

1942

# Oscar W. Moyle and May P. Moyle v. Salt Lake City : Appellant's Petition for Re-Hearing

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Christensen; City Attorney; E. Holmgren; A. P. Kesler; Assistant City Attorneys; Attorneys for Petitioner; Salt Lake City;

---

## Recommended Citation

Petition for Rehearing, *Moyle v. Salt Lake City*, No. 6328 (Utah Supreme Court, 1942).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/757](https://digitalcommons.law.byu.edu/uofu_sc1/757)

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

Case No. 6328

---

**IN THE SUPREME COURT  
of the State of Utah**

---

OSCAR W. MOYLE AND MAY P. MOYLE,

*Plaintiff and Respondent,*

vs.

SALT LAKE CITY, a municipal corporation,

*Defendant and Appellant.*

FILED  
FEB 15 1931  
CLERK OF SUPREME COURT  
SALT LAKE CITY

---

**APPELLANT'S PETITION FOR RE-HEARING**

---

E. R. CHRISTENSEN,  
*City Attorney,*

H. HOLMGREN,  
A. P. KESLER,  
*Assistant City Attorneys,*

*Attorneys for Petitioner  
Salt Lake City*

## INDEX

	Page
PETITION FOR RE-HEARING.....	1
CERTIFICATE OF COUNSEL.....	8
BRIEF IN SUPPORT OF PETITION.....	9
I. General Statement of Facts.....	9
II. Grounds 1, 2, 3, 4, and 5.....	29
III. Ground 6.....	40
IV. Ground 7.....	44
V. Grounds 9, 10, and 11.....	50
VI. Ground 12.....	52
VII. Ground 13.....	52

## TEXTS

18 Am. Jur., P. 903 Sec. 262.....	41
17 C. J., P. 1000 Sec. 303.....	46
17 C. J., P. 1085 Sec. 395.....	47
25 C. J. S., P. 751 Sec. 130 (c).....	47
25 C. J. S., P. 907 Sec. 193.....	47

## AUTHORITIES

Des Moines Wet Wash Laundry vs. Des Moines	
.....Iowa.....	
198 N. W. 486	
34 A. L. R. 1517.....	42
East Mill Creek Water Co. vs. Salt Lake City	
.....Utah.....	
159 P2d 863.....	48
Enid & A. Ry. Co. vs. Wiley	
.....Okla.....	
78 P. 96.....	41

# IN THE SUPREME COURT of the State of Utah

---

OSCAR W. MOYLE AND MAY P. MOYLE,  
*Plaintiff and Respondent,*

vs.

SALT LAKE CITY, a municipal corporation,  
*Defendant and Appellant.*

Case No. 6328

---

## APPELLANT'S PETITION FOR RE-HEARING

---

Comes now the appellant, Salt Lake City, above named, and hereby petitions this Honorable Court for a re-hearing and a re-examination and re-determination of the issues presented by the appeal herein and of the Court's opinion and ruling thereon in its decision on said appeal. This petition is based upon the following grounds, to-wit:

1. The opinion and ruling of the Court are contrary to the undisputed facts in the case and is wholly without support in the evidence wherein the opinion states as facts that Moyle "had other irrigation rights (that is, water other than the  $22\frac{3}{4}$  shares involved in this case) which he used for irrigating his crops, and which was sufficient for that purpose. The water right herein involved was a right in excess of what he required for irrigation during those years (1926-1939), which he could have sold or rented had the City not taken the water."

2. That the opinion and ruling of the Court are contrary to the undisputed facts in the case and are wholly without support in the evidence wherein the opinion holds fallacious the argument that because this water was not turned into the City Conduit, the City did not have possession thereof and states as a fact that "the record shows conclusively that all creek water not diverted into the City mains under the exchange agreement was used by the City in supplying to the Corporation the volume of water it was obligated to supply the Corporation."

3. That the opinion and ruling of the Court are contrary to the undisputed facts in the case and are wholly without support in the evidence wherein the opinion states as a fact that "after the City obtained the order for possession, Moyles did not draw or use any water represented by the water rights involved in this action."

4. That the opinion and ruling of the Court are contrary to the undisputed facts in the case and are wholly without support in the evidence wherein the Court states that "the evidence justifies the finding and conclusion of the triers of the facts that the City had possession and use of the water rights here involved during the period of time involved in this action," and said statement is contradictory to the finding and statement in the opinion that during 1936-1937-1938, the Big Cottonwood Tanner Ditch Company did not issue "to Moyles a time or turn ticket for the  $22\frac{3}{4}$  shares of water here involved, but distributed that time and water to other stock holders in the Corporation," which clearly shows that the City did not possess the water during those years and that it was the Company who allowed some other stock holders to use Moyle's water in those years

5. That the opinion and ruling of the Court are contrary to the undisputed facts in the case and are wholly without support in the evidence wherein it holds as "specious argument" the point made by the City that after the order granting the City possession, Moyle was still issued tickets by the water master for his irrigation turns the same as before the order, and, therefore, he was deprived of no water, and in concluding that Moyle was deprived of his water whereas the undisputed facts in evidence show that Moyle not only received tickets for his water turns the same after as before the order for possession, but he actually used the water so ticketed to him for irrigation every season except the

years 1936, 1937, 1938, when at his own request no tickets were issued to him.

6. The Court erred in holding that until the order of possession was vacated and set aside, it became Moyle's duty to exercise no control over the property (water) and to not use the water, as such order of possession was not self-executing and it was entirely within the right of the City not to take Moyle's water at any time and it was Moyle's duty in order to mitigate damages, to take and use his water whenever the City was not using it and it was made available to him for his use and benefit both by the City and by the Ditch Company. The undisputed testimony shows that in three of the years only creek water was turned into the Tanner Ditch and during all but a short period from July to October in each year only creek water flowed in the Ditch and during all of that time Moyle's water was available to him and was ticketed to him in turns and was used by him. And further, the only time "lake juice," as the opinion euphemiously describes it, was turned into the Tanner Ditch was during July, August, September, and part of October, and if such commingling of water constituted a taking pro tanto then the Court should have decreased the judgment to reflect that pro tanto taking and not have sustained a judgment for the full yearly rental value of the water.

7. The Court erred in affirming the judgment in the sum of \$4769.75 as included in said sum is the sum of \$350.00 awarded as damages accruing between the

time of the commencing the action and the time of trial, which award is not sustained or authorized by any supplemental or additional pleadings and is not recoverable in a law action, and for the further reason that such damages did not accrue by reason of any taking of water by the City under the order for possession as such order was dismissed long prior to the filing of the complaint herein and the rule of damages in eminent domain would not apply to such period of time.

8. The Court erred in failing to hold that by reason of plaintiff's failure to protest the application of Salt Lake City to the State Engineer of Utah to change the point of diversion of the water of the Big Cottonwood Tanner Ditch from the head of that ditch to the head of the City conduit, and to appeal from the order of the Engineer granting such application, the plaintiffs are estopped to object to the City operating under said exchange agreement and may not now recover damages which result, not from the City actually taking plaintiff's water, but from a carrying out of said exchange agreement.

9. The Court erred in holding that the corpus of the water was the thing withheld from plaintiffs by the City under the order for possession, whereas all that plaintiffs were or could have been deprived of was the right to use that certain quantity of water for culinary, domestic, and irrigation purposes which the said  $22\frac{3}{4}$  shares represented.



10. The Court erred in holding that the water right which the City interfered with in this case was a right wholly consisting of potable water even though it had been used by plaintiffs merely for irrigation purposes, and that plaintiffs were entitled to recover on the basis of the highest and possible use to which said water could have been put under any possibility though different from the use made by the plaintiffs and in failing to restrict recovery to the value of said water based upon the character of the use to which plaintiffs had been and were actually putting said water at the time the order of possession was granted.

11. The Court erred in adopting and applying to this case as the rule for fixing the measure of damages the rule applicable to a case where the taking is a permanent one and involves real or tangible property which has value and substance not necessarily based upon present use, whereas the property right here involved is a right existing only by virtue of and based upon beneficial use, which beneficial use fixes both the character, nature and extent as well as the value of the right or property taken.

12. The Court erred in failing to hold that, during all of the time complained of by plaintiffs, they did receive all the identical clear and potable creek water to which they were entitled under their  $22\frac{3}{4}$  shares for culinary domestic and stock watering purposes through the pipe system installed under the exchange agreement, and in failing to reverse the judgment of the trial court for the reason that the amount awarded by the trial

court includes damages for deprivation of the entire quantity of water, including culinary, domestic, and stock watering water, to which plaintiffs would be entitled to under said  $22\frac{3}{4}$  shares.

13. That the Court erred in concluding that the assignments of error presented only two questions for consideration of the Court, viz., whether the complaint stated a cause of action and what is the measure of damages, and in failing to consider and express its opinion on assignments of error as follows:

(a) Assignment of error No. XII wherein error is assigned in the trial court entering judgment for the return of  $22\frac{3}{4}$  shares of water right in the Big Cottonwood Stream, when all the evidence shows that Moyle did not own any such shares of water right in the Big Cottonwood Stream but only owned  $22\frac{3}{4}$  shares in the Big Cottonwood Tanner Ditch which in turn was entitled to a certain proportion of the Big Cottonwood Stream and such judgment is prejudicial and misleading and ought to be modified to state Moyle's true interest.

(b) Assignment of error No. XIII wherein error is assigned in the trial court adjudging and decreeing that 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 seven of the decree in the case of *Big Cottonwood Tanner Ditch Company vs. Vincent Shurtliff* as no such decree was necessary to the determination of the issues of this case and there is no evidence to sustain such determination.

(c) Assignment of error No. XIV wherein error is assigned in the trial court decreeing that the plaintiffs recover from defendant the use and possession of the water of Big Cottonwood Stream described as 22¾ shares of water right in said stream as plaintiffs own no such right and it would be impossible to enforce such decree or to know when plaintiffs were actually receiving the water to which they are entitled under the shares involved in this action under that description and to allow such fallacious judgment to stand would be prejudicial and a source of confusion and uncertainty.

In view of the foregoing, we respectfully submit that this petition for rehearing should be granted and the cause set for rehearing.

Respectfully submitted,

E. RAY CHRISTENSEN,  
*City Attorney*

HOMER HOLMGREN,  
A. PRATT KESLER,  
*Assistants.*

#### CERTIFICATE OF COUNSEL

HOMER HOLMGREN hereby certifies that he is one of the counsel for the petitioner named in the foregoing petition for re-hearing; that in his judgment said petitioner is entitled to the relief sought therein and that said petition is well taken in point of law and in fact and that the same is not imposed for the purpose of delay.

HOMER HOLMGREN

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

### I

#### GENERAL STATEMENT OF FACTS

Since our petition for rehearing is directed to such a large extent to what we claim to be erroneous fact conclusions stated in the opinion and since if such fact conclusions are erroneous there is no basis for the decision as made it becomes necessary and extremely important that the record be carefully and thoroughly reviewed in this brief. We realize this is repetitious but we earnestly solicit the attention of the Court to this review for we feel certain it will demonstrate the errors we have assigned.

Ever since 1848 the water flowing in Big Cottonwood Creek has played an important part in the settlement and development of the Salt Lake Valley. In that year the Big Cottonwood Tanner Ditch was constructed to divert a part of the creek flow to supply water for domestic and irrigation purposes to about 1800 acres of land. The right to the use of this water continued in individual ownership until 1903 when the Big Cottonwood Tanner Ditch Company was organized. All but a few of the individual water users transferred their water rights to this corporation and received certificates of stock therefor. The articles of incorporation (introduced in evidence as a part of the files in Case No. 31665, ex-

hibit C) provided for two branches known as "Main Branch" and "North Branch." Under Article XXI, the stock certificates must show on their face from what particular branch or fork the owner shall be entitled to water, and he shall not be allowed the use of water from any other branch or fork except that shown on his stock certificate, and no stock holder shall be allowed to transfer or sell any capital stock to another branch, ditch, canal, or other conduit without the consent of at least two thirds of the issued stock to the branch or fork from which said stock is transferred as shown by the books of the company.

In 1911 an action was commenced by the Big Cottonwood Tanner Ditch Company in which the rights to the use of the water in the said Tanner Ditch were adjudicated. The files in this action, Big Cottonwood Tanner Ditch Company vs. Vincent Shurtliff, et al, case No. 14230, and in which Oscar W. Moyle was a party defendant, were admitted in evidence in the instant case as exhibit 2. In that case in paragraphs 4 and 5 of the Findings of Fact (abstract, Page 87 and 88) the Court found as follows:

"4th. That for the purpose of fairly, effectively and equitably distributing said waters to the stockholders in the said The Big Cottonwood Tanner Ditch Company and owners in said ditch, it has been the custom ever since the construction thereof to distribute to each one his proportion thereof by distributing to each one all of the stream flowing in a branch or branches of said

ditch for a definitely stated period of time or a definite fractional part thereof for a definite period of time, which said custom is now and has been a matter of necessary regulation in order that the said water may be distributed equitably and be used beneficially.

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

The evidence in the instant case shows without dispute that this same custom in management and distribution still continues.

In 1920 Salt Lake City, being in need of additional water fit for domestic and culinary uses, negotiated with the Company to exchange water obtained by the City from Utah Lake, and fit for irrigation purposes, for the Cottonwood Creek water held by the Company, the Company to receive piped creek water for culinary and domestic use. Practically all of the stock holders of the Company were willing and anxious to effect such an exchange, among other reasons, so that they could obtain

water, properly treated, in pipes under pressure for domestic and culinary use and an additional amount of irrigation water during the late summer months when the creek supply became low and inadequate. At that time, Mr. Moyle was the owner of  $23\frac{1}{4}$  shares of capital stock of the Company and he and a few others whose lands were situated high on the Ditch, objected to the exchange. However, the exchange agreement was duly entered into January 2, 1920.

Under the agreement the Company transferred to the City the right to take and use perpetually from Big Cottonwood Creek all of the water of said Creek to which the Company was or might be entitled, except 2.491 second feet during April, May, June, July, August, and September, and 1.438 second feet during the other months of the year, called "culinary water." The City agreed to install a pipe line system and furnish and deliver this culinary water pure and wholesome through such system over the area served by the Tanner Ditch, a very considerable system as shown by the agreement. The City also agreed to furnish and deliver to the Company irrigation water during the months of April, May, and June in quantity equal to the flow to which the Company was entitled from the creek, and during July, 30 second feet, August, 28 second feet, September, 26 second feet, and the first fifteen days in October, 15 second feet. The water available to the City from which to supply this irrigation water was Utah Lake water, and this required the installation of a pumping plant and

pipe line to pump the lake water from the City canal to the head of the Tanner Ditch.

Immediately upon the signing of this agreement, the City commenced the work of installing the pipe line system, finishing the line on 62nd South running in front of Moyle's 32 acre tract, in the fall of 1921. (Tr. P. 267-8) The pumping plant was installed in 1924. (Tr. P. 266) According to Mr. Towler, on July 11, 1923, Mr. Moyle ordered a one inch connection to this 62nd South line and later, when this wooden stave pipe line was replaced by an iron line, Moyle had this connection changed into two one inch connections emptying into a two inch line and also caused to be made four one inch connections emptying into a two inch line and a two inch connection emptying into a two inch line. (Tr. p. 278-79) Mr. Moyle himself testified that he built his large two story home on his property in 1923 and built into it 1½ inch pipes so water could be piped throughout the house, upstairs and down stairs, the water coming from the main line installed by the City on 62nd South in front of his place under the exchange agreement between the City and the Company. This first connection was made in 1923 when he built his home (Tr. p. 84-85), and consisted of two one inch connections to the wooden stave line. Then he had another connection running to some cottages. When the iron main pipe was installed to replace the wooden line, he had two more one inch connections made. None of the connections were metered and he received culinary water therefrom without charge



except the usual stock assessment levied by the Company on its capital stock. (Tr. p. 86-87) He also had the City install a two inch connection running into his property but from which he has not yet used water. (Tr. p. 343) Moyle has been using water from these connections, except the latter, for culinary domestic, stock watering, and lawn sprinkling purposes since 1923, and he has even used it to irrigate his orchard. In the face of all this acceptance of the benefits of the exchange agreement, Moyle still was strenuously opposed to the Company entering into the agreement. In fact, in February, 1922, he filed an action, in evidence as exhibit G, against the Company to restrain the Company from delivering its water to the City under said agreement claiming the Company had no power to make such exchange, such agreement being ultra vires. Instead of pressing said action to a conclusion, he has let the same lie dormant to this date, electing in 1923 to build his pretentious home, connect it and his cottages with the culinary pipe lines installed under the agreement, and make every possible use of the water which the City, under said agreement, had chlorinated and made fit for human consumption and placed in the pipe line system under pressure.

In addition, Moyle admittedly has used the irrigation water delivered by the City through its pumping system to the company to which he was entitled under his stock ownership in the company, which gave him the extra water in the dry months called for by the agreement.

On February 13, 1920, after the exchange agreement was entered into, the City filed with the State Engineer of Utah an application to change the point of diversion from the head of the Tanner Ditch to the head of the City conduit at the mouth of Big Cottonwood Canyon, all in pursuance to the provisions of said agreement. Notice of this application was duly published and no protest was filed by Moyle or anyone else. The application was granted September 3, 1920, and no appeal has been taken by anyone from the decision of the State Engineer. (Exhibit 3)

Under a decree of court in what is known as the Progress Case, a water commissioner was appointed by the court to take charge of all the water of Big Cottonwood Creek and distribute the same to the various ditches, including the Tanner Ditch, according to the decree in that case. (Tr. p. 161) After the State Engineer had granted the application for change of diversion, (Exhibit 3) the water to which the Tanner Ditch was entitled was diverted under the supervision of the water commissioner at the mouth of Big Cottonwood Canyon in pursuance to the State Engineer's certificate, a point above the point of diversion of the Tanner Ditch. (Tr. p. 162) 'A portion of the year the clear Cottonwood Creek water would run into the Tanner Ditch and part of the year there would be a commingling of both creek and canal water flowing in the Tanner Ditch. After July 1, the Water Commissioner did not check as to the amount of creek water flowing in the ditch as the City could furnish canal water in specified quantities under the ex-

change agreement. This change of diversion began in 1921 and has continued ever since, so that during the four or five years before the order for possession was obtained by the City in the so called condemnation suit, and during the time between the granting of that order in 1926 and the dismissal of that action in January 1938, and during the time between such dismissal and the institution of the present action, the diversion of water at the City's intake up the Canyon has followed identically the same pattern and procedure. The order for possession in no wise altered or added to the methods pursued. In fact, the water commissioner apparently knew nothing about the order for possession and always divided the water according to the decree in the Progress Case under which he had his appointment and by which his duties were defined, except as modified by the order of the State Engineer granting the change of diversion in accordance with the exchange agreement (Abst. p. 114).

So far as the water masters appointed by the Ditch Company were concerned, they divided and distributed the water without regard to the order entered in the condemnation proceedings. George F. Smith, the water master from 1923 to 1929, testified that while he was water master in the early part of each season when there was lots of water he just notified the users verbally when to use the water. When it became scarce he issued tickets giving the length of time they could use the water on each turn. He issued tickets to Moyle for the use of the water on the north branch. From 1923 to 1929 he timed

the  $22\frac{3}{4}$  shares in the north branch outside the corporation to Moyle and he used it. (Abst. p. 136-137)

Horace T. Godfrey has been the water master since February, 1929, to the present time. Each year he made out water tickets as follows: On the north branch, in which branch Moyle owned the  $22\frac{3}{4}$  shares not represented by stock in the Company, he issued and delivered to Mr. Moyle water tickets each year covering these  $22\frac{3}{4}$  shares and an additional  $3\frac{1}{4}$  shares representing stock owned in the Company entitled to receive water through the north branch, making a total of 26 shares all ticketed on the same water ticket and handled without any distinction between shares outside and shares inside the corporation. The ticket gave Moyle the right to use the full stream of the North Branch for the full time allotted to the total 26 shares shown on the ticket. The only years in which he did not ticket these  $22\frac{3}{4}$  shares to Mr. Moyle were the years 1936, 1937, and 1938 and this omission was at Mr. Moyle's own request. However, when he delivered the water ticket in 1936, he delivered the same to Mrs. Moyle, one of the plaintiffs herein, and she wanted to know why there was a reduction in the amount of water ticketed to them. Godfrey advised her that Mr. Moyle had advised him he did not want his water out of the corporation timed to him any more. However, in 1939, he issued tickets to Mr. Moyle for the full 26 shares. Moyle used the water from the North Branch on his place all of the time except the 3 years above mentioned and, in addition, on numerous occasions Godfrey observed the water running from a  $1\frac{1}{4}$  or  $1\frac{1}{2}$

inch pipe into a ditch in Moyle's property and also running on his lawn. During all of the time he has been water master, Mr. Godfrey also issued tickets to Mr. Moyle for the corporate stock owned by him in other branches of the ditch. During this time, no one has changed the use of water from the North Branch to other branches. (Abst. p. 126-133)

Exhibit 8 is a letter written by Moyle to Godfrey stating the number of shares of corporate stock owned by him January 30, 1936, and the name of the branch out of which the water represented by such stock should be taken.  $16\frac{1}{3}$  shares were in the South Branch,  $4\frac{3}{4}$  shares were in the Main Branch, and only  $3\frac{1}{4}$  shares in the North Branch. All of the water represented by the stock other than the  $3\frac{1}{4}$  shares in the North Branch was by this letter directed to be delivered as it had theretofore been delivered to tracts of land other than the 32 acre, or home tract which was supplied from the North Branch. He states in the letter as follows: "*I desire this water in the south branch as heretofore* to be allotted to my ten acre piece, Pete Riva, and the water in the main branch to my five acre piece, Pete Riva, the remainder on my home place." In addition to this segregation of the place of use of the water, Godfrey also testified that a concrete division box has been in use which automatically divides the steam so that 30 per cent goes to the north branch and 70 per cent goes to the other branches.

Richard C. Towler, Assistant Engineer of the City in charge of the water supply, testified from definite

records that in all the years from 1926 to 1939 there was always some creek water delivered to the Tanner Ditch during the irrigation season, except in 1936, between August 11 and October 15, when at times all water delivered in the ditch was canal water while at other times part canal water and part creek water was delivered. In the years 1927, 1928, and 1929, all of the water supplied during the whole irrigation season was clear creek water. In all of the years during the months of April, May, and June and in many of them in the month of July, all the water coming into the Tanner Ditch for irrigation purposes was clear creek water and at times even in the months of August, September, and October the water furnished was entirely clear creek water. It appears, therefore, that there was only a small part of the irrigation season when there was a commingling of creek water and lake water in the Tanner Ditch. (Abst. P. 139-141) It further appears from his testimony that in the year 1934, an extremely dry year, there was more water delivered in the culinary pipe system alone than the Tanner Ditch was entitled to under its entire decreed rights, and that had it not been for the extra water which the Tanner Ditch obtained under this exchange agreement, the tree growth on Moyle's property and all crops under the Tanner Ditch would have died. (Abst. P. 144-147) Mr. Towler likewise has observed that Mr. Moyle used the water for irrigation. A two inch pipe under 40 lbs. pressure, which was the pressure in the main pipe in front of Moyle's place, would deliver 115,200 gallons of water per 24 hours. As

heretofore pointed out, Mr. Moyle had three such connections to the culinary system.

The record is also conclusive that after the exchange agreement was entered into and after the culinary pipe system was installed there was no attempt on the part of the Company to time or ticket or control the use of culinary water drawn from the pipe system. No meters were placed on these pipes and no account was made as to the quantity of water drawn by those using the culinary water. The tickets issued by the water masters above referred to relate only to the water turns for irrigation. The amount of water which a water user would or could use from the pipe system was entirely within the control of the user himself. The court in Case of *Big Cottonwood Tanner Ditch Co. vs. Shurtliff, et, al.*, No. 14230, exhibit 2, to which Moyle was a party, entered the following conclusion of law:

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

The court also entered the following conclusion:

“23rd. The Court further finds that the plaintiff (Big Cottonwood Tanner Ditch Company) is entitled to a decree enjoining and restraining all of the defendants in this action (including Mr. Moyle) from interfering with the distribution of the water of the Big Cottonwood Tanner Ditch in accordance with the rules and

regulations adopted from time to time by the owners of the water rights of said Big Cottonwood Tanner Ditch."

By the construction of the culinary pipe system the users of water, both under stock ownership and under shares outside of the corporation, were supplied with water for their culinary, domestic, and stock watering purposes, which the Court concluded as a matter of law in the case Exhibit 2, as heretofore quoted, were simply uses attached to the irrigation right and not separate and apart from the irrigation right.

Since this culinary water pipe system made water available in continuous flow during the whole of the year for culinary, domestic and stock watering purposes, the conclusion of the Court in the case above referred to the effect that such regulations should be adopted as would enable the water users to receive as near a continuous flow as reasonably possible in order that they might have water for culinary, domestic, and stock watering purposes was completely complied with. So far as the water users on the Tanner Ditch were concerned when that pipe system was installed, there only remained the matter of distributing water for irrigation during the irrigation season and this was taken care of as testified to by the two water masters.

That the pipe system was designed to and does carry the culinary water to users on the Tanner Ditch for shares outside the Tanner Ditch Company is evident from the testimony of Moyle himself. He testified he



asked the City to put in a two inch pipe connection with the 62nd South Main, which was done. It extends about six inches inside his fence. While he says no water was actually drawn from it, he nevertheless testified "*I expect to use it when I get my water back.*" (Tr. P. 373) Mr. Towler testified it has a valve on it which, if properly turned, keeps the water from flowing out. It would also follow that, if turned the other way, water would flow out. (Tr. P. 295) The opening is there, and, according to Moyle's counsel, connection can be made thereto at any time. How Moyle expects to get his water back and delivered to him in the pipe line installed under the exchange agreement without becoming a real party, and submitting himself and all his rights, to such agreement is not explained. This intention to use the water through the pipe line was evidenced in 1934 in which year the connection was made. It is indisputable evidence also that Moyle would be perfectly agreeable to having the culinary and domestic water to which he was entitled under his  $22\frac{3}{4}$  shares outside the Company delivered to him in the pipe line, and that he was prepared to take that water through that very identical connection. By the City making that connection and leaving it in such condition that Moyle could draw all the water therefrom that such connection would deliver, viz., 115,200 gallons per day, was tantamount to a direct tender to him of water to that extent. In the face of such a situation, how can it be said that the City had possession of all his water and refused to permit him to use it? And furthermore, he had two other

connections, one consisting of four one inch connections emptying into a two inch pipe, and another consisting of two one inch connections emptying into a two inch pipe, (Tr. P. 279) each capable of delivering a like amount of water each day, and from which connections he admittedly used water. There is not the slightest evidence that he could not or did not procure all the culinary and domestic water to which he was entitled under all his shares both in and out of the corporation from these two connections. As a matter of fact, he himself testified (Tr. P. 344) that he might have used the water he had both in the corporation and outside the corporation from the pipe lines. He admits there were no meters on any of the lines so there was no way of telling how much water he used. The important fact, however, is that the City permitted him to make these connections and made available to him the enormous total of approximately 445,000 gallons of water per day had he chosen to draw from such connections. The fact is that he had it within his power to use the quantity of water which those connections were capable of delivering. He himself testified (Tr. P. 86-87) that he was inclined to think that all three connections were put in at the same time and that he has had the three connections from the time he built his house.

Edward C. Bagley testified that he leased 40 acres of land adjoining Moyle's home place on the West for eight years prior to the trial. On the North branch, the users take the entire stream of that branch during water turns. He would have to go each turn to Moyle's place to get his water, he being the next user below. On each

occasion during the eight years when he went to get his water, it would be diverted onto Moyle's land. Before he leased this property adjoining Moyle's, he quite often had to go to Moyle's place to get the water for his own land, and on those occasions he would find the water turned onto Moyle's place. The water has been turned onto Moyle's place into his ditches ever since Bagley lived in that vicinity, a period of more than thirty years. (Abst. P. 117-119)

As shown by Towler's testimony above referred to, during the period from 1926 to 1939, there was only a very short time in one year, viz. 1936, when creek water was not turned down the Tanner Ditch. Under the exchange agreement, so far as the Ditch Company and its stock holders were concerned, the City was not required to turn down any creek water into the ditch, but could supply all water from its lake water, the culinary and domestic uses being taken care of by the pipe lines. When it did turn down creek water each year, except the short period in 1936, it follows that it did not take possession of or keep Moyle's creek water. The evidence is without dispute that the City turned down creek water which, with the canal water, supplied the Company with a total quantity sufficient to give Moyle and all water users all the water his and their rights entitled him and them to. This is true because the Company every year ticketed Moyle his full rights in the Ditch under the various branches. He, himself, testified (Abst. P. 34) "*I am inclined to think that immediately after this condemnation suit the water master continued to give me*

*the water that was condemned.*” He further testified he told the water master he had no water but he was not able to state whether it was one, two, or three years, or when it was after the condemnation suit that he so informed the water master. (Abst. P. 35) Mr. Godfrey, the water master, testified it was in 1936 that Moyle told him he wasn’t entitled to the water, so according to his own testimony, the water master continued to give him the water that was condemned until 1936. This water was not delivered to him in the years 1936, 1937, and 1938 at his own request, as heretofore pointed out, but it was again delivered to him in 1939 after the condemnation suit was dismissed. He also testified that it was the custom for him to take his water at the time designated on his water tickets and to keep the water until the time shown on the tickets expired and the next user came and took it. (Abst. P. 45-46) While he disclaimed ever using what he called muddy water, which according to the evidence was only delivered in parts of the months of July, August, September, and October, and sometimes was not delivered at all during the entire season, whenever the clear creek water was delivered he used it and would just let the water run until the other fellow came and took it.

If the Company had the full quantity of water to which the Tanner Ditch was entitled, being a combination of creek and canal water, it cannot be said that the City had or kept possession of Moyle’s water. All Moyle could object to was a commingling of the creek water with the canal water, which thereby decreased the quality

of his creek water, a condition which might be inherent in the operation of the exchange agreement, but which certainly could not be held to be the equivalent of a taking and possessing by the City. Moyle himself recognized that his proper remedy was against the Ditch Company to prevent it from exchanging the creek water under the exchange agreement, and he commenced an action to that end in 1922, which is in evidence as exhibit G. The City did not enter into that controversy, though an order was entered requiring Moyle to make the City a party. Moyle permitted that suit to lie dormant so far as making the city a party and four years later the City brought the condemnation suit and obtained an order for immediate possession. But, it should be kept in mind, that such order was not self executing—even with the order the City could, and by all the evidence did, continue to let creek water run down in the Tanner Ditch all of every irrigation season except 1936 as heretofore indicated. During the remainder of every year, creek water alone was available to the North branch users either in the ditch itself or in the pipe lines to the full extent of their water rights.

Certainly, simply because the City had obtained a Court order giving it permission to take possession, did not mean that the City was compelled to take possession nor did it prevent the City from turning down creek water whenever it so desired. The order for possession was merely permissive and whether it was availed of would be a matter of proof and the proof all shows, as we have demonstrated, that the City did not elect to

take exclusive and entire possession of all the creek water to which the Tanner Ditch was entitled.

The burden of proof was upon the plaintiffs to show that the City had in fact taken actual possession of all of the water to which plaintiffs were entitled under their  $22\frac{3}{4}$  shares. The procurement of the Court order giving the City immediate possession was merely proof of intention to take possession and legal sanction for the taking; but it did not accomplish the taking and possessing. That could only be done by the City actually diverting all of Moyle's water into its conduit at the mouth of the canyon and in not permitting any of it to reach the North branch diversion box. Instead of producing testimony to prove such diversion, Moyle, himself, testified, as above shown, that the water masters continued to supply him the condemned water for several years, and according to Godfrey ten years, after the order giving possession was granted and the only year when this water was not supplied were the years that Moyle specifically requested the water master not to deliver it. All that Moyle testified to was that he refused to use the "muddy" water. He had no hesitancy in using all the piped water he wanted; in fact he built his pretentious home only when assured the piped water would be available. He always used the creek water when it was not commingled with the lake water. He used that water, according to his own testimony, as specified in the turns allotted to him in his water tickets. Those tickets specifically fixed the turns covering the very  $22\frac{3}{4}$  shares which he had the burden of showing the City took away

from him. That the water masters ticketed to him this water; that the water was available in the north branch for his use; that he used water according to his ticketed turns; all this is not only undisputed, but it is testified to by himself. In the face of all this his inconsistent statement by way of a conclusion that he tried not to use the water represented by these shares and thinks he did not use it can have no weight as evidence. When the condemned water was made available to him each year, he claims he informed the Company he would not have it because it was condemned, but he nevertheless took and used it both through the pipe system and through the open ditch.

It might be said that the water used by him on his home tract of 32 acres was only water to which he was entitled under his stock ownership. We confidently assert that there is not a scintilla of evidence to support such a position. The facts we have already referred to disprove it. Under the articles of incorporation of the Ditch Company, he could not transfer to the north branch any water from the main or south branches without the consent of the other stock holders. There is an entire absence of proof of such consent and Godfrey testified no transfer was made. Moyle's own letter, exhibit 8, shows that all his rights under his stock ownership, except  $3\frac{1}{4}$  shares, were specifically allotted to the main and south branches in which they were issued. All these main and south branch shares had been and were to be used by Moyle's own direction by Pete Riva on the 10 acre and 5 acre tracts. The  $3\frac{1}{4}$  shares were the only

stock shares that could be used to supply water to the home tract. If Moyle had limited his use of water on this tract to the rights represented by these  $3\frac{1}{4}$  shares, it would have been very simple for him to have testified that while he was ticketed for 26 shares he in fact used water only that fractional part of the time which the  $3\frac{1}{4}$  shares represented on the tickets, to wit:  $3\frac{1}{4}$  over 26, or  $\frac{1}{8}$  of the time allotted. Instead of so testifying, he testified he used his turns at least when creek water was available and let it run until the next user (who was Bagley) came and took it. As to the culinary water, he had no way of knowing when he had used his  $3\frac{1}{4}$  shares worth, and even admits that he may have used more than his stock ownership entitled him to.

In the light of the foregoing analysis of the record, we shall proceed to advert to the specific grounds for rehearing stated in our petition.

### GROUND 1, 2, 3, 4, 5

The majority opinion makes the following statement: "The point is urged that after the order granting the City possession, Moyle was still issued tickets by the water master for his irrigation turns the same as before the order and, therefore, he was deprived of no water. This is specious argument. He does not sue for crop damage for lack of irrigation water. *He had other irrigation water rights in the Big Cottonwood Tanner Ditch which he used for irrigating his crops, and which was sufficient for that purpose. The water right herein*



*involved was a right in excess of what he required for irrigation during those years, and which he could have sold or rented had the City not taken the water.*'' The following points are thus asserted and relied upon in the affirmance of the judgment: (1) That Moyle is not suing for crop damage for lack of irrigation water, because (2) he had other irrigation water sufficient for the purpose. (3) The water right taken over by the City was in excess of what he required for irrigation during those years (1926-1939): and (4) this excess water he could have sold or rented if the City had not taken it.

Because this view of the record must of necessity had such an extremely important bearing on the decision reached and because such view is wholly untenable we feel bound here to refer again to the matters and record already reviewed.

In his complaint, Moyle alleged that these  $22\frac{3}{4}$  shares of water right were at all times complained of appurtenant to his land in the Southeast quarter of the Southeast quarter of Section 15, which was this 32 acre home tract. Such a right could only come into being and continue to live and exist as an appurtenance to that land because the water represented thereby had been and was being put to beneficial uses upon the same. Moyle testified the he required this water to irrigate this tract, not for the purpose of raising farm crops it is true, but for the purpose of irrigating the native trees and shrubs which covered approximately half of this

tract, and in addition to irrigate his orchard, pasture, lawn, and grass, and to beautify this tract, and that it was because the City by the order of possession prevented a continuation of such use that he brought this action. Here is a summary of his testimony: The  $22\frac{3}{4}$  shares were appurtenant to this tract. (Tr. P. 57) He used all this water both that that is in the corporation and that that is out of the corporation on this property and other property. (Tr. P. 63) On the 32 acre tract he used part water represented by stock and the rest by shares outside of the corporation. (Tr. P. 65) That part used was allotted by the officers of the Ditch Company and they allotted both the stock shares ( $3\frac{1}{4}$  shares) and the  $22\frac{3}{4}$  shares on the same ticket. When asked what use he made of that water, he testified: "I used it almost all the time on these 32 acres. (Tr. P. 66)" During all the years prior to 1926 he put all this water to use on his home tract, on his orchard, trees, in front of his house, and on shrubs and bushes, and for beautification. (Tr. P. 90) His land was not adapted to farming so he used all his water for trees and beautification. (Tr. P. 109) Prior to 1926 it was his custom to use his water to irrigate trees, grass, shrubs, garden, alfalfa, and to beautify the place. (Tr. P. 142) He ran a ditch from the Southeast corner of this tract North along the East side and then Westerly. Another ditch was run West from this ditch at about the center of the East line to water ground planted to oats and alfalfa. It would likewise carry water to the trees. More than half of this

tract was covered with trees. Then he took a ditch out of the North Branch running Northwesterly South of his house from which he irrigated half an acre and also the orchard. He also had 2 acres where he grew a garden and some fine strawberries. He also had a clover patch and some pasture land which he irrigated. All these areas he irrigated before 1926. After that one of the ditches and pipes were abandoned. The ditch he refers to isn't clear in the record, but the ditch is still there but hasn't been used, except in the spring a little water comes down from the Judge property ditch. (Tr. P. 331-342)

Such was the user, testified to by Moyle himself, that preserved this water right as an appurtenance to this 32 acre tract. That he considered all the water represented by those  $22\frac{3}{4}$  shares was necessary to properly irrigate that particular tract, being a "gravelly soil," is borne out by the foregoing testimony and further by Moyle's answer in the action in evidence as exhibit 2, the Shurtleff Case, wherein he claimed that in addition to the  $22\frac{3}{4}$  shares he and his predecessors since 1893 had beneficially used for irrigation purpose, a stream of water running ten inches deep and  $2\frac{1}{2}$  feet wide four days a week to produce crops on this 32 acre tract. There is not the slightest evidence that suddenly and without any apparent reason in 1926 Moyle had no need for this water represented by these  $22\frac{3}{4}$  shares to irrigate this tract or that he had other water rights on the ditch which he used for irrigating this land which were sufficient for that purpose. It should be remem-

bered that under the articles of incorporation he could not use the corporation stock water rights to irrigate this land without the consent of the other stock holders, and the evidence is that no transfer or use from one branch to another was made. By his own direction, as shown by exhibit 8, he was using all his other water rights on his ten acre and five acre tracts which left no water to irrigate the 32 acre tract except that represented by  $3\frac{1}{4}$  shares of stock and the  $22\frac{3}{4}$  shares, and it is without dispute that the water master ticketed his other shares of stock in the Company to the South Branch and the Main Branch.

Likewise, there is absolutely no evidence to sustain the statement that these  $22\frac{3}{4}$  shares represented water in excess of what was required for irrigation during the years 1926 to the time of trial. If it was excess water in 1926, how and when did it become such? If it was excess water then, it must have always been excess water unless some special conditions intervened and there is no testimony of any changed conditions. Certainly it did not become excess water because the City obtained the order of possession. It could only become excess water because Moyle no longer had use for it for irrigation purposes on this 32 acre tract. But the testimony, as reviewed, shows that Moyle claimed he used it all in the years 1921 to 1925 inclusive, the years the exchange agreement was effective before the order of possession was granted. It also shows he claimed he used it all during all the years prior thereto since he owned the place. There is no evidence at all that in 1926 or any other

time he decided to discontinue use of this water for irrigating this tract. The evidence is that his water tickets covered these shares for irrigating this tract and no other tickets were issued for this tract. If the evidence did not show a user for irrigation purposes during those years since 1901, when he acquired the property, to 1926, then it must follow Moyle had no irrigation rights, for it is only by use that such rights continue to exist.

Furthermore, the statement by the majority opinion that the water right involved was a right in excess of what was required for irrigation, he having sufficient other irrigation water for his crops, which excess he could have sold or rented had the City not taken the water, completely ignores the culinary and domestic rights which these  $22\frac{3}{4}$  shares represented. It must be assumed that the excess water was the water represented by those shares. According to the testimony, the culinary and domestic rights constituted a very important part of the water rights represented by these shares and were important in fixing the rental value thereof. Does the majority opinion mean by this language that what the City took was only the excess irrigation water for which Moyle had no need during the years covered by the order of possession and that Moyle must have received his culinary and domestic water? If so, then the City did not take possession of his entire rights represented by these shares and the case should be reversed, because the judgment of the trial court is clearly based upon the proposition that Moyle was completely dispossessed of all rights represented by these shares.

The majority opinion next sweeps aside the contention of the City and all of the evidence hereinbefore reviewed to the effect that the City did not actually take Moyle's water since creek water was actually furnished to the Tanner Ditch at all times in every year, except a short time in 1936 and during some years (1927, 1928, 1929) no lake water at all was in the ditch, by the simple process of postulating that "if the City used this Moyle water as part of the water it delivered to the Corporation under the exchange agreement it had possession of it." The opinion further says that the record conclusively shows that all creek water not diverted into the City Mains under the exchange agreement was used by the City in supplying the Corporation with the volume of water it was obligated to supply to the Corporation. On the contrary, we respectfully submit that there is absolutely no basis in the record to assume that the City furnished the Moyle water to the Corporation to make up the water it was bound to deliver to the Corporation under the exchange agreement. This is indisputably true because, in the first place, the City was obligated under the exchange agreement to deliver to the Corporation only the same quantity of water the Corporation, as such, was entitled to in the Big Cottonwood Tanner Ditch, plus the bonus water in the dry months. The Corporation had no interest in or right to that quantity of water represented by Moyle's  $22\frac{3}{4}$  shares outside the Corporation. It did not exchange that quantity of water nor did the City undertake to deliver to the Corporation water in lieu thereof. When the City

furnished that quantity of water to which the Corporation was entitled, it fully discharged its part of the agreement.

In the second place, there was actually delivered into the Tanner Ditch not only the quantity of water to which the Corporation as such was entitled, but there was also delivered therein an additional quantity at all times sufficient in amount to supply Moyle all the water represented by his  $22\frac{3}{4}$  shares. This is demonstrated beyond all cavil by the fact that the Corporation ticketed this water to him and assigned to him the turns in hours to which those shares entitled him and the water was there flowing in the ditch during those hours. This occurred every year except 1936, 1937, 1938 when by Moyle's own request this water was not ticketed to him, but in those years, this water was delivered into the ditch and was used by James H. Moyle. Furthermore, the exchange agreement was in effect four years before the order of possession was obtained and the delivery of canal water occurred two years before that order was granted. And during all these years Moyle got his water. This conclusively shows that the City did not need and was not using Moyle's water to supply the corporation with the water contemplated by the exchange agreement.

In the 3rd place, the majority opinion itself contradicts its own statement above referred to when it goes on to say that during the years 1936, 1937, 1938, the "Corporation did not even issue to Moyles a time

or turn ticket for the  $22\frac{3}{4}$  shares of water herein involved, *but distributed that time and water to other stock holders in the Corporation.*” If the Corporation distributed this water to some other stock holders then the City must not have retained possession of it, but on the contrary must have supplied it to the Corporation in the ditch. If the Corporation had the water represented by these shares available for distribution during those three years and did actually distribute it to someone other than Moyle, then, of course, the City must have supplied more water than that necessary to meet its exchange agreement and did not use Moyle’s water to make up the quantity it was bound to furnish to the Corporation as such under its agreement.

Furthermore, the opinion entirely omits to state that the reason this water represented by the  $22\frac{3}{4}$  shares was not ticketed and distributed to Moyle was because he expressly instructed the water master, Godfrey, not to issue him a ticket for or distribute to him this water during those years. (Tr. P. 230) The water was used by his brother, James H. Moyle and was again ticketed to plaintiff in 1939 on direction of Henry D. Moyle, director and attorney for the Corporation. Some of the water tickets issued to Moyle are in evidence and show conclusively that his full water rights were available to him. He claims he did not use it and the Court apparently chooses to believe this even in spite of the overwhelming evidence to the contrary from the water masters and the water engineer, Mr. Towler, and from Mr. Bagley who took the water right after Moyle’s turn



ended, and in the face of the indisputable fact that the Company so distributed the water of the ditch that the water actually ran through the North Branch divide for the Moyle place the 13 hours or 26 hours in the turns which represented Moyle's rights for irrigation as shown by the water tickets (exhibits 4, 5, and 6). That water just didn't come to the division box and stay there. It kept running. It didn't go down to Bagley, the next user, before his turn started. He went up and got it at Moyle's place every turn and every time he found it running into Moyle's place. That evidence stands absolutely uncontradicted except by Mr. Moyle's assertion that he tried not to use the water and in his opinion he did not use it. But he himself admits he used the creek water in the months when no lake water was commingled therewith.

In addition, Moyle himself testified that "after this condemnation suit the water master continued to give me the water that was condemned." (Tr. P. 75) He says, "for some time after 1926 the watermaster didn't recognize this condemnation because I had took it up with them a lot of times and they finally did so; I say I didn't know when they cut it down." He didn't have any judgment as to approximately when they cut it down; doesn't know whether it would be within a year or two years or three years, or what after the condemnation. (Tr. P. 77) He could not estimate how many hours the water would run on the land or whether it was in the day time. He had a boy there. (Tr. 96) After an extensive cross examination he finally admitted

he had no idea how long the water was allowed to run on his home place or whether it was in the day time, because he didn't do the irrigating; he had a boy there to do it.

The water to which Moyle was entitled under his shares of stock, by his own letter, Exhibit 8, had always been used from the Main and South Branches by Pete Riva, and were to continue to be so used so he did not use that water on his home place nor did he have anything to do with the use of that water. When he says he let the water run when it was clear creek water until the next man came for it he could not be referring to the water Pete Riva was using on the ten and five acre tracts. He must have had reference to the use of water on his home tract.

We refer the Court again to the undisputed testimony of Bagley, the water user who took the North Branch water after Moyle's turn. On each turn for eight years he had to go to Moyle's place to get his water and every time he found it still running into Moyle's place when his turn began. The Company always had water in sufficient quantity to supply Moyle his full water rights. This water was ticketed to him in regular turns and the water was actually flowing in the ditch and through the divide into the North Branch at Moyle's place and was there interrupted by some one and turned into Moyle's property for it was not allowed to run on down to Bagley's place until he came up and took it.

## III

## GROUND 6

The opinion makes much of the point that as soon as the order for possession was granted it was Moyle's duty not to use the water represented by the  $22\frac{3}{4}$  shares. Of course, he would have had no right to take such water away from the City, if the City insisted on using it. But it should be remembered that the distribution system was such that there was no way for Moyle to receive and take creek water except such as flowed past the City's intake up the canyon. Any creek water which flowed past the intake was not held by the City under the order of possession. In all of the years 1927, 1928, 1929, nothing but creek water flowed in the Tanner Ditch, and in addition, culinary water was furnished through the pipe system. As already shown, clear creek water flowed in the Tanner Ditch during all of April, May, and June, and parts of July, August, September, and October of every year except 1936, when for a short period in the fall only lake water flowed in the Ditch. The period of April, May and June is the high water period when there is more water than all rights combined can use. If the condemnor voluntarily relinquishes possession of all or a part of the property there is then no duty resting upon the condemnee to refrain from using it. Just the reverse, it is his duty to use it and thus mitigate the damages he would otherwise suffer. This principle is admitted by plaintiff themselves. Counsel stated to the Trial Court (Tr. P. 316) with reference

to the materiality of evidence showing use by Moyle of the water involved:

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

In 18 Am. Jur. p 903 Sec. 262, Eminent Domain, is the following:

“It is the duty of the owner, so far as reasonably possible, to attempt to minimize his damages by salvaging what he can from the property taken. Thus, where growing crops are destroyed, it is his duty, if he has the opportunity, to care for such perishable property. So also, it is his duty to use all reasonable exertion to protect himself, and avert, as far as practicable, the injurious consequences of the taking.”

*ENID and A. RY. CO. vs. WILEY*—Okla.,— 78 P. 96. In this case the Railroad sought to condemn a right of way. Appraisers were appointed and fixed the damage at \$600.00. That amount was deposited, but the land owner refused to accept it and demanded a jury trial. Pending these proceedings, the Company entered the land and excavated for its roadbed and disfigured about sixteen acres. It then obtain other land and dismissed the proceedings. The land owner then instituted an action for damages. The Court says:

“We do not think the value of the land sought to be taken and upon which the injuries are committed should be the test of the limit of

recovery. This rule may well be applied where land is actually taken. The measure of damages as stated in Sedgwick on Damages, Sec. 939 (8 Ed.), is the cost of restoring the land to its former condition, with compensation for loss of it, if this all together is less than the diminution in value of the land with the injuries left standing. This is on the principle that, if the cost of repairing the injuries is greater than the diminution in market value of the land, the latter is the true measure of damages; the rule of avoidable consequences requiring that in such case the plaintiff shall diminish the loss as much as possible."

In *DES MOINES WET WASH LAUNDRY vs. DES MOINES*,—Iowa—, 198 N.W. 486, 34 A. L. R. 1517, the City sought to condemn a tract on which was a building leased and used by the plaintiff as a laundry. On mitigation of damages the Court says:

"Plaintiff's lease hold was commandeered and the obligation was upon plaintiff to minimize the consequent damage. One way of doing this, and which was done, was to secure other quarters."

The order for possession reads as follows:

"That Salt Lake City, plaintiff herein, 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 pipe furnish

to and make available to defendants for domestic and culinary purposes sufficient creek water in Big Cottonwood Creek.”

Certainly it was Moyle's duty to use the water thus to be made available to him pending the final disposition of the case and thus keep his damages at a minimum. If the water so furnished did not equal in rental value the water taken, it nevertheless had some value whether used by Moyle himself or rented by him and Moyle could not wilfully and stubbornly refuse to use or accept of it. If he could have rented or sold the water taken by the City, he also could have rented or sold the water which the order obligated the City to furnish and which all of the evidence shows was actually furnished. Mr. Towler testified that the water furnished under the exchange agreement to stockholders, which was the same kind of water which was made available to Moyle, was worth twice as much both in rental and sale value as was the water Moyle claims the City took (Tr. P. 307) The fact is, as we have demonstrated, Moyle did use the water, both that which flowed in the Tanner Ditch and that which was piped to his place, and he built a spacious home so he could use the water so delivered under pressure.

Further, the order did not require the City to at all times take all of the creek water to which the Big Cottonwood Tanner Ditch was entitled. The City was simply authorized to take and to replace what it took with other irrigation water, and was also required to furnish domestic and culinary water in the pipe system

sufficient for Moyle's needs which would be almost without limitation. The City could have refrained from taking any water under this order or it could take such part as it needed, furnishing other irrigation water in lieu thereof, but being obligated to furnish creek water in pipes sufficient for Moyle's culinary and domestic use.

The opinion makes the point that the commingling of creek and lake water was a taking pro tanto. While we seriously question this proposition, as we shall later develop, if it is a taking pro tanto it is not a complete taking and credit should have been given for the value of that which was not taken.

#### IV

#### GROUND 7

The decision both of the trial court and this court is based on a taking of Moyle's water by the City under an order for possession granted in condemnation proceedings. That order of possession was dismissed January 7, 1938, when the entire proceeding was dismissed. The order of dismissal states:

“The court having sustained the demurrer imposed by the defendant 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 the complaint without amendment it is therefore ordered that the above entitled case be and the same hereby is dismissed.”

There was nothing surreptitious about such dismissal. The defendants in that case, the plaintiffs here, interposed the demurrer and they knew it had been sustained, and they also knew that the City would either have to amend or stand a dismissal. If Moyles had any interest whatever in the case they would have been fully advised of the dismissal. It was in the record—the decision not to amend was made in open Court. Furthermore, the City had a right to dismiss the case at any time on its own motion. The implication that the City sneaked over a dismissal to the prejudice of the Moyles, keeping the fact a dark secret, is wholly unfair and without foundation.

After the dismissal the City was not holding Moyle's water under the order for possession. The year 1938 was one of the years Moyle told the water master not to give him turns for these  $22\frac{3}{4}$  shares and the water represented by those shares, according to the Court's own opinion, was used by other stock holders and hence was not used by the City. In 1939 the water was again ticketed to Moyle just the same as it had always been even before the order for possession was granted. There apparently was no taking of Moyle's water between 1921 and 1926 before the order for possession was entered, although the exchange agreement had been in effect during that time and the lake water had been commingled with the creek water, as his complaint is based entirely upon a taking under the order and a failure to return the water after its dismissal. If Moyle was ticketed and had available to him in 1939 and since



the water to which he was entitled in the same manner as before 1926, then there must have been a return to him of his water. And the record is conclusive that this is what happened. After the order was dismissed the City was not taking as a condemnor—if it took any water it took it as a trespasser and it could only be liable for that water which it actually took. The clear water was in the ditch in 1939 during April, May, June and until July 10. From July 10 to October 15th, Lake water was added. (Tr. P. 272) Moyles then knew the order was dismissed for on April 17, 1939, they filed their claim for damages reciting the fact of dismissal. Clearly then, for the years 1938 and 1939 plaintiffs were not entitled to a judgment based upon a taking by the City of all their water rights under these  $22\frac{3}{4}$  shares.

In addition to giving plaintiffs the full rental value of the  $22\frac{3}{4}$  shares based upon Moyle's testimony of value for the year 1938 and 1939, the Court also gave judgment based upon that same estimate of value for the time intervening between the filing of the action and the time of judgment, a period of over a year, awarding the sum of \$350.00. This was done without the filing of any supplemental pleadings or any amendment to the complaint. We submit that such an award was gross error.

17 C.J. p 1000, Section 303:

The assessment of damages is usually governed by the situation or condition of affairs existing at the time the action is brought; hence for a recovery of loss or damages occurring

thereafter, plaintiffs should amend or file a supplemental petition.”

17 C.J. p 1085, Section 395:

“As a general rule, damages are to be assessed as of the date at which action is brought, and only such damages as have then accrued may be awarded either in actions of contract or of tort. Plaintiff can recover only for such damages as are the consequences of what defendant did before action was brought. Damages which have accrued after the action is begun may be allowed where they are the consequence of acts done before the beginning of the action and constitute a part of the cause of action declared on.”

See also 25 C.J.S. p 751, Section 130 (c), and p 907, Section 193.

There is another feature to this question. The opinion states that the commingling of lake and creek water was a taking by the City pro tanto. The fact is that the City's intake is high up in the Canyon and the creek water that flows past its intake continues on down the creek to a point at the head of the Tanner Ditch where the ditch's portion of the creek flow is received. It is at this last point that the lake water is emptied into the Tanner Ditch from the city's pumping plant under the exchange agreement, and it is here and by virtue of that agreement that the commingling takes place. Under these conditions can it be said that the City is the one that has taken the water pro tanto or any creek water? Is it to be charged with the trespass? The Ditch Company is the distributing agency whose duty it is to

see that the water users on the Ditch get the water they are entitled to, not the City.

It is undoubtedly Moyle's position that no return of his water can ever take place until either the exchange agreement is abrogated so creek water will always flow down to his place in the Tanner Ditch uncommingled with lake water or a separate conduit is provided him to carry his portion of the creek water to him. And such conduit could only be a pipe line, for no open channel would carry that quantity of water and in the turns of use which he is required to take without substantial loss. But Moyle, as a stock holder in the Company, can also insist that the exchange agreement be complied with—that the City furnish the lake water in amounts sufficient to make up the quantity agreed to be delivered by the City. Under the ruling of this court in *East Mill Creek Water Company vs. Salt Lake City*,.....Utah....., 159 P. 2d. 863, he, as a stock holder, is a beneficiary under such agreement, entitled to bring an action to compel performance. The effect of the Court's decision therefore is to place the City in the position of a trespasser if it complies with the agreement giving Moyle a right to recover damages for such trespass, while on the other hand if the City fails to comply with the agreement it may be compelled by Moyle as a beneficiary thereunder to make performance.

The Court allows no diminution of damages in the trespass action for the water made available to Moyle. If, from a legal standpoint, the exchange agreement is

impossible of performance without depriving Moyle of his water rights, should the burden of paying the resulting damages fall upon the City as if it were the culpable party to the contract that brought about and was responsible for the unavoidable effects of the contract? The commingling of lake water with the creek water is not the act of the City. The City merely delivers the lake water to the Company at a point designated by the Company. Moyle commenced an action against the Company in 1922, the files being in evidence as exhibit G, to enjoin the delivery of creek water by the Company to the City as being ultra vires and that action is still pending. He was ordered to make the City a party, but he has never done so in the twenty-four years that have since elapsed.

In 1920, after the exchange agreement was entered into, the City filed an application with the State Engineer to change the point of diversion from the head of the Tanner Ditch to the head of the City conduit farther up the Canyon so it could take the creek water at its conduit. A certified copy of that application together with the action taken by the State Engineer is in evidence as exhibit 3. This exhibit shows that notice of hearing on said application was published in the Deseret News from April 19 to May 19, 1920; but no protests of any kind, not even by Moyle, was filed. That the application was granted September 3, 1920. Moyle must be held to have had notice under the statute. Furthermore he well knew that if the application was granted, the exchange agreement would be made ef-

fective and that the inevitable consequence would be that lake water would be delivered to the Company as provided for in the exchange agreement. Notwithstanding this knowledge, he filed no protest nor did he appeal from the decision of the State Engineer. He has permitted his action to enjoin the Company from performing under said agreement to lie dormant for 24 years. In addition he has used the water pipe system which was installed under the exchange agreement and has received the benefits of such system delivering water under pressure and thus eliminating taking water for culinary and domestic purposes from an open ditch. We submit that under such facts and conditions, the plaintiffs are now estopped from taking a position that places the City in the position of a trespasser in the performance of the exchange agreement. He must now be held to have acquiesced in any change thus brought about to his water right. He has not been deprived of water suitable for any of the purposes to which he had been using it. He has been receiving or has had made available to him all the water that he was entitled to use either for irrigation or for culinary and domestic purposes.

## V

## GROUNDS 9, 10, and 11

The grounds for rehearing relied on in this group relate to the fundamental error in the decision arising

from the failure to keep in mind the nature of the property right involved, and consequently the correct measure of damages which should be applied. Since these matters are so ably and exhaustively covered by Justice Wolfe in his dissenting opinion, we incorporate that opinion as a part hereof. We desire only to add the following observations.

This case is unlike the Shurtliff and Sigurd cases in that here there is no permanent taking of the water, whereas in those cases the taking was permanent and the owner of the water right lost the right in its entirety. Here there is only a temporary interference with the right to use water. Surely in such a situation the owner's damages should be measured by the use which he lost. He should not be permitted to be enriched by a value based upon a possible use which could only result from a permanent taking. The right which Moyle had was to take a certain amount of water from the Tanner Ditch; he could not have sold or leased anything else. It was that right which was interfered with, and he lost only what that right would have meant to him <sup>but for</sup> such interference. The value of that right cannot be ~~predicted~~<sup>ga</sup> upon a possible use which could be made if the taking were permanent, nor is the value to be found by considering that the water might have been put in pipes or reservoirs or that it could have been taken out at some other point of diversion where it could be put under pressure and used entirely for culinary and domestic use.

## VI

## GROUND 12

As we have already pointed out, the record is conclusive that plaintiffs in fact have received all of the Big Cottonwood Creek water to which they were entitled under their  $22\frac{3}{4}$  shares for culinary and domestic purposes through the pipe system installed under the exchange agreement. This being a fact, the judgment of the Trial Court should be reversed because it fails to diminish the amount of damages by the reasonable rental value of the water so delivered.

## VII

## GROUND 13

The opinion entirely ignores the assignment of error which relate to the action of the Trial Court in entering judgment for the return to Moyle of  $22\frac{3}{4}$  shares of water right in the Big Cottonwood Stream and in decreeing that plaintiffs' water rights were the same water as that decreed to Oscar W. Moyle in the Progress case and the *Big Cottonwood Tanner Ditch Company vs. Shurtliff* case, and decreeing that the plaintiff should recover from defendant the use and possession from the water of Big Cottonwood Stream described as  $22\frac{3}{4}$  shares water right in said stream. In the first place, such a decree was entirely unnecessary to a disposition of the issues presented by the pleadings. In the second place, the evidence is conclusive that the  $22\frac{3}{4}$  shares

were shares in the Big Cottonwood Tanner Ditch and not in the Big Cottonwood Stream. It is true the water of the Tanner Ditch came from the Big Cottonwood Stream, but Moyle's shares represent a certain portion of the Tanner Ditch Company's right and not a certain proportion of the Big Cottonwood Stream as a whole. The decree is therefore misleading in describing a water right in the Moyles which they do not own and in decreeing that the City return a water right which is impossible to define and to which the plaintiffs are not entitled.

In view of the foregoing, we respectfully submit that this petition for rehearing should be granted and the cause set for rehearing.

Respectfully submitted,

E. R. CHRISTENSEN

City Attorney,

HOMER HOLMGREN,

A. P. KESLER

Assistant City Attorneys,

Attorneys for Appellant.