murray, Utah, a copy of which I inclose. The Big Cottonwood Tanner Ditch Co. ought to receive this money but as stated in the inclosed letter, Salt

Lake City was given possession of this water right in July 1926 and since that time, having the possession of the water, should pay the assessment."

Also, in a letter dated September 12, 1933, to Irvin T. Nelson, Treasurer of Big Cottonwood Tanner Ditch Company, Mr. Moyle wrote as follows:

"I can only inform you, as I have heretofore informed you each year as you send the statement, that Salt Lake City brought condemnation proceedings against this water several years ago, took possession of it, and has had the use and benefit of it ever since. I am not entitled to it, am not using it, and will not pay any upkeep or any expense whatever, and I do not understand why you continue to send me these yearly statements, since, as stated, the water does not belong to me and has not been used by me. I do not know what Salt Lake City is doing with it, that is a matter between you and the City." (Exhibit J.)

Also, to the same effect, see Exhibit K.

Nevertheless the watermaster of the Company continued to issue to Moyle cards allotting to him the full amount of water represented by the $22\frac{3}{4}$ shares involved herein. But the testimony of Moyle is positive that notwithstanding such allotment cards he used only the water represented by the 23+ shares of corporate stock, and used no part of the water right represented by the $22\frac{3}{4}$ shares not in the Corporation. Abs. 56.

The reasonable value of the use of the water taken by the City from the time of its taking until the time of trial was at least \$15.00 per share per annum; this was

the testimony of Mr. Moyle and was the lowest estimate by any witness in the case; other witnesses fixed its value at \$50.00 per share per annum; and in a controversy between Salt Lake City and the Moyles before the State Engineer, the State Engineer found that the value of Big Cottonwood stream water in the vicinity of Moyle's place was ten times the value of Jordan River water delivered at the same place. Plaintiffs' position is that there is no evidence offered by defendant contradicting the evidence on the question of damages.

On pages 7, 8 and 9 of Appellants brief counsel has listed nine questions, lettered A to I inclusive, which he states are involved in this appeal. Six of these questions which are set out in full below, we submit are not involved in this appeal at all as there is no evidence on any such questions at all. These six questions are:

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

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

Appellants question 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?

Appellants question 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?

Appellants question G: May the plaintiffs, Moyles, use the culinary water through the pipes and all the irrigation water they used 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?

Appellants question 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?

And appellants other three questions may be asked in any case. They are:

Appellants question A: Does the complaint state sufficient facts to constitute a cause of action against Salt Lake City?

Appellants question 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?

Appellants question 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 property is not now in existence, that is at least under anyone's control?

ARGUMENT

The first contention argued by appellant is that plaintiffs complaint does not state a cause of action against defendant. He sets out in the brief (p. 10) that plaintiff alleges the taking of a water right and the taking of the water to which the right attaches; the withholding of the possession thereof from plaintiffs by defendant; the reasonable value of the use and possession of such water during the withholding was a stated amount and by reason of such withholding plaintiffs were damaged in the amount of such reasonable value of the use of the water; then defendant concluded his statement by saying there is no allegation in the complaint of any damages sustained or suffered by plaintiffs. This position seems to arise from a confusion that runs throughout the brief. Counsel does not seem to consider

general damages as anything more than nominal damages. On his theory, a suit for conversion of a ton of sugar, alleging the conversion of the sugar, the value of the sugar at the time of the conversion and alleging the damage in the amount of the value (say \$100.00) would entitle the plaintiff to a judgment of only nominal damages. On his theory plaintiff would have to allege that he intended to make candy out of the sugar and make other allegations to show a right to recover special damages. This confusion runs throughout the whole brief. At page 15 he says "plaintiffs' counsel in open court disclaimed any damages"; at page 24, "and their attorney in open court disclaimed any damage for any diminution of water after 1926"; page 27, "they (the plaintiffs) through their attorney, in open court, disclaimed any right to recover damages, claiming they were not seeking damages and did not attempt to allege or prove any damages"; page 27, the statement is repeated. By reading what actually took place in open court it shows clearly that what counsel said was that we were not claiming special damages to trees, shrubs, lawns, vegetable garden and property—no where is it intimated that we were not seeking the damages alleged in the complaint. Plaintiffs spent most of their time at the trial in testimony tending to prove their damage and the amount thereof and defendant likewise called witness after witness to testify to things that the defendant has always (erroneously, we think) contended had a tendency to reduce the amount of plaintiffs' damage.

There is no question but what a water appropriation right depends upon beneficial use; and it is equally true that if the appropriator fails to put the water to beneficial use and allows the water to run waste another may use the water without doing any legal wrong to the appropriator. But it is equally true and equally well settled that an appropriator of water may maintain an action for damages against one who obstructs, abstracts, or diverts the water to which plaintiff is entitled or otherwise interferes with his rights.

“An appropriator is entitled to have the full quantity of water called for by his appropriation flow in the natural stream, or in his ditch or canal, in such way that he can enjoy its use and for any material interference with his flow of water, by which his right to its use is substantially impaired, he may maintain an action for damages.” 3 *Kinney on Irrigation and Water Rights*, p. 1662, p. 3054. *Bailey v. Idaho Irr. Co., Limited* (Idaho), 227 Pac. 1055 at p. 1056, second column. *Jerrett v. Mahan* (Nev.), 17 Pac. 12.

There can be no doubt that at common law, and under the code prescribing civil remedies, there would be a right of action for damages for a wrongful interference with a water right to the injury of the owner thereof. *Van Buskirk v. Red Buttes Land and Live Stock Co.* (Wyo.), 156 Pac. 1122 at 1126, bottom of second column.

Defendant's brief cites *Parks Canal v. Mining. Co.*, 57 Cal. 44, and quotes the whole opinion. That case

simply holds that the plaintiff therein could not bring 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. No such question is involved in this case and no such complaint is on file herein. The decision is probably correct for one cannot ordinarily waive the tort in trespass and recover in an action of contract because no promise can be implied. The taking of the water in the case at bar was not a tort but was taken under an express order of the court and whether the order for possession was erroneous or not, the taking could not have been a tort. Assumpsit on a common count for goods sold and delivered is an action sounding in contract and as heretofore stated cannot be brought for the value of property taken by trespass, at least not taken in the manner the water was taken, if at all, in the case of *Parks Canal v. Hoyt*, ante. That case counsel for the City probably obtained from 67 Cor. Jur. 1053, Para. 507, where it is specifically (and the only case cited) cited to the text that an action for the value of the water, as personal property sold and delivered, cannot be maintained against one who has diverted the stream above the head of the appropriation ditch. The action of the plaintiffs in this case is fully supported in 67 *Cor. Jur.* 1052, para. 505.

Appellant in its brief spends considerable time in explaining how its complaint in its so-called condemnation case of *Salt Lake City v. Moyle* does not state a cause of action. The Moyles interposed a general de-

murrer to that complaint and that demurrer was sustained by the Court and thereafter on motion of the City the case was dismissed. So it is that on that ruling of the trial court at least the appellant and respondent agree. But because a complaint does not state a cause of action does not oust the Court to proceed in the case and pronounce a valid judgment either correctly or erroneously. Courts have jurisdiction to err as well as to follow the law. But appellant says that in the original complaint there was no allegation of certain conditions precedent to the bringing of condemnation proceeding to condemn a water right. Assuming, but not conceding, that the suit filed was a condemnation proceedings, it does not follow that because conditions precedent to the filing of the complaint were not alleged in the complaint that therefore the Court would have no jurisdiction to proceed; the defendant could waive such allegations and would do so by not raising the question and if raised the Court would have jurisdiction to rule rightly or to rule erroneously upon the question. Under a similar statute to the Utah statute cited in appellants brief, the Supreme Court of Wyoming, in the case of *Edwards v. Cheyenne*, 114 Pac. 677, at p. 694, holds that it is not necessary to allege the proper action by the City Council and adds that perhaps they should be shown at the hearing. While the defendant in the condemnation proceeding may waive any such action by the City authorities and may do so by failing to raise the question the plaintiff is in no position to do it. It does not lie in his mouth

to say the the Court has no jurisdiction over the particular proceedings that he has instituted.

“Jurisdiction of the person of the defendant is not essential to the commencement of a suit. But it is apparent that a suit is not commenced until the court has in some manner acquired jurisdiction of something in relation to the controversy. It must, therefore, be over the person of the plaintiff, or the subject matter, or both. The court acquires jurisdiction of the plaintiff when he applies for its power and assistance to compel the defendant to render him his rights under the law; but this aid must be sought according to prescribed forms, and under our practice that form requires that he file with the clerk of the court a praecipe for the process he desires. This is an application, in its nature, to the court to send its process to require the defendant to appear at a subsequent term to defend the action. The Court clearly has jurisdiction of the plaintiff when he thus invokes its aid. When he thus submits his person to the court, he, by asking its aid, gives the court jurisdiction over the subject matter in controversy, and confers power to adjudicate and determine his rights thus submitted. In this manner the court becomes possessed of jurisdiction of the person of the plaintiff and of the subject matter, and when so possessed it becomes the duty of the court to commence and carry on the power to bring the defendant in to the court, that the case may be heard; and the rights of the parties in the matter thus brought before the court may be judicially and conclusively determined.” *Schroeder v. Merchants etc., Ins. Co.*, 104 Ill. 71 at 75. *Ex parte Cohen*, 6 Cal. 318.

Jurisdiction of a particular action is acquired by the filing of pleadings which show the case to be within the general class of cases which the Court has jurisdiction to hear and determine and a petition or complaint which shows this is sufficient to give jurisdiction although it is defective in other respects. A plain illustration of this would be the exercise of the power of appointing a receiver by the Court where the complaint alleged no facts showing the necessity of such appointment; the appointment would not be void and it could not be attacked collaterally.

It is true that Justice Frick speaks of the action of the City authorities as jurisdictional. In that case the defendant, not the City, was claiming that the complaint did not state a cause of action and he was so claiming it in the condemnation proceedings. "The owner whose property is sought to be appropriated without his consent certainly has the right to insist that the statute be followed. That is all Johnson is contending for on this appeal." Mr. Justice Frick in *Tremonton v. Johnson*, 49 Utah at p. 312. In this case at bar Salt Lake City is attempting to attack collaterally an order of the Court on account of a defect in their own complaint. Mr. Justice Frick certainly used jurisdiction to mean nothing more than it was necessary to state the action of the City authorities in the complaint in order to state a cause of action when the question was properly raised in the case by proper objection on the part of the property owner; that was all that was before the Court.

It is argued by counsel under Assignment of Error Nos. 2, 3 and 4 that the description of the water right in plaintiffs complaint is misleading. It is, in our opinion, strictly accurate. The right is a right to divert water through the Tanner Ditch from the Big Cottonwood stream; it is not a right to divert water from the Tanner Ditch. Neither the Tanner Ditch nor the Big Cottonwood Tanner Ditch Company ever owned the right to divert the water from the Big Cottonwood stream. Nor is the position of counsel that there is no evidence of possession of the water by Salt Lake City tenable. The City under a showing of immediate possession procured from the Court an order for such immediate possession in July, 1926. The evidence shows that April, May and June, 1926, the water in Big Cottonwood stream was clear water; that in July, August, September and to October 15, 1926, the water available at the intake of the Tanner Ditch was at least a mixture of Utah Lake water caused by Salt Lake City pumping such water into Big Cottonwood Stream. Abs. 139. That rendered the water of the Tanner Ditch non-potable and was an actual taking of the water of plaintiffs under the order of the Court. The evidence also shows that at least part of that time the entire flow of Big Cottonwood Creek was diverted at the City conduit by Salt Lake City. The evidence we think of the taking of possession of the water by Salt Lake City is quite conclusive. The order of the Court was for immediate possession because of the necessities of Salt Lake City and the City had all the means necessary to take the water. It did take all the water of the

stream at times in 1926 and took it admittedly by polluting the water in July, August and September and October 1926. There is no evidence that the City ever returned the water to the plaintiffs. Although the City put on a witness, the assistant City Engineer in charge of water supply, and especially in charge of the exchange contract on the Big Cottonwood stream, not a word came from him to show that the City did not immediately take possession of the water and had not kept the possession of the water until the time of the trial.

“The right to own property carries with it the right to exercise dominion and control over it. When the dominion control and management of one’s property is taken away from him, the right to private property is violated. To take away the dominion and control over property is to take the property itself, for the absolute right to property includes the right of dominion, control, and the management thereof.” *Fisher v. Bountiful City*, 21 U. 29.

The Court in this case further said at page 35:

“The dominion and right to the use of the water and the control and diversion of the same for irrigation, culinary and other beneficial purposes, was vested in the plaintiffs’ by their appropriation and use, and they could not be deprived of such right except by their voluntary act, by forfeiture, or by operation of law.”

Under Assignments Nos. 5 and 6, appellant contends that plaintiffs proved no damage. In our complaint we alleged the reasonable value of the use and possession

of the water during the time the water was taken from plaintiffs and alleged plaintiffs' damages in the amount of that reasonable value. The testimony of Mr. Moyle was that the reasonable rental value of that water at the time and in the vicinity of his property was \$15.00 per share per annum for the whole time involved. This was the lowest value put on that water by any witness qualified to testify as to its value. Mr. Moyle qualified to testify on the subject of value and there is a presumption that the owner of property knows its sale and rental value. The testimony of Mr. Moyle on direct examination as abstracted (Abs. 37 and 38) is somewhat uncertain and in order to determine his true testimony in this regard, it is necessary to refer to the Transcript, Pages 80 to 83.

M. R. Weiler, a resident of the immediate vicinity of the Moyle property and a man educated as an engineer, well acquainted with Big Cottonwood stream in its natural condition at that place, and one who had been in the market for culinary water in the vicinity of his home and of the Moyle premises, and with the amount of such water that would come to the Moyles place by reason of the $22\frac{3}{4}$ shares owned by the Moyles outside the Corporation, testified that fifty dollars per share per annum would be a conservative valuation for the use of that water. (Abs. 59-61, Trans. 123, 124.)

On cross examination Mr. Moyle testified that in his judgment the shares were worth \$800.00 per share. In a controversy between Salt Lake City and the plain-

tiffs over this water in question before the State Engineer of Utah, that official found among his findings that Big Cottonwood stream water had a value at Moyles place and in that vicinity, of ten times as much as Utah Lake water pumped by Salt Lake City to the Tanner Ditch intake. That finding was a proper one to be found by the State Engineer in that controversy, was made in the course of his official duties and no one can doubt the qualifications of the State Engineer to determine that value. See Exh. E. It should carry great weight with any tribunal that was called upon to determine the value of water at that place. Had it been found by the Court in a controversy submitted to it the finding would have been *res judicata*. We do not claim it to be so because the finding was not made by a judicial tribunal; but we do claim that it is evidence of a very high order and entitled to great weight. On that valuation the rental value placed by Mr. Weiler would provide a very low rental return on the value determined by the State Engineer. It is true that the trial court said that he did not think that the finding of the State Engineer was competent evidence of value. On what theory it is not we do not know. The finding is in evidence for other purposes and we think has great weight on the question of value.

On the defendant's part witnesses from far down on the Tanner Ditch were sworn and testified as to the value of water for irrigation purposes and that Utah Lake water was as valuable as Cottonwood water for

farm irrigation. We submit that each and every witness for defendant failed to qualify as a witness as to the rental value of the $22\frac{3}{4}$ shares in question. They knew nothing about values except as to the value of Tanner Ditch corporate stock and its rental value. Even the witness Towler, the assistant City Engineer, testified: "I am perfectly frank to say that I based the rental value on the use to which Mr. Moyle had put the water there." That was, he testified, to irrigation use on the Moyle property. Trans. p. 301. Probably every eminent domain case tried contains an instruction to the general effect that the owner is entitled to the property's actual value for its highest or best use to which the property could be put at the time of the taking. And a witness's testimony on value where he excluded uses of a more valuable nature that the property could be put to at the time of the taking is of little or no value to aid court or jury to determine what is just compensation for the property. There is nothing in the record to justify the statement that Mr. Weiler, a witness for the plaintiffs, calculated his value of the Moyle water by determining the number of gallons it would yield per annum and multiplying the amount by the price per gallon Salt Lake City charges for water delivered through its pipe line. Neither did any other witness in the case. So we say that the question as to whether that is a correct way of ascertaining the reasonable value of the use and possession of the water in question is not in the case before the Court. But certain it is that a witness would not be

disqualified from testifying on the value simply because he knew at what price the City was charging for culinary water in that vicinity. Supposing that the City was selling its water through the pipe line at a price that would enable the plaintiffs to procure from the City through its pipe line an amount of water equal to that amount of culinary water that one share of the water in question would produce in a year at a charge of five dollars per annum; would the City be here arguing that that fact was immaterial? Hardly; this suit would have been settled long ago if that were a fact.

The appellant complains because the trial court did not take into consideration any beneficial use that the plaintiffs received for the culinary water furnished through the pipe line or the Lake water furnished through the Tanner Ditch. The argument is not naive and we must recall some facts. In addition to the $22\frac{3}{4}$ shares of water in question, the Moyles' were the owners during all the time since July, 1926 (and for some time before) of more than 23 shares of the stock of the Big Cottonwood Tanner Ditch Company. This corporate stock furnished the Moyles with ample culinary water for their home and also with all the Tanner Ditch water that they used on their land. They cut down at once the amount of ground cultivated upon the entering of the order of the Court for immediate possession of their water right. Abs. 32-3 and 56. Mr. Moyle says that he was very careful not to use water other than that allotted to him on his corporate stock. He knew that the order of the Court was

that the City was to have immediate possession of his water in Big Cottonwood stream and that the City was to make available to him Lake water in the Tanner Ditch and some culinary water in its pipe line; that is that the suit was to compel a trade in accordance with the contract with Tanner Ditch corporation. Mr. Moyle was not willing to agree to this and was opposed to entering into any such agreement. He knew, that if he accepted the terms of the proposed agreement he would be in no position to resist the claims of the City that he should be compelled by the Court to accept those terms. And so it was that he was very careful not to use any of the water that the City claims was available for him. He was not compelled to accept those terms and was not compelled to minimize any damages he might suffer by reason of the taking of the City. There is no question of minimizing the damages in this case because we are not asking for special damages but only for general damages.

Counsel says that Mr. Moyle was not entitled to any water rights during the non-irrigation season because he had ample culinary water through the City's pipe line. Just how that follows, the writer is not able to see. The water, the entire amount, was decreed to him during the entire year. Para. 7, p. 107 Abs. And Mr. Moyle testified that he so used it until deprived of the possession of it by the City under the order of the Court. Abs. 29.

The City in its brief contends that the action is

barred by some statute of limitations ; a sufficient answer to that is that the City from 1926 until the time of trial continued to take and possess the water belonging to plaintiffs under circumstances that renders the City liable for its reasonable rental value as damages for the loss of the use of the water by the plaintiffs. The right to bring an action for such damages existed at common law and does not rest upon any statute of the State. Out of abundance of caution, plaintiffs presented a claim to the City for a wrong then continuing to exist, not for one that had ceased to exist at some prior time, and then brought their action for that same wrong still continuing at the time of the filing of the action ; and the testimony shows the wrong to still continue at the time of the trial. The right to bring the action at bar is not statutory but always has existed. The citation of *Hurley v. Bingham*, 63 Utah 589, cited by appellant, was an action for personal injuries and purely statutory.

The argument that plaintiffs had abandoned any part of their water right for any part of the year is not borne out by the evidence in the record, and the State Engineer, in the controversy instituted before that officer against the Moyles heretofore referred to, found that there had been no such abandonment.

Appellant's contention that the order of possession fixing what the City should do to reimburse Moyle for the taking of the possession of the water also fixed the responsibility of the City for such taking is simply unten-

able. Courts do not make contracts for parties nor determine the damages in the absence of any action being brought to determine such damages.

The contention that plaintiffs have been benefitted by the action of the City in beneficently bringing Utah Lake water to their place to exchange it for Big Cottonwood water is pure fiction; and even if it were true, the City has no right to force its benefactions upon its own residents to say nothing of the City trying to do it upon communities far beyond its boundaries.

The plaintiffs were in possession of a water right in Big Cottonwood stream and defendant, being, as it asserted, in sore need of that water right for the health and necessities of Salt Lake City inhabitants brought a special proceedings to compel the plaintiffs to exchange that water right for certain amounts of Utah Lake water and a limited amount of culinary water from the City's pipe line. On such a complaint Salt Lake City procured an order of the Court for the immediate possession of that water right from the plaintiffs in this action. The City, so the evidence amply shows, took possession of all the water in the Big Cottonwood stream for long periods of time, leaving none of it to go down to the plaintiffs herein and put into said stream bed Utah Lake water, a very different and inferior quality of water. After many years the City had the special proceeding dismissed but has not yet returned the use of the water to these plaintiffs. This action was brought to recover the value of

the use of such water to taken and withheld by the City and for the return of that water to the plaintiffs for their use and benefit. In our opinion plaintiffs introduced competent and satisfactory evidence of the taking, the reasonable rental value of that water during the withholding of it by the City from the plaintiffs and of every fact alleged in the complaint and of every fact in the trial court's findings. The evidence would have justified a much larger judgment but the plaintiffs felt that they were bound by the amount asked in their claim filed with the defendant, Salt Lake City. The City can at any time return that water but they seem to prefer to keep possession and risk the outcome of litigation. The evidence and the law fully supports the judgment rendered by the trial court and we submit that the judgment should be affirmed in all particulars.

Respectfully submitted,

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