

1948

James C. Whittaker v. Richard Spencer, John  
Edison Spencer, Elizabeth A. Tibbs, Vord Spencer,  
Irwin M. Price, Simon Huguen-Tobler, Indianola  
Irrigation Company and the State of Utah : Brief of  
Appellants

Utah Supreme Court

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John A. Hougaard, Judge; Elias Hansen; Allan G. Thurman; J. Vernon Erickson; Dilworth Woolley; Jensen & Jensen; John S. McAllister;

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# IN THE SUPREME COURT of the State of Utah

JAMES C. WHITTAKER,

*Plaintiff,*

— vs. —

RICHARD H. SPENCER, (in whose  
name RICHARD LEO SPENCER, as  
Administrator has been substituted,  
JOHN EDISON SPENCER, ELIZA-  
BETH A. TIBBS, VORD SPENCER,  
IRWIN M. PRICE, SIMON HUGEN-  
TOBLER, (in whose place Que Jensen  
has been substituted, INDIANOLA  
IRRIGATION COMPANY and the  
STATE OF UTAH,

*Defendants.*

## BRIEF OF APPELLANTS

APPEALED FROM THE SEVENTH JUDICIAL  
DISTRICT COURT, IN AND FOR SAN-  
PETE COUNTY, STATE OF UTAH.

JOHN A. HOUGAARD, JUDGE  
ELIAS HANSEN

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*Attorney for defendant Que Jensen.*

**FILED**

**JUN 24 1948**

**CLERK, SUPREME COURT, UTAH**

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# IN THE SUPREME COURT of the State of Utah

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JAMES C. WHITTAKER,

*Plaintiff,*

— vs. —

RICHARD H. SPENCER, (in whose  
name RICHARD LEO SPENCER, as  
Administrator has been substituted,  
JOHN EDISON SPENCER, ELIZA-  
BETH A. TIBBS, VORD SPENCER,  
IRWIN M. PRICE, SIMON HUGEN-  
TOBLER, (in whose place Que Jensen  
has been substituted, INDIANOLA  
IRRIGATION COMPANY and the  
STATE OF UTAH,

*Defendants.*

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## STATEMENT OF CASE

This action was commenced on July 21st, 1941 by the plaintiff to quiet his claim to 60 acres or shares of primary or class "A" water in Thistle Creek and its tributaries. These creeks rise in the northern end of Sanpete County and when not diverted for irrigation flow northerly into Spainsh Fork River and thence into Utah Lake.

Simon Hugentobler was made a party defendant because he held a mortgage on a tract of land owned by Richard Spencer, together with 55 shares or acres of primary class "A" water right in Thistle Creek and its tributaries.

Prior to the trial of this cause Simon Hugentobler conveyed his interest in the water of Thistle Creek and its tributaries to Que Jensen who was substituted for Simon Hugentobler.

Prior to the trial of the cause Richard H. Spencer died and Richard Leo Spencer, having been appointed administrator of the estate of his father Richard H. Spencer was substituted as a defendant for his deceased father.

J. Vord Spencer, a son of Richard H. Spencer, did not claim any interest in the controversy, except as an heir of Richard H. Spencer, deceased.

The Indianola Irrigation Company is a mutual irrigation company and as such distributes the waters of Thistle Creek and its tributaries to its stockholders who own land adjacent to said creek.

By his pleadings Richard Leo Spencer claimed all of the waters in controversy but during the course of the trial it was agreed by his counsel that Que Jensen, as successor in interest of Simon Hugentobler, was entitled to 55 acres or shares of the waters in question.

By his pleadings defendant, Irwin M. Price claimed to be the owner of 160 shares of the water in dispute,

but during the course of the trial he disclaimed any right to such stocks.

By his pleadings defendant John Edison Spencer claimed to be the owner of the water in controversy, but that eighty shares of the water was to be conveyed to his sister Elizabeth A. Tibbs, when and if he established a right thereto. During the course of the trial counsel for defendants, John Edison Spencer and Elizabeth A. Tibbs, conceded that Que Jensen, as the successor of Simon Hugentobler, was entitled to 55 shares or acres of the water right in controversy.

Elizabeth A. Tibbs claims the right to 80 shares of the water in controversy because of an agreement had between John Edison Spencer, Irwin M. Price and her father, Richard H. Spencer, and because her father Richard H. Spencer, by a warranty deed conveyed to her 80 acres of land to which she claims 80 shares or acres of the water in dispute is appurtenant.

In order that the court may more readily understand what appellants, John Edison Spencer and Elizabeth A. Tibbs, claim for the evidence, which we shall presently summarize, we at the outset claim:

1. That the plaintiff, James C. Whittaker, does not have any title to the 60 shares of water right to which he seeks to quiet title because:

- (a) The mortgage under which he claims title was and is void for uncertainty as to any sixty acres or shares of water:



(b) The decree of foreclosure of the mortgage under which he claims title is void for uncertainty:

(c) The sheriff's deed which was issued pursuant to the decree of foreclosure is void for uncertainty in so far as it affects the 60 shares or acres of water right:

(d) The deed to the plaintiff from the grantee in the sheriff's deed to the 60 shares or acres of water right claimed by the plaintiff is void for uncertainty.

2. That the water right in controversy, other than the 55 shares to which Que Jensen is entitled, is appurtenant to land which Richard H. Spencer, during his lifetime, conveyed to John Edison Spencer and Elizabeth A. Tibbs and as such 80 shares or acres belongs to Elizabeth A. Tibbs and the remainder to John Edison Spencer.

3. That even if the water right is not appurtenant to the land conveyed to Elizabeth A. Tibbs and John Edison Spencer, they own the right to such waters by reason of the delivery of the stock certificate to John Edison Spencer.

The record in this case is somewhat lengthy. Much of the evidence is not in conflict. We shall direct the attention of the court to those portions of the evidence that we deem necessary to an understanding of the matters which divide the parties to this litigation.

On June 21st, 1918 the persons who claimed a water right in Thistle Creek and its tributaries ex-

ecuted Articles of Incorporation of the Indianola Irrigation Company. (See plaintiff's Exhibit 7). By such articles it was provided among other things:

#### “ARTICLE 5

The capital stock of this corporation shall be \$80,000. Eighty Thousand Dollars divided into Twenty Two Hundred shares, as follows: Eighteen Hundred shares of class “A” stock, of the par value of Forty Dollars per share, and Four Hundred shares of class “B” stock of the par value of Twenty Dollars per share.”

#### “ARTICLE 6

The purpose for which this corporation is formed, and the pursuits and business to be engaged in, is to manage, regulate, control and distribute the waters of Thistle Creek, its branches and tributaries in Sanpete County, to which it shall be entitled, to and among its stockholders in proportion to their and each of their respective rights to the use thereof, to construct and maintain all such dams, ditches, canals, gates, reservoirs, flumes and other and different structures and means which may be found necessary or convenient for the domestic and other purposes.”

#### “ARTICLE 18

Subscription to the capital stock of this corporation, by the persons above named, are made by each of such persons conveying to this corporation by good and sufficient deed one acre of primary water rights from the waters of Thistle Creek, its branches and tributaries, for

every share of class "A" stock, subscribed for by him, which said water right is taken and received by this corporation at the price and valuation of Forty Dollars per acre of such primary water rights as fully paid up subscription for such stock. And one acre of secondary water right from the above mentioned sources for every share of class "B" stock subscribed for by him, which said water rights are taken and received by this corporation at the price and valuation of Twenty Dollars per acre of such secondary water rights as fully paid up subscription for such stock, and future subscriptions to any capital stock of this corporation shall be made only upon the above terms. And the Board of Directors shall in all cases determine the sufficiency of water-rights to be received by the corporation for subscriptions for its stock. The waters hereinbefore referred to, include the waters from Thistle, Rock and Clear Creeks, their branches and tributaries."

## "ARTICLE 19

The Board of Directors shall cause the waters owned by this corporation to be distributed and divided to and among its stockholders, at the rate and in the proportion of stock held by each person, in the following manner, to wit: from and after the first day of March, to and including the 15th day of June each and every year, all the waters owned by this corporation, shall be divided among, and distributed to the stockholders of this corporation, both to class A and class B equally, pro-rate, and in proportion to the amount of stock held by each person. From and after the 15th day of June, to and including the first day of March, following,

during each and every year, the owners of class A stock of this corporation, shall be entitled, as a first right, to an amount of water equal to  $1/40$  of a second foot of water for every share of class A stock of this corporation, held by him, or if there shall not be sufficient water, owned by this corporation, to fully supply said amount, then such water as may be available, shall be divided and distributed to the holders of said class A stock, pro-rate and in the proportion to the amount of said class A stock held by each person. And if, after all of class A stock, shall first have been fully supplied with the amount of water above stated, there shall at anytime be a surplus of water, over and above what will fully supply all of class A stock, as above stated, then such surplus water shall be divided among and distributed to the holders of class B stock, pro-rate and in proportion to the amount of said class B stock held by each person."

On May 6th, 1920 a decree was entered in the district court of Sanpete County in an action entitled: "Indianola Irrigation Company, a corporation, et al., plaintiffs, vs. R. H. Spencer, et al., defendants." In such decree it was, among other things, adjudged:

"It is further ordered, adjudged and decreed that for the purposes of effecting a proper and economical method of distributing the waters of the aforesaid streams through said Indianola Irrigation Company said stream shall be divided into 1800 shares of class "A" stock, and 500 shares of class "B" stock and said stock shall be divided between the parties hereto including

the stockholders of the Indianola Irrigation Company, as follows:"

Then follows a list of persons who are decreed water rights to the total number of 1728 shares of class "A" water right. R. H. Spencer, who is the same person as Richard H. Spencer, is awarded 448 shares of class "A" stock. (See plaintiff's Exhibit "A".)

On January 23, 1922 defendant R. H. Spencer and his wife, Annie H. Spencer, executed a mortgage to Simon Hugentobler on Lot 4 of Section 5 and Lot 1 of Section 6, in Township 12 South, Range 4 East, Salt Lake Meridian, consisting of 77 acres, together with 55 shares of primary water right from the waters of Thistle Creek to secure the payment of a note for \$2577.91. That mortgage was recorded on January 12, 1922 in Sanpete County, Utah. (See Trs. pages 26 to 28).

On November 9th, 1926 Richard H. Spencer, who is the same person as R. H. Spencer, and J. Vord Spencer, Josie Spencer, his wife, H. M. Spencer and his wife Ida Spencer gave a mortgage to the Federal Building and Loan Association, a corporation, together with Two Hundred eighty-five (285) shares of capital stock of the Indianola Irrigation Company, a corporation, also all water and water right appurtenant to or used upon or in connection with the real estate described in the mortgage. The land described in the mortgage is in Sanpete County, Utah and particularly described as follows:

Beginning 7.61 chains South from the North East Corner of the South East Quarter of Section 5, Township 12 South, Range 4 East, Salt Lake Meridian, thence South 89 degrees West 18.79 chains; thence North 7.88 chains; thence West 21.21 chains; thence South 20.00 chains; thence East 40 chains; thence North 12.39 chains to the place of beginning, containing 59.46 acres, more or less.

Also:

Beginning at a point 3.89 chains South from the Southeast Corner of the Northeast Quarter of Section 5, Township 12 South of Range 4 East, Salt Lake Meridian, Utah: thence West 1 degree South 18.79 chains; thence South 3.72 chains; thence East 1 degree North 18.79 chains; thence North 3.72 chains to beginning, containing 7 acres, more or less.

Also:

Beginning at the Southeast corner of the North East quarter of Section 5, in Township 12 South, Range 4 East, Salt Lake Meridian, Utah, thence running West 3.50 chains, thence North 2.17 chains; thence West 15.29 chains; thence South 1.72 chains, thence East 4.44 chains, thence South 25° East 3.60 chains; thence South 60° 45' West 1.50 chains; thence West 4.65 chains, thence South 0.34 of a chain; thence North 89° East 18.79 chains; thence North 3.89 chains to beginning, containing 7.54 acres, more or less.

Also:

The Southeast quarter of Section 8 in Township 12 South of Range 4 East, Salt Lake Meridian, Utah.

The land and water right above described were given to secure a note for \$14,266.50. That mortgage

was recorded in Sanpete County, Utah on November 9, 1926. (See Trs. 29 to 35).

At the time R. H. Spencer executed the mortgage above mentioned he also executed and delivered to the Federal Building and Loan Association a written instrument which is in words and figures as follows:

### "ASSIGNMENT

"For value received I have bargained, sold, assigned and transferred and by these presents do bargain, sell, assign and transfer to the Federal Building and Loan Association, a Utah corporation, with its principal place of business in Ogden, Utah, all of my right, title and interest in and to Two Hundred Twenty Three (223) shares of class "A" stock in the Indianola Irrigation Company in the State of Utah with its principal place of business at Indianola, Sanpete County, State of Utah, and I further assign to said Federal Building and Loan Association any additional interest in said stock that may accrue to me in said stock, which at this time is unissued and should the same be issued I direct that it be issued to the Federal Building and Loan Association, and I hereby constitute and appoint the Federal Building and Loan Association my true and lawful attorney irrevocably for me instead to transfer said stock on the books of said company with full power of substitution and irrevocation.

Dated this 9th day of November, 1926.

Witness.

David Wilson /s/''

/s/ R. H. Spencer

(See Irrigation Co. Exhibit 1.)

The other 62 shares of the 285 shares or acres of water mortgaged to the Federal Building and Loan Association belonged to H. M. Spencer and Elizabeth Tibbs. (Tr. 342 to 405.)

On May 21, 1931 R. H. Spencer and his wife Annie H. Spencer conveyed to the defendant Elizabeth A. Tibbs :

“The NE  $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 3, Township 12 South, Range 4 East, Salt Lake Meridian, containing 40 acres more or less.

Together with twenty acres of primary water right from Clear Creek, Rock Creek and Thistle Creek.”

That deed was recorded on May 21, 1931. (Tr. 35-36)

On October 16th, 1931 Henry M. Spencer, otherwise known as H. M. Spencer, Ida Spencer, his wife, Leo Harold Spencer and Fern Spencer, his wife, R. H. Spencer and Annie H. Spencer, his wife, mortgaged to W. H. Hadlock, State Bank Commissioner of Utah the West Half of the Northeast Quarter, the Southeast Quarter of the Northwest quarter and the North Half of the South Half of Section Three (3), Township 12 South, Range 4 East, Salt Lake Base and Meridian, containing 280 acres, subject to right of way of county road.

“Together with all right of every kind and nature, however evidenced to the use of water, ditches and canals for the irrigation of said



premises to which the mortgagors or said premises are now or may hereafter become entitled, whether represented by certificates of stock or otherwise and together with sixty (60) shares or acres of water right owned by R. H. Spencer in the waters of Indianola Creek, Thistle Creek and Rock Creeks in addition to water now used for the irrigation of the above described lands."

That mortgage was given to secure a number of notes, one for \$2440.00, one for \$4750.00, one for \$1500.00; one for \$500.00; one for \$1400.00; one for \$150.00 and one for \$5000.00.

That mortgage was recorded on October 21, 1931. (Tr. 37 to 41).

By an instrument dated June 21, 1918 a number of persons executed what purports to be a Deed of Water Rights whereby they purported to convey to the Indianola Irrigation Company certain water rights. The conveyance recites that in consideration of certificates of the capital stock of the Indianola Irrigation Company the signers grant, bargain, sell, assign, transfer and quit claim to the Indianola Irrigation Company all of their rights, titles, interest, claims and demands in and to the waters of Thistle, Rock and Clear Creeks and their tributaries the respective amounts and classes which are set opposite their names, together with all ditches, canals, dams, gates, and all other appurtenances heretofore used in the controlling and distribution of said water in accordance with the terms and conditions

contained in the articles of incorporation of the Indianola Irrigation Company.

Among the signers of the conveyance were Richard H. Spencer and his wife Annie Spencer. Through the words: "dated this 25th day of November, 1931," there is drawn in red ink a line. Under the name of Richard H. Spencer and Annie Spencer the words "One Hundred and Sixty shares class A stock."

The paper on which the names of Richard H. Spencer and Annie Spencer appear is attached to the conveyance. The acknowledgement was taken on June 1st, 1918, before H. F. Wall and shows that R. H. Spencer and Annie Spencer acknowledged the instrument on that day. (See Indianola Irrigation Co. Exhibit 5) That conveyance was read into the record and will be found at pages 43 to 49 of the transcript.

On October 29, 1933 Richard H. Spencer and Annie H. Spencer, his wife, conveyed to the defendant John E. Spencer the South one-half of the Southwest Quarter of Section 5, Township 12 South, Range 4 East, Salt Lake Meridian, together with 80 acres of water in what is known as Thistle Creek. That deed was recorded on June 22, 1933. (See page 51 and 52 of Trs.) On September 16, 1933 a deed was given to correct the description in the deed above referred to in which later deed the land conveyed is described as the North One Half of the Southwest Quarter of Section 5, Township 12 South, Range 4 East, Salt Lake Meridian, containing 80.00 acres. Together with 80 acres of water in what is

known as Thistle Creek. That deed was recorded on September 21, 1933. (Tr. 2 to 54). The last mentioned deed was offered and received in evidence as "John Edison Spencer et al., Exhibit 12."

Plaintiff offered and over objection of defendants John Edison Spencer and Elizabeth A. Tibbs, there was received in evidence certain of the files in case numbered 2888 and in which John A. Malia, as State Bank Commissioner, is plaintiff and Richard H. Spencer, John Edison Spencer, Robert D. Tibbs, Elizabeth A. Tibbs and others are defendants. Later in the proceedings all of the files in that case were received in evidence. (Tr. 73 to 80 and 576-583)

The files in 2888 civil contain the proceedings had in the mortgage foreclosure proceedings by the Bank Commissioner through which foreclosure proceedings the plaintiff in this case, as we understand his position, claims his title to 60 acres or shares of water. We shall not attempt to set out the various documents found in that case but shall content ourselves with referring to such of such documents as we deem material to this case. The files are marked: "John Edison Spencer Exhibit 14," but most of the documents therein contained were first offered by the plaintiff and over objections received in evidence as above indicated.

It will be seen from the files in said case numbered 2888 civil that the action was first brought to set aside certain deeds. After issues were made by the complaint and answers thereto an amended complaint was filed

in which numerous additional parties were made defendants and the plaintiff sought to foreclose a mortgage on both real and personal property.

In our view the only part of the proceedings had in that case which are material here are those portion thereof which relates to the foreclosure of the mortgage executed by H. M. Spencer, Ida Spencer, R. Leo Spencer, Grace Spencer, R. H. Spencer, Leo Harold Spencer and Fern Spencer. A copy of that mortgage will be found marked Exhibit "G" and made a part of the amended complaint. As heretofore indicated that mortgage covers the West Half of the Northeast Quarter, the Southeast Quarter of the the Northwest Quarter and the North Half of the South Half of Section Three (3), Township 12 South, Range 4 East, Salt Lake Base and Meridian, containing 280 acres, subject to right of way of county road.

Together with all rights of every kind and nature, however evidenced to the use of water, ditches and canals for the irrigation of said premises to which the mortgagors or said premises are now or may hereafter become entitled whether represented by certificates of stock or otherwise and together with sixty shares or acres of water right owned by R. H. Spencer in the waters of Indianola Creek, Thistle Creek and Rock Creek in addition to waters now used for the irrigation of the above described lands.

To the complaint of the Bank Commissioner Richard H. Spencer, Annie H. Spencer, John Edison

Spencer, Elizabeth A. Tibbs, et al, filed a general demurrer and an answer. In the answer they denied most of the allegations of the complaint.

To the complaint filed by John A. Malia, as Bank Commissioner, the Indianola Irrigation Company filed an answer and cross complaint. In its answer it admitted most of the allegations of the complaint and in its cross complaint it sought to enjoin the transfer of the certificates of stock held by the other parties to the action.

Simon Hugentobler also filed an answer, counterclaim and cross complaint in the action. In his counterclaim and cross complaint he sought to foreclose a mortgage given to him on January 3, 1922 by Richard Leo Spencer, Grace Spencer, R. H. Spencer and Annie H. Spencer as security for a note in the sum of \$2,577.91. The mortgage which he sought to foreclose was on Lot 4 of Section 5 and Lot 1 of Section 6 in Township 12 South, Range 4 East, Salt Lake Meridian and 55 acres of Primary Water Right from the waters of Thistle Creek.

There are numerous other pleadings in cause 2888 civil but no useful purpose will be served by directing the attention of the court thereto in this proceeding.

It appears from the recitals preceding the Findings of Fact and Conclusions of Law that a trial was had before the court sitting without a jury. That the plaintiff and defendants Richard H. Spencer, Annie Spencer, cross complainants Simon Hugentobler and Indianola

Irrigation Company were represented by counsel; that John Edison Spencer was present in court but not represented by counsel and that the other parties to the action had been given notice of the time set for the trial.

The findings of fact are in the usual form in a mortgage foreclosure. In paragraph 12 on page 5 of the findings the court finds that the mortgage to the Bank Commissioner was executed. In its findings numbered 21, 22, 23, 24, 25 and 26 the court found:

## 21

“That the Indianola Irrigation Company, a corporation claims to be the owner of the water rights described in plaintiff’s mortgage by virtue of a deed of conveyance executed and delivered to said company the 25 day of November, 1931, by the defendants Richard H. Spencer and Annie H. Spencer, his wife. That on said 25 day of November, 1931, the said defendants Richard H. Spencer and Annie H. Spencer, his wife, executed and delivered to said Irrigation Company a deed conveying and transferring to said company 160 shares of decreed water rights then owned by the said Richard H. Spencer in the waters of Clear Creek, Thistle Creek and Rock Creek. That said 160 shares of decreed water rights included the 60 shares of water rights described in plaintiff’s mortgage hereinabove referred to, which mortgage was executed and delivered the 16th day of October, 1931.”

## 22

“That said Indianola Irrigation Company

accepted conveyance of said water rights subsequent to the recordation of plaintiff's mortgage which was recorded upon the records of Sanpete County, Utah, the 21 day of October, 1931, and said Irrigation Company is charged with notice of plaintiff's mortgage. That the rights acquired by the said Irrigation Company by virtue of said conveyance from Richard H. Spencer and wife are subsequent, subject, subordinate and inferior to the rights of the plaintiff under the plaintiff's mortgage hereinabove mentioned."

"That on said 25 day of November, 1931, the said Richard H. Spencer received from said Irrigation Company in exchange for the conveyance aforesaid, certificate of stock No. 57 of said company for 160 shares of class "A" stock of said Irrigation Company, which certificate was issued in the name of State of Utah as pledges of R. H. Spencer. That said defendant Richard H. Spencer and Annie H. Spencer, at the said time and place represented and warranted to the officers of said Irrigation Company that the 160 shares of water deeded to said company on said day were free and clear of all encumbrances and that the title of said defendant Richard H. Spencer thereto was good and valid and that said defendant Richard H. Spencer was entitled to said 160 shares of corporate stock in said corporation; that said irrigation company then and there relied upon said statements and representations of said defendant and in reliance upon said statements and representations the said company issued its stock certificate No. 57 aforesaid."

“That on or about the 30 day of December, 1933, the defendant Richard H. Spencer surrendered and endorsed to said Indianola Irrigation Company the said certificate of stock No. 57 above mentioned, and upon this request and representation that he was the owner of the stock and water rights represented thereby there was issued to and received by him two certificates in exchange therefor, to-wit: Certificate No. 72 for eighty shares issued in the name of “The Federal Land Bank of Berkeley as agent of the Land Bank Commissioner, pledgee of John E. Spencer.” That said certificates Nos. 72 and 73 are now outstanding and are now in possession of the defendant Richard H. Spencer.”

“That the defendants Richard H. Spencer and John Edison Spencer, claim, by virtue of said stock certificates No. 72 and 73 aforesaid, and otherwise, to be the owners of the water rights represented by the said certificates. That said claims are in each case subsequent, subject, subordinate, and inferior to the rights of the plaintiff under his mortgage as aforesaid.”

“That said defendants Richard H. Spencer and John Edison Spencer will probably attempt to transfer the said shares of stock represented by said certificates herein referred to unless restrained by the court and in case of such transfer the said Indianola Irrigation Company will



probably suffer irreparable injury for which said company has no adequate remedy at law.”

In its findings the court also found that the mortgage to Simon Hugentobler had been executed.

In its conclusions of law the court ordered judgment in favor of the plaintiff, Bank Commissioner, and Simon Hugentobler.

As one of its seventeen conclusions the trial court in said cause No. 2888 civil says:

“\* \* \* and that plaintiff has a valid and subsisting first mortgage lien, as against each and all of the other parties to this action, upon all of the real estate and water rights described in plaintiff’s real estate mortgage hereinabove referred to, to secure payment of all the respective amounts owing upon said notes as above set forth, including interest and attorney fees and costs of this action.”

“That whatever rights, if any, the defendants and cross complainants herein may assert in, to or upon the real estate and water rights described in plaintiff’s real estate mortgage aforesaid, such rights and claims are in the case of each and every defendant and cross complainant subsequent, subordinate, inferior and subject to the lien of plaintiff’s mortgage.”

In its Decree of Foreclosure the court among other things determined, ordered, adjudged and decreed: That plaintiff’s mortgage be enforced and foreclosed and the real estate and water rights described therein and that

the mortgage of Simon Hugentobler be foreclosed and sold to satisfy the judgment in favor of Hugentobler.

Paragraph 14 of the decree of foreclosure reads thus:

“That the defendants Richard H. Spencer, Annie H. Spencer, John Edison Spencer, Robert D. Tibbs and Elizabeth A. Tibbs be and are hereby restrained and enjoined from in any way assigning, transferring, disposing of or encumbering certificates of stock No. 72 and No. 73, issued by the Indianola Irrigation Company, or the water rights represented by said certificates, or any other water rights held or claimed by said defendants in the waters of Thistle Creek, Clear Creek or Rock Creek until the further order of this court. The Court hereby retains jurisdiction of this cause for further hearing upon the rights asserted by the Indianola Irrigation Company against said defendants.”

The findings of fact, conclusions of law and decree were signed on December 3, 1936 and filed the following day.

On the same day that the decree of foreclosure was filed the sheriff published notice of sale. Such notice describes the land covered by the mortgage and water in the exact language of the mortgage.

So also in the sheriff's return and the order of sale the real and personal property is described in the exact language of the mortgage made to the Bank Commissioner. (Note the files in 2888 civil being made as

exhibits are not numbered consecutively but the papers therein are arranged in the order in which they were filed).

The Bank Commissioner's deed to the plaintiff, James C. Whittaker, describes the water right claimed by him in the following language:

"The right to the use of 60 acres of primary water right, being 60 acres or shares of class "A" right, from Thistle Creek and its tributaries in Sanpete County, State of Utah to be used for irrigation, culinary and stock watering purposes, during the irrigation season from April 1st to October 1st of each year upon lands in Township 12 South, Range 4 East, Salt Lake Meridian, being the same 60 acres of primary or 60 shares of class "A" water right of the 448 acres or shares of primary or class "A" water right decreed to Richard H. Spencer by the decree of the district court in and for Sanpete County, State of Utah in case No. 1406." See Tr. 97.

The proceedings had in the mortgage foreclosure of the State Bank Commissioner against the Spencers will also be found in an abstract which was received in evidence as Plaintiff's Exhibit "M".

The mortgage given by the Spencers to the Federal Building and Loan Association on the land and water right heretofore mentioned was foreclosed. At the foreclosure proceedings the Association bought in the mortgaged property. Thereafter the Association conveyed the water right to the Indianola Irrigation Company.

(See Indianola Irr. Co. Exhibit 2) It received two certificates of stock the same being represented by certificate of stock No. 84 for 125 shares of class "A" stock which was received in evidence as Indianola Irrigation Company's Exhibit 20A. It will be noted that the certificate was assigned to Richard H. Spencer.

The remainder of the 285 shares acquired by the Federal Building and Loan Association is numbered 86 of the Indianola Irrigation Company for 160 shares of class "A" water stock issued to the Federal Land Bank of Berkeley as pledgee of Robert D. Tibbs. That exhibit was received in evidence as Exhibit 11. That is the 160 shares of stock that was awarded to the appellant John Edison Spencer.

The land that was foreclosed by the Federal Building and Loan Association was also reconveyed to Richard H. Spencer. (Tr. 884, 887 and 889).

Under date of August 7, 1945 R. H. Spencer executed a deed to the Southeast Quarter of Section 8, Township 12 South, Range 4 East, Salt Lake Meridian, containing 160 acres. (See John Edison Spencer's Exhibit 5.) This is a part of the property that was mortgaged to and foreclosed by the Federal Building and Loan Association. On the same day R. H. Spencer executed a warranty deed to Elizabeth A. Tibbs to the Southwest Quarter of the Northwest Quarter of Section 5, Township 12 South, Range 4 East, Salt Lake Meridian, containing 40 acres, more or less. (See John Edison Spencer's Exhibit 7.) This too is a part of the property mortgaged to and

foreclosed by the Federal Building and Loan Association.

Therefore R. H. Spencer had executed a deed to Elizabeth A. Tibbs conveying the Southeast Quarter of the Northwest Quarter of Section 5, Township 12 South, Range 4 East of the Salt Lake Base and Meridian. (See John Edison Spencer's Exhibit 8.)

On August 7, 1945, R. H. Spencer also executed a deed to 53.78 acres of land in said Section, township and range. (See John Edison Spencer's Exhibit 6.)

This tract of land is also a part of the land mortgaged to and foreclosed by the Federal Building and Loan Association.

The deeds from R. H. Spencer, sometimes known as Richard H. Spencer, which were executed on August 7, 1945 before C. H. Beal, an abstractor of Manti were delivered to the grantees on May 31, 1946. (See testimony of R. D. Tibbs, Louise Spencer and C. H. Beal. Tr. 819 to 878.)

The water represented by all of the certificates of stock have at all times been used on the Hugentobler land and the land which Richard H. Spencer conveyed to John Edison Spencer and Elizabeth A. Tibbs. (See testimony of Lyman Seeley. Tr. 360 to 365 and testimony of John Edison Spencer, Tr. 502 to 511, and Tr. 600 to 635.) There is no evidence to the contrary.

The court may be aided in following the evidence as to the land upon which the water in question was at

all times used by referring to Indianola Irrigation Company's Exhibit 29.

The trial court awarded to appellant John Edison Spencer 3 acres of water for which no certificate had been issued as being appurtenant to the land conveyed to John Edison Spencer by R. H. Spencer, also known as Richard H. Spencer, under date of August 7, 1945. (See Tr. 584 to 586.) So far as appears no certificate was ever issued for the water that was used on the land covered by the mortgage to Simon Hugentobler unless it was represented by certificate 84 for 125 shares of water.

We have thus far at some length directed the attention of the court to transactions had touching the title to the land upon which the water in dispute was used at all times prior to the death of Richard H. Spencer and up to the time of the trial of this cause. We have done so because, as we contend, the water right was at all times appurtenant to the land upon which the water was used notwithstanding the water right may have been represented by certificate of stock. In this connection an examination of the testimony will reveal that at all times prior to the time R. H. Spencer delivered the deeds to John Edison Spencer and Elizabeth A. Tibbs the certificates of stock and the land upon which the water was used were owned by the same person.

In the event the court should conclude that the water in dispute is appurtenant to the land upon which it was used that would probably end this controversy, except

possibly as to the 60 acres or shares claimed by the plaintiff.

If the court should not so conclude it will probably be necessary to look into the evidence touching the various transfers of the stock certificates.

Certificate numbered 86 for the 160 shares of water is marked John Edison Spencer's, et al, Exhibit 11 and as such was received in evidence. It is made out to The Federal Land Bank of Berkeley as pledgee of Robert D. Tibbs. On the back of that certificate is a release of a lien by the Federal Land Bank of Berkeley, pledgee.

That certificate comes out of the certificate for 285 shares evidenced by certificate 81 issued to the Federal Building and Loan Association. (See photostatic copy of the exhibit of Indianola Irrigation Co.) The number of the exhibit does not appear on the same. That certificate was surrendered and certificates number 84 and 86 issued in lieu thereof. Certificate 86 is for the 160 Class "A" stock which is marked: "John Edison Spencer's, et al, Exhibit 11.) Certificate 84 is for 125 shares Class "A" stock and is marked "Indianola Irrigation Company's Exhibit 20A". Certificate numbered 86 for 160 shares was acquired by John Edison Spencer assuming and paying the obligation owing upon the certificate and the land upon which it was used to the Federal Land Bank of Berkeley. (See evidence of John Edison Spencer beginning at page 476 to 489 of the transcript and John Edison Spencer's Exhibits 3, 4, 4a.)

As to certificate 84 for 125 shares, marked Indianola Irrigation Company's Exhibit 20A, the evidence is that it was part of the water right mortgaged to the Federal Building and Loan Association; that after the mortgage was foreclosed the Federal Building and Loan Association conveyed all of the water right it acquired to the Indianola Irrigation Company and received in return therefor a certificate of stock for 285 shares of which 223 acres or shares were the waters owned by R. H. Spencer and the balance of 62 or 62½ acres or shares were owned by his children who signed the mortgage to the Federal Building and Loan Association. The certificate for 125 of the 285 shares was made out and delivered to R. H. Spencer. It will be noted that R. H. Spencer received something like 62 or 63 shares more when he purchased the land and water back from the Federal Building and Loan Association than he had when he made the mortgage to the Federal Building and Loan Association. There is evidence that the Hugentobler water was in that certificate. Mr. Pederson, a witness called by the administrator of the estate of R. H. Spencer testified that the Hugentobler water came out of the water claimed by the Federal Building and Loan Association and not out of certificates 72 or 73. (Tr. 241.)

Mrs. Louise Spencer, the wife of John Edison Spencer, testified that on May 30, 1946 when the deeds were delivered to John Edison Spencer and Elizabeth A. Tibbs that Mrs. Tibbs mentioned that the deeds did not mention any water and that Daddy (R. H. Spencer) told



her that when the litigation was finished and the water was clear she would get water for her ground. That Mr. Spencer also mentioned that water would go with the other land. On cross examination she testified that he gave Edison certificate 84 and told him that was to be his and have it transferred. (Tr. 852-854.) On cross examination an attempt was made to impeach Mrs. Spencer by calling her attention to her testimony given at the time an administrator was appointed. Such testimony will be found on pages 856 to 864. At the former hearing Mrs. Spencer did not testify about the delivery of the water certificate but it will be noted that the subject matter of inquiry on the former hearing was the deeds which Mr. Spencer delivered to John Edison Spencer and Elizabeth A. Tibbs, which deeds had been brought in a sealed envelope from the office of Mr. Beal at Manti.

John Edison Spencer testified that the certificate for 125 shares was given to him along with the deed to a tract of land (deed which is known as the Waupitz land). That he went and talked to the secretary of the Indianola Irrigation Company and he said he couldn't transfer it to me, that thereafter he took it to the Federal Building and Loan Association to see if there was an assignment from his father to him. (Tr. 626.) It should be noted that the foregoing testimony of John Edison Spencer was objected to because the witness was incompetent to testify. The objection was overruled because the administrator had waived the objection by in-

quiring into what the witness had testified to on a prior hearing. (See Tr. 466 and 467 and administrator's Exhibit 14.)

As to certificate numbered 72 the evidence shows that it came out of certificate 57. (See photostatic copy marked Indianola Irrigation Company's Exhibit 9.) That certificate No. 72 is dated December 30, 1933 and made out to Richard H. Spencer, Pledgee Federal Land Bank of Berkeley. It was so made out because Richard H. Spencer intended to secure a loan from that Bank, but the loan failed. That certificate was assigned to I. M. Price, Richard H. Spencer having signed his name to the same with the words "as part of security named in mortgage." The evidence shows that I. M. Price attempted to foreclose a mortgage on that certificate, together with certificate No. 72 and 160 acres of land. (See John Edison Spencer's, et al, Exhibit 9, the same being the official files of the district court of Utah County.) It will be noted that the land therein described is in Sections 5 in Sanpete County and parts of sections 33 and 34 in Township 11 South of Range 4 East of Salt Lake Meridian. The reporter has copied all of the files in the transcript at pages 514 to 566.

There is also in evidence a certified copy of the mortgage which was sought to be foreclosed. It will be noted that the mortgage is dated February 27, 1932 and was acknowledged the same day.

It will be observed that with the land in Sanpete County there is included 160 acres of water right. It

will also be observed that the sheriff attempted to sell the 160 acres of water used on Section 5, Township 12 South of Range 4 East, Salt Lake Meridian. The attempt was made by both the sheriff of Utah County and Sanpete County. In the certificate of the sheriff of Sanpete County dated February 4, 1937 certificates 72 and 73 are specifically mentioned. (See John Edison Spencer's, et al, Exhibit 10.) So far as appears no sheriff's deed to the land or bill of sale to the water were ever executed by the sheriff.

In light of what occurred at the trial we shall not devote any time to a discussion of the mortgage foreclosure proceedings. We direct the attention of the court to Administrator's Exhibits 12 and 16.

Early in the trial counsel for Whittaker and counsel for the administrator and counsel for the Indianola Irrigation Company demanded that counsel who appeared by the record to represent Mr. Price show their authority to do so. (See Tr. pages 10-58-59. Thereupon John Edison Spencer was sworn and testified touching that matter. (See Tr. 59.) Mr. L. Leland Larson also testified about our authority to act for Mr. Price. (Tr. 83-85.) It will be noted that the trial of the cause began on June 23, 1947. The evidence above referred to was given on June 23 and 24. Later in the trial administrator's exhibit 12 was received in evidence. It will be noted that such exhibit is dated July 14, 1947. It will also be noted that administrator's exhibit 16 characterized as a deposition is dated the 1st day of March, 1947, several

months before the case came on for trial. No claim is made that counsel for Mr. Price, if he had one, or counsel for John Edison Spencer or Elizabeth A. Tibbs ever had any notice that a deposition was to be taken. It necessarily follows that to characterize the administrator's Exhibit 16 a deposition is a misnomer. However, the contents of that exhibit shows that Mr. Price disclaimed any right, title or interest in or to certificates 72 and 73. He states that he returned it to R. H. Spencer in 1934. "I paid \$600 for it \*\*\* I do not claim any interest in it now. It was for a loan. I do not owe anything to R. H. Spencer's estate. It does not owe me anything. I transferred the title to the water stock, Nos. 72 and 73 and bench property and Wansit Farm back to R. H. Spencer in the fall of 1941."

In this connection with the deal between Price and R. H. Spencer touching the two certificates 72 and 73 is the testimony of John Henry Peterson. (Tr. 446.)

The court will have a difficult task to reconcile the foregoing statements of I. M. Price with the mortgage foreclosure proceedings had in Utah County to which reference has heretofore been made.

The position of counsel who thought they were representing Mr. Price was expressed by them at the trial. (See Tr. 497-498, and 920 and 926.) It will be noted that administrator's Exhibit 16 was received in evidence over the objection of counsel for John Edison Spencer and Mrs. Tibbs. (Tr. 918.)

We have not changed our mind in such particular. We shall not burden the court with an analysis of the transaction had between I. M. Price and R. H. Spencer touching certificates 72 and 73 because no matter what view is taken of the evidence the results will be the same, namely: that Price had a lien on the two certificates as security for a loan. That when the loan was paid off the certificates reverted to the persons who owned them before the loan was made.

The evidence touching the ownership of certificate No. 72 independent of the question of whether or not the same is appurtenant to the land upon which it was used consist of the following:

Louise Spencer testified that on May 30, 1946 when the deeds were delivered R. H. Spencer stated that: "when the litigation was finished and the water was clear she (Mrs. Tibbs) would get water for her ground. (Tr. 852.) Edison Spencer testified that according to an arrangement had with Price and his father he, Edison, was to pay to the daughter of Price the sum of \$1000.00 and certificate numbered 72 was to be given to Mrs. Tibbs. (Tr. 608 and 640.)

Counsel for the administrator cross examined John Edison Spencer at considerable length. (Tr. 738 to 749.) Apparently counsel for the administrator deemed it of considerable importance because Mr. Spencer at such former hearings testified that he claimed only 5 shares of water right. The fact was that at that time, as shown by the evidence in this case, Mr. John Edison Spencer

did not, so far as he knew, have a record title on the books of the company to the water in dispute.

In the warranty deed dated May 31st, 1931 Richard H. Spencer and Annie Spencer, his wife, conveyed "40 acres of land and 20 acres of water" to Elizabeth A. Tibbs. (Tr. 35 and 36.)

R. D. Tibbs, the husband of Elizabeth A. Tibbs, testified that he (R. H. Spencer) told Edison and Mrs. Tibbs that water went with the land that he conveyed to Mrs. Tibbs. (Tr. 824.) That on another occasion when the first deed was given to Mrs. Tibbs in 1943, he, R. H. Spencer, was to get water for the land conveyed to her as soon as the litigation was finished. (Tr. 828.)

Independent of any question of appurtenancy the evidence bearing on the ownership of certificate No. 73 shows: That certificate is made out to the Federal Land Bank of Berkeley as agent of the Land Bank Commissioner, pledgee of John E. Spencer. On the back of the certificate it is assigned to I. M. Price by John E. Spencer, as security for loan to R. H. Spencer as per mortgage.

The warranty deed of Richard H. Spencer and Annie H. Spencer, his wife, to John E. Spencer conveys to John E. Spencer: The North One Half of the Southwest Quarter of Sec. 5, Township 12 South, Range 4 East, Salt Lake Meridian.

“Together with 80 acres of water in what is known as Thistle Creek”. (See John Eidson Spencer, et al, Exhibit 12.)

At the time of the death of R. H. Spencer and for some time prior thereto certificates numbered 72 and 73 were in the possession of the firm of attorneys, Larson and Larson, until they were turned over to his present counsel. (Tr. 615 and 670-671 and 717-718.)

We have directed the attention of the court to the evidence in this case at greater length and in more detail than usual in the statement of the case. We have done so because there are so many exhibits brought up with the record, a number of which were not received in evidence, and the evidence presented in the transcript is so long that we have deemed it necessary to direct the attention of the court to where the evidence which we deem of importance may be found in the transcript. We hope that we have succeeded in directing the attention of the court to those portions of the evidence which are of controlling importance, if not doubtless opposing counsel will finish the undertaking.

### ASSIGNMENTS OF ERROR

The defendants and appellants John Edison Spencer and Elizabeth A. Tibbs jointly and severally make the following assignments of error upon which they rely for a reversal of the judgment appealed from and for an order of this court directing the court below to make

findings of fact, conclusions of law and a judgment as prayed for by them in their pleadings:

1. The trial court erred in making that part of its findings wherein it is found that during the trial it was made to appear that such appearance and pleadings (for Irwin M. Price) had not been authorized by him; for the reason that such findings is without support in the evidence and is contrary to the clear preponderance thereof. (J. R. 249.)

2. The trial court erred in holding that the trial was had on a disclaimer of John Edison Spencer because there was no disclaimer by John Edison Spencer to the water right involved in this controversy. (J. R. 250.)

3. The trial court erred in that part of its finding numbered 7 wherein it found that Richard H. Spencer mortgaged to the Federal Building and Loan Association, a corporation, 285 shares or acres of his said 448 acres of primary or class "A" water right, that such finding is without support in the evidence which affirmatively shows that Richard H. Spencer mortgaged only 223 acres or shares of water right to the Federal Building and Loan Association. (J. R. 256.)

4. The trial court erred in making that part of its finding numbered 7 wherein it found that he, Richard H. Spencer, mortgaged 60 shares or acres of his said 448 acres of primary or class "A" water right to M. H. Hadlock for the use and benefit of the creditors of the North Sanpete Bank. That such finding is without sup-



port in the evidence in that the mortgage is so ambiguous and uncertain as to be null and void. (J. R. 256.)

5. The trial court erred in making that part of its finding numbered 7 wherein it is found that on November 25, 1931 Richard H. Spencer conveyed to the Indianola Irrigation Company by deed 160 shares or acres of his said 448 shares or acres of primary water right. That the evidence and the preponderance thereof shows that such conveyance was made on June 1st, 1918, and the evidence shows that such deed was and is so uncertain and ambiguous as to render it null and void. (J. R. 256.)

6. The trial court erred in making that part of its finding numbered 7 wherein it found that: "the said conveyance of 160 acres of water right made by said Richard H. Spencer to the Indianola Irrigation Company includes the 55 acres which he had previously mortgaged to Simon Hugentobler." That such finding is wholly without support in the evidence and is contrary to the evidence and the preponderance thereof. (J. R. 256.)

7. The trial court erred in making that part of its finding numbered 7 wherein it found in effect that the 160 acres of water conveyed to the Indianola Irrigation Company included the 60 acres which, he, Richard H. Spencer, had previously mortgaged to W. H. Hadlock. That such finding is without support in the evidence and is contrary to the preponderance thereof. (J. R. 256.)

8. The trial court erred in making that part of its finding numbered 8 wherein it is in effect found that Richard H. Spencer mortgaged to the Federal Building and Loan Association 285 acres of water. That such finding is without support in the evidence and is contrary thereto and the clear preponderance thereof. (J. R. 256.)

9. The trial court erred by in effect finding in its finding numbered 9 that in the case numbered 2888 civil a valid foreclosure proceeding was had and a valid sheriff's deed was given conveying 60 acres or shares of water to Rulon F. Starly, State Bank Commissioner of the State of Utah. That such findings are without support in the evidence and on the contrary the evidence shows that such proceedings were so ambiguous and uncertain as to render the same null and void. (J. R. 257.)

10. The trial court erred in making that part of its finding numbered 10 wherein it found that on May 22, 1939 Rulon F. Starly, State Bank Commissioner of the State of Utah was the owner, for the use and benefit of the creditors of North Sanpete Bank, of the right to the use of said 60 acres of primary water right or 60 shares of class "A" water right. That such finding is without support in the evidence and is contrary thereto in that the pretended mortgage sought to be foreclosed, the notice of the pretended sale and the pretended sheriff's deed are so uncertain and ambiguous as to render such documents and proceedings null and void. (J. R. 258.)

11. The trial court erred in making that part of its finding numbered 10 wherein it found that the Bank Commissioner of Utah conveyed to this plaintiff 60 acres of primary water right or 60 shares of class "A" water right, the same being a part of the 448 shares of primary or class "A" water so decreed to said Richard H. Spencer, in case No. 1406. That such findings is without support in the evidence and is contrary thereto in that the pretended conveyance is so uncertain and ambiguous as to render the same null and void and no title passed to the plaintiff thereby. (J.R.258)

12. The trial court erred in making that part of its finding numbered 10 wherein it found that the plaintiff became and he has ever since been and now is the owner in fee simple of the right to the use of 60 acres of primary water right or 60 shares of class "A" water right of the waters of Thistle Creek and its tributaries for the irrigation of 60 acres of land in Section 3, Township 12 South, Range 4 East, Salt Lake Meridian, in Sanpete County, State of Utah; that said 60 acres so owned by this plaintiff are a part of the 1728 acres of primary or class "A" rights mentioned and described in the decree in case No. 1406 aforesaid and a part of the 448 acres of primary water right or shares of class "A" rights decreed to said Richard H. Spencer in case No. 1406. That such finding is without support in the findings but is contrary thereto for the reason that the conveyance under which plaintiff claims title is so vague, uncertain and ambiguous as to be null and void. (J.R. 259.)

13. The court erred in making its finding numbered 11 and the whole thereof and particularly to that part of finding numbered 11 wherein it is found that Richard H. Spencer conveyed 285 acres of water to the Federal Building and Loan Association and that portion of said finding that there are 115 shares of class "A" stock of said corporation outstanding for which said corporation has no water stock. (J.R. 259)

14. The trial court erred in making that part of its finding numbered 15 wherein it found that plaintiff, James C. Whittaker, now is and ever since the 22nd day of May, 1939 has been the owner and entitled to the use and enjoyment and ever since the 9th day of December, 1937. . . he and his predecessors have been the owners and entitled to the use and enjoyment of 60 acres or shares of primary or class "A" water right in the waters of Thistle Creek and its tributaries, the same being a part of the 448 acres or shares of primary or Class "A" water right so decreed to Richard H. Spencer by the decree made and entered on May 6, 1920 in case No. 1406. That such part of finding numbered 16 is without support in the evidence and is contrary to the preponderance thereof. That the evidence and the preponderance thereof fails to show that Whittaker has title to such water right. (J.R. 260)

15. The court erred in finding in its finding numbered 17 that the plaintiff's title to 60 shares or acres of water right included and that its value has been impaired or lessened for the reason that plaintiff has no

title to the water right claimed by him. That such part of finding numbered 17 is without support in the evidence and is contrary to the preponderance thereof. (J.R. 260.)

16. The trial court erred in making those parts of its finding numbered 17 wherein it in effect found that all of the claims of the defendants, except that of Que Jensen and the State of Utah, are subsequent and subordinate to the right and title of the plaintiff therein and are void, and that none of the defendants to this action has any right, title or interest in or to the said 60 acres of primary or class "A" water rights or part thereof. That such findings are without support in the evidence and the same are contrary to the evidence and the preponderance thereof. (J.R. 261)

17. The trial court erred in making its finding numbered 18 because such finding is without support in the evidence and the same is contrary to the evidence and the preponderance thereof. (J.R. 262)

18. The trial court erred in making that part of finding numbered 19 wherein it found that the 55 shares of water right mortgaged to Simon Hugentobler and the 60 shares of water right mortgaged to the State Bank Commissioner—are part of the water right represented by said certificates numbered 72 and 73 aforesaid and particularly did the court err in making such finding as it might affect the rights of the plaintiff and Simon Hugentobler because such finding is without any issue raised by Simon Hugentobler and/or the plaintiff as neither of

them made any such claim in the proceeding had to foreclose their respective mortgages. That such finding is without support in the evidence in this case and is contrary to the same and the preponderance thereof, and such finding is not within any issue raised by said plaintiff or by the successor in interest of Simon Hugentobler in the present action, and is at variance with the pleadings of each of the above mentioned parties to this action. (J.R. 261 and 262.)

19. The trial court erred in making that part of its finding numbered 20 which in effect found that the claim of Irwin M. Price to a lien on certificates numbered 72 and 73 was subsequent to the decree of foreclosure entered in case numbered 2888 civil for the reason that the claim of Irwin M. Price originated on February 27, 1932 (See exhibit 13 of John Edison Spencer, et al) and as found by this court in its finding numbered 9 was entered on December 4, 1936. That such finding is without support in the evidence and the same is contrary to the evidence and the preponderance thereof. (J.R. 262)

20. That the trial court erred in making that part of its finding numbered 20 wherein it found that said certificates numbered 72 and 73 were returned to the possession of Richard H. Spencer for the reason that such finding is without support in the evidence and is contrary thereto and to the preponderance thereof. (J.R. 262)

21. The trial court erred in making that part of its finding numbered 20 wherein it found that at the time of

his death Richard H. Spencer was the owner and in possession of said certificates and each of them and that Richard Leo Spencer, as administrator of the estate of Richard H. Spencer, deceased, is now entitled to 45 shares of the class "A" stock of the Indianola Irrigation Company represented by certificates 72 and 73 after said certificates shall have been surrendered to the Indianola Irrigation Company and cancelled and a new certificate for 45 shares of said class "A" stock shall be issued in lieu thereof. That such finding is without support in the evidence and is contrary to the evidence and the preponderance thereof. (J.R. 262)

22. The trial court erred in making that part of its finding numbered 20 wherein it found: "that the water right represented by certificate No. 72 is not appurtenant to the South Half of the Northwest Quarter of Section 5, Township 12 South, Range 4 East, Salt Lake Base and Meridian in Sanpete County, Utah, claimed to be owned by Elizabeth A. Tibbs. That such finding is without support in the evidence and is contrary to the evidence and the preponderance thereof. (J.R. 262)

23. The trial court erred in making that part of finding numbered 21 wherein it found that prior to the death of Richard H. Spencer he did not cause to be conveyed and transferred to John Edison Spencer the water right represented by certificates numbered 73 and numbered 84 in the Indianola Irrigation Company. That such finding is without support in the evidence and the same

is contrary to the evidence and the preponderance thereof. (J.R. 262)

24. The trial court erred in making its finding numbered 22 and the whole thereof. That such finding is without support in the evidence and is contrary to the evidence and the preponderance thereof. (J.R. 263)

25. The trial court erred in making its finding numbered 23 and the whole thereof. That such finding is without support in the evidence and the preponderance thereof. (J.R. 263-4)

26. The trial court erred in making its finding numbered 24 and the whole and each part thereof. That such finding is without support in the evidence and is contrary thereto and the preponderance thereof. (J.R. 264)

27. The trial court erred in making its finding numbered 25 and the whole thereof. That such finding is without support in the evidence and is contrary thereto and the preponderance thereof. (J.R. 264)

28. The trial court erred in making that part of its finding numbered 26 wherein it found that the deed which was made and executed by Richard H. Spencer and his wife as grantors to the Indianola Irrigation Company as grantee \* \* \* is not null or void and is of full force and effect, that said deed \* \* \* was actually signed and executed by Richard H. Spencer and his wife on November 25, 1931, and was never acknowledged by Richard H. Spencer or his wife. That the above quoted



parts of finding numbered 26 are without support in the evidence and the same are contrary thereto and the clear preponderance thereof.

29. The trial court erred in making its finding numbered 27 and the whole and each part thereof. That such finding is without support in the evidence and is contrary thereto and the preponderance thereof. (J.R. 265.)

30. The trial court erred in its construction of what was alleged and what was found and what was adjudged in case numbered 2888 civil. That the court in said case numbered 2888 made its findings of fact, conclusions of law and decree as recited in such findings, conclusions and decree and not otherwise.

31. The trial court erred in its finding numbered 28 wherein it found that the trial court in 2888 civil found that the water rights involved in this action were subsequent and that the rights claimed by John Edison Spencer and Elizabeth A. Tibbs were inferior to the rights of the plaintiff, that such rights were sold at public auction to the plaintiff. That such findings are without support in the evidence and are contrary thereto and the preponderance thereof. (J.R. 266.)

32. The trial court erred in that part of its finding numbered 28 wherein it found that the water rights involved in this action were sold and conveyed to the plaintiff herein and that the plaintiff herein has been and now is the owner of such water rights. That such

finding is without support in the evidence and is contrary thereto and the preponderance thereof. (J.R. 266)

33. The trial court erred in its finding numbered 28 wherein it is found that Richard H. Spencer has filed his verified disclaimer in and to the water rights involved in this action. The trial court likewise erred in its finding numbered 28 wherein it found that John Edison Spencer has filed his disclaimer to any of the water rights involved in this action. That such finding is without support in the evidence and is contrary thereto and the preponderance thereof. More particularly the water rights which were disclaimed by Richard H. Spencer and John Edison Spencer and described in plaintiff's complaint and particularly paragraph XIV thereof were "the right to the use of 60 acres of primary rights or 60 shares of class "A" water rights of the waters of Thistle Creek and its tributaries for the irrigation of 60 acres of land in Section 3, Township 12 South, Range 4 East, Salt Lake Meridian, in Sanpete County. That the water rights here involved were never used on any land in Section 3 above described. (See record 8) (J.R. 266)

34. The trial court erred in making that part of its finding numbered 28 wherein it found that the disclaimer of Richard H. Spencer has never been withdrawn, modified or questioned in this action and is still binding upon him and all persons, including John Edison Spencer and Elizabeth A. Tibbs, and likewise erred in finding that the alleged disclaimer of John Edison Spencer has never been withdrawn, dismissed, set aside, modified,

annulled or repudiated by him and is still binding upon him. That such findings and each of them is without support in the evidence and is contrary thereto and the preponderance thereof. And more particularly the trial court permitted both the administrator of the estate of Richard H. Spencer and John Edison Spencer to file an answer to the merits of plaintiff's complaint, and the case was tried on the issues raised by plaintiff's complaint and the answers thereto of the administrator of the estate of Richard H. Spencer and John Edison Spencer. That plaintiff's counsel did not object to the trial on the merits; that by such proceedings the alleged disclaimer was in legal effect vacated and set aside. (J.R. 266)

35. The trial court erred in making that part of its finding numbered 20 wherein it is found that the decree in No. 2888 civil has been and now is a valid, subsisting and final judgment and decree of said court with respect to the water rights therein described and which are the same water rights claimed by the plaintiff in this action, and with respect to the water rights claimed by the plaintiff in this action, and with respect to the validity of the mortgage of the plaintiff in said action and with respect to the validity of the mortgage lien described in said action. That such finding is without support in the evidence and is contrary thereto and the preponderance thereof. (J.R. 267)

36. The trial court erred in making subsection "b" of its finding numbered 28 and each part and the whole

thereof. That such finding is without support in the evidence and is contrary thereto and the preponderance thereof. (J.R. 267)

37. The trial court erred in making subsection "c" of its finding numbered 28 and each part thereof. That such finding is without support in the evidence and is contrary thereto and the preponderance thereof. (J.R. 267)

38. The trial court erred in making its 1st conclusion of law and each part thereof. That such conclusion of law is without support in the findings of fact and is likewise without support in the evidence. (J.R. 268)

39. The trial court erred in making that part of its conclusion of law wherein it concluded that Que Jensen is entitled to 55/1728ths of the flow of said stream. That such conclusion is without support in the evidence and is likewise without support in the findings of fact.

40. The trial court erred in making its conclusion of law numbered 3 and each part thereof. That such conclusion of law is without support in the evidence and is likewise without support in the findings of fact. (J.R. 267)

41. The trial court erred in making its conclusion of law numbered 5 and each part thereof. That such conclusion of law is without support in the evidence and likewise is without support in the findings of fact. (J.R. 270)

42. The trial court erred in making its conclusion of law numbered 6 and the whole thereof. That such

is likewise without support in the findings of fact.(J.R. 271)

43. The trial court erred in making its judgment and decree contained in paragraph 1 and each part thereof in so far as said judgment affects the defendants and appellants John Edison Spencer and Elizabeth A. Tibbs, or either of them. That such judgment and decree is without support in the evidence and is likewise without support in the findings of fact and is against law. (J.R. 274)

44. The trial court erred in making that part of its judgment contained in paragraph 2 thereof wherein it adjudged that Que Jensen is awarded 55/1728th of the flow of said stream. That such judgment or decree is without support in the evidence and is likewise without support in the findings of fact. (J.R. 274)

45. The trial court erred in making paragraph 3 of its judgment in so far as the same affects the defendants and appellants John Edison Spencer and Elizabeth A. Tibbs, or either of them. That said paragraph 3 of the judgment or decree in so far as the same affects the defendants and appellants John Edison Spencer and Elizabeth A. Tibbs is without support in the evidence and is likewise without support in the findings of fact and is against law. (J.R. 274)

46. The trial court erred in making its judgment or decree contained in paragraph 5 thereof. That the judgment therein contained is without support in the

evidence and is likewise without support in the findings of fact and is contrary to law. (J.R. 275)

47. The trial court erred in making its conclusions of law numbered 6 and the whole thereof. That the judgment contained in said paragraph 6 is without support in the evidence and likewise without support in the findings of fact and the same is contrary to law. (J.R. 267)

48. The trial court erred in not making findings of fact, conclusions of law and decree awarding to John Edison Spencer and Elizabeth A. Tibbs the rights to the use of the waters of Thistle Creek and its tributaries as prayed for in their counterclaim and cross complaint.

49. The trial court erred in denying the motion of Richard H. Spencer and John Edison Spencer to strike each and all of the allegations sought to be stricken by their motion filed in this cause on April 22, 1942. (J.R. 41 to 44)

50. The trial court erred in overruling the demurrer of Richard H. Spencer and John Edison Spencer filed in the above entitled cause on June 30, 1943. (J.R. 48-49.)

## A R G U M E N T

We have heretofore in our statement of the case directed the attention of the court to the testimony of John Edison Spencer and L. Leland Larson, who at the trial was one of counsel for John Edison Spencer and Elizabeth A. Tibbs but who is no longer of counsel for

them because he was subsequent to the trial of the cause appointed to the District Court of the Seventh Judicial District of Utah.

It will be seen from such testimony that opposing counsel requested that counsel who claimed to be representing Irwin M. Price show their authority so to do. Thereupon John Edison Spencer was called and testified that he was authorized by Irwin M. Price to secure counsel to represent him. That he had a letter wherein he was granted such authority. He said the letter was at his home and that he would produce the letter the following day. He was unable to find the letter. (Tr. 59 to 62 and 81-82) Thereupon L. Leland Larson was called and after being sworn testified that he is an attorney at law and has been engaged in the practice of law since 1929; that he has known Irwin M. Price since about 1940; that the firm of which he was a member represented Mr. Price for the period up to the time his firm had withdrawn; that he had been reemployed in connection with me; that he had called Mr. Price at San Francisco by telephone and told him that there was a dispute about whether he was being represented by you and by me in this case and asked him if he had authorized Edison Spencer to employ you in this case, and he said he had, and I told him that I had been associated in the case by you and Edison had asked me to come in the case, and he said that it was alright. I asked him if he would ratify everything we had done in connection with the matter up until the present time and he said he did and if there was any question about it go

ahead and fight it until we were satisfied the matter was cleared up one way or another. (Tr. 84-85)

In the light of testimony it is easy to understand why Mr. Larson would make the statement he did make as set out on pages 926 and 927 of the transcript. There is no competent evidence to the contrary. There was admitted in evidence administrator's Exhibits 12 and 16. I think no lawyer will seriously contend that such exhibits are competent evidence, except to show that I. M. Price no longer claimed the water right in question. When counsel for John Edison Spencer and Elizabeth A. Tibbs objected to the introduction of Exhibit 16, counsel represented that he offered such exhibit for the purpose of rebutting the evidence theretofore offered tending to show that Irwin M. Price owned certificates 72 and 73. (Tr. 917 to 921)

Notwithstanding the evidence above quoted and referred to the trial court in its preliminary findings found that: "Appearances had been made and various pleadings filed for and on behalf of Irwin M. Price but during the trial it was made to appear that such appearances and pleadings had not been authorized by him." (J.R. 249) If such a finding upon such evidence is to be justified then indeed is the practice of law a precarious profession. If such a finding on such a record is to be sustained every lawyer may be subject to disbarment because he has pretended to represent a client when he knows that he has no such authority or because he knowingly and falsely testified that he had, on the night before giving



such testimony, received the express authority to continue to represent his client. All of these results can be accomplished by opposing counsel or their clients, without any notice or knowledge to accused counsel of what is to be attempted, securing an affidavit from the client of accused counsel that such counsel has no authority to represent his client. We submit that such is not the law, never has been the law and we hope never will be the law, not even in this case, except in the mind of the trial court and those who may have induced it to sign the findings in this case.

We are still somewhat at a loss to know just what our duties are towards Irwin M. Price. It would certainly ill become us to argue that he never acquired any rights under the mortgage foreclosure proceeding which he prosecuted to judgment. Nor can we well argue that he presently has an interest in the water rights involved in this action because, if we did that, we would be confronted with the document marked Exhibit 16 which, while improperly called a deposition, does have the effect of disclaiming any interest in the water right here involved or the land upon which it has at all times been used. Under such circumstances the writer of this brief has concluded to take Mr. Price at his word, namely: that he secured the water certificates 72 and 73 as security for a loan made to Richard H. Spencer who has paid the loan and the certificates have been returned to Richard H. Spencer and the whole transaction cancelled.

# THE TRIAL COURT ERRED IN AWARDING TO PLAINTIFF 60/1728ths AND TO QUE JENSEN 55/1728ths OF THE FLOW OF THISTLE CREEK AND ITS TRIBUTARIES.

The articles of incorporation of the Indianola Irrigation Company, (Indianola Irrigation Company's Exhibit 7) among other things, provides:

## “Article 5.

“The capitol stock of this corporation shall be \$80,000 Eighty Thousand Dollars divided into Twenty Two Hundred shares as follows: Eighteen Hundred shares of class “A” stock of the par value of Forty Dollars per share and Four Hundred shares of Class “B” stock of the par value of Twenty Dollars per share.”

Article 19 provides in substance that from March 15th to June 15th class “A” and class “B” stockholders shall be entitled to an equal amount of water per share. After June 15th to the following March 1st of the following year each share of class “A” stock shall entitle the holder to 1/40 of a second foot, and if there is any water left over after supplying the class “A” stockholders during the period extending from June 15th to March 1st of the following year the same shall be divided prorata to the stockholders of the class “B” stock. So far as appears the water right has been divided as provided in the articles of incorporation. Obviously if Que Jensen is awarded 55/1728 of the flow of Thistle Creek he will get more water than he is entitled to. There were at least 1728 shares of class “A” stock and 490 shares of class

“B” stock outstanding at the time of the trial. (Tr. 311) Obviously if Que Jensen gets 55/1728 of the water of Thistle Creek as decreed to him he will get not only water to supply his 55 shares of class “A” water right but also a portion of the class “B” water right. He does not have and so far as the record shows never has had any class “B” stock. Thus if the award made to Que Jensen is affirmed the other stockholders, including John Edison Spencer, will be deprived of a part of their water rights.

What we have said in support of the attack made on the conclusion of law and decree in our assignments numbered 39 and 44 as to the water decreed to Que Jensen applied to the water right awarded to the plaintiff James C. Whittaker which we have attacked by our assignments numbered 38 and 43.

It will be noted in the conclusions of law and decree so attacked the court concludes and decrees to plaintiff James C. Whittaker 60/1728 of the waters of Thistle Creek notwithstanding even if he is entitled to prevail in this action, contrary to our contention, as to 60 acres or shares of class “A” water right he is, even in such event, not entitled to the quantity of water awarded to him. There is no evidence that Whittaker ever owned or even claimed any class “B” water right yet by the decree he is awarded not only water stock which goes with 60 acres or shares of class “A” water right but in addition thereto 60/1728 of the class “B” water rights of Thistle Creek and its tributaries.

THE MORTGAGE, THE COMPLAINT SEEKING TO FORECLOSE THE MORTGAGE, THE DECREE OF FORECLOSURE, THE SHERIFF'S DEED TO HADLOCK, BANK COMMISSIONER AND THE DEED TO THE PLAINTIFF THROUGH WHICH PLAINTIFF CLAIMS TITLE ARE SO VAGUE, AMBIGUOUS AND UNCERTAIN THAT PLAINTIFF ACQUIRED NO TITLE TO WATERS IN CONTROVERSY BY REASON THEREOF.

Our assignments numbered 3, 6, 8, 9, 10, 11, 13, 14, 15, 17, 18, 24, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 may well and will be grouped and discussed under this heading in so far as they affect the claim made by Whittaker to 60 shares or acres of Class "A" water right in Thistle Creek and its tributaries.

At the outset we direct the attention of the court to our statutory law and the authorities dealing with the decree of certainty required in the description of property which is conveyed or mortgaged, in order to render such conveyance or mortgage valid.

While it is not entirely clear whether plaintiff seeks to recover the right to the use of the sixty shares or acres on the theory that the same is appurtenant to real estate and as such subject to the law affecting real property or on the theory that the water is personal property. It would seem however in the final analysis plaintiff bottoms his claim upon the claim that the 60 shares or acres of water right is real estate and appurtenant to some land. In any event the degree of certainty is the

same whether it be real or personal property except where the personal property is delivered to the mortgagee. In this case neither the plaintiff nor the bank commissioner under whom he claims title was ever in the possession of any water certificate nor have they or either of them ever been in possession or had the use of the water which is claimed by the plaintiff.

It is said in 36 Am. Jur., sections 42, 43 and 47, page 711 and 712 that:

Section 42. "While there is authority to the effect that the courts more closely scrutinize, and require a higher degree of certainty in, the description of property in a mortgage than in an absolute conveyance. generally the rules as to descriptions of real estate in mortgages conform to those with respect to descriptions in deeds. In this connection it has been held that mistakes in the matter of description do not vitiate the security any more than they would a conveyance of the land, provided they are capable of correction, and that a mortgage will not be invalidated by reason of an error in the description of the property, in case the remainder of the description, after rejecting the erroneous portion, is sufficiently definite to enable the land to be located. In regard to an ambiguity in a mortgage, the modern tendency is to allow a liberal interpretation of the description of the property and to uphold the validity of the mortgage if in any way it is possible to arrive at the intention of the parties thereto. Mortgages are also frequently upheld against attacks based upon the indefiniteness of the mortgage. In this respect, any reference or description by which the premises in-

tended to be dealt with may be found and identified is generally regarded as sufficient, and a description will not be deemed insufficient if, by any reasonable construction of its terms, it can be held to inclose or embrace a particular tract of land. Furthermore, a description may be sufficient even though it may be necessary on account of its imperfect or indefinite character to aid the intention of the parties by averring and proving extrinsic facts. Accordingly, in order to identify the property intended to be mortgaged, and to give affect to the intention of the parties to the instrument, parol evidence is generally held admissible to explain a mistake in description of property in a mortgage, or to explain and remove an uncertainty. However, if the description of the land is so vague and indefinite that effect could not be given the instrument without writing new material language into it, parol evidence is not admissible. A mortgage must contain such a certain and definite description of the property encumbered as to make it the subject of the charge created."

Section 43. "The old classification of ambiguities into "latent" and "patent" is still applied by many courts to descriptions of property in mortgages of real estate. The general rule under this distinction is that a patent ambiguity in a mortgage may not be removed by parol evidence. Within the meaning of this rule, a patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties, as to what land was to be conveyed. The reason for the rule is that otherwise new lan-

guage would be inserted into the instrument. In any event, it is clear that a latent ambiguity in a mortgage may be explained and removed by parol evidence. Within the meaning of this rule, a latent ambiguity is an uncertainty which does not appear on the face of the instrument, but is shown to exist for the first time by matter outside the writing, when an attempt is made to apply the writing to the property. The reason for the rule is that the ambiguity having been revealed by matter outside the instrument, it may be removed in the same manner. A typical instance of a latent ambiguity in a mortgage is a case where the description applies equally to each of two things. There is a so-called intermediate type of ambiguity which partakes of the nature of both a latent and patent ambiguity, to explain which parol evidence is generally held to be admissible."

Section 47. "The general rule is that parol evidence is admissible where land is described in a mortgage as a "part", "half", or "fraction", with a further description sufficient to serve as a guide to the location of the land intended to be conveyed. This rule also prevails where the mortgage refers to a certain number of acres out of a particular tract of land. Where, however, the instrument does not contain a description sufficient to point out the way for the identification of the land, parol evidence is not admissible, because the mortgage must set forth a subject matter, either certain within itself or capable of being made certain by extrinsic matter to which the instrument refers."

For other general discussions of the certainty required in a deed or real estate mortgage see 12 *L.R.A.* 177; 41 *C. J.* 399 and cases there cited.

It has been stated generally that where the description is such that the sheriff could readily ascertain the parcel to be sold by him and the surveyors locate it the description is sufficient, otherwise not. See 137 *Am. St. Rep.* 255. Such is the purpose of the statutory law of Utah. *U.C.A.* 1943, 104-13-4 provides:

“In an action for the recovery of real estate it must be described in the complaint with such certainty as to enable an officer upon execution to identify it.”

The following holdings of cases will show the trend of judicial authority:

*Bunch vs. Crowe* (*Ark.*) 203 *S.W.* 584 wherein a mortgage on real estate contained the following description:

“Residue of the West Half of the Southwest Quarter of Section 4, Township 2 North, Range 2 East, containing 78 acres.”

It is held that the description is too vague and indefinite to constitute a valid mortgage and the same was void.

In the case of *Harris vs. Woodard* (*N. C.*) 41 *S.E.* 790 the mortgage contained this description:

“Certain tract of land including Grist mill and fixtures and one store house, including 3 acres.”



The whole tract consisting of 40 acres was described in the mortgage. It was held that every deed of conveyance must set forth a subject matter either certain in itself or capable of being reduced to a certainty by recurrence to something extrinsic to which the deed refers.

In the case of *Cathey vs. Lumber Co. (N. C.)* 66 S.E. 580 the deed conveyed "324 acres of land of a certain tract composed of Lots 44, 97, 98 in Graham County." The entire tract within the lots described consisted of 724 acres. It was held that the deed furnished no means by which the 324 acres could be identified and set apart nor did it refer to something extrinsic to it by which the acres sought to be conveyed could be located. It is held that it is self evident that a certain part of a whole cannot be set apart unless the part can be in some way identified. Therefore where a grantor undertakes to convey a part of a tract of land his conveyance must itself furnish the means by which the part can be located; otherwise the deed is void, for it is elementary that every deed of conveyance must set forth a subject matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the deed refers.

In the case of *Wilson vs. Calhoun (Tenn.)* 11 S.W. (2d) 908 it is said:

"The degree of certainty with which the premises must be denoted is defined in many books and the cases are extremely numerous in which the subject has been illustrated. They are

not all harmonious. But they agree in this, that it is essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject matter. The terms may be abstract and of a general nature but they must be sufficient to fit and comprehend the property which is the subject of the transaction, so that with the assistance of external evidence the description, without being contradicted or added to can be connected with and applied to the very property intended and to the exclusion of all other property.”

An instructive case is that of *Maxwell vs. Maxwell*, (Wash.) 123 Pac. (2d) 335 where a number of other cases are cited. It will be observed from that case that when a conveyance is vague and ambiguous there must be clear and convincing proof of the intention of the grantor before a court of equity will reform the deed. In this case apparently no attempt was made to reform the mortgage in the course of the proceedings to foreclose the same.

The case of *Jacobsen vs. Christenson*, 18 Utah 149, 55 Pac. 562 involved the validity of a mortgage on 700 head of sheep. While that case deals with a chattel mortgage as heretofore indicated the requirements of real estate mortgages and mortgages on personal property as to the definiteness in descriptions is the same or substantially so. We quote the following from the syllabus which reflects the opinion of the court in that case:

“A mortgage of a specific number of sheep out of a herd comprising a much larger number of

similar sheep, which does not separate or designate the sheep mortgaged is void for uncertainty.”

Applying the principles announced in the foregoing cases to the case in hand it will be seen that the Hadlock mortgage falls squarely within that class of mortgages which are held void for uncertainty. R. H. Spencer at the time he executed the mortgage to Hadlock was the owner of 448 shares or acres of water right to Thistle Creek and its tributaries. True he had mortgaged some water right to the Federal Building and Loan Association but he was none the less the owner thereof when the Hadlock mortgage was executed. There is absolutely nothing in the Hadlock mortgage from which the court can conclude that the mortgage was a first mortgage. There is some very substantial evidence to the effect that the water right which was intended to be covered by the Hadlock mortgage was for water used on some Indian lands in Section 3, which lands were taken away from R. H. Spencer. H. M. Spencer, a son of R. H. Spencer, on cross examination by counsel for the plaintiff testified:

“That at one time his father secured a deed from the Indians for that land. The deed was secured about 30 years ago. (Tr. 386-387.) That water was used on that land, which consisted of 160.7 acres. No decree was ever entered for that water right.” (Tr. 389-390.)

In plaintiff's complaint filed herein he apparently claims the water right to which he seeks to quiet title is water

used on Section 3, Township 12 South, Range 4 East, Salt Lake Meridian. (See the last part of paragraph 14. R. 8.)

The evidence in this case shows without conflict that the water right here involved and represented by the certificates of shares was always used on Sections 5 and 8. No part of it was ever used on Section 3.

If we examine the mortgage given to the Bank Commissioner there is no language therein which even remotely sheds any light on what shares or acres of water right was mortgaged, except that it was "sixty shares or acres of water right owned by R. H. Spencer in the waters of Indianola Creek, Thistle Creek and Rock Creek in addition to the waters used for the irrigation of the above described land. The lands described in the mortgage was only a part of Section 3. (See Exhibit "G" attached to the amended complaint in case numbered 2888 which is marked: "John Edison Spencer, et al. Exhibit 14.)

There are two files in 2888, the one just referred to is File No. 1.

The decree of foreclosure contains the same description of the sixty shares which were attempted to be foreclosed as does the mortgage. No more and no less. (See paragraph 1 of the decree of foreclosure in case 2888.) Likewise the notice of sale contains identically the same description of the 60 acres or shares of water as is contained in the mortgage. So also the return of

the sheriff and the sheriff's deed contain identically the same description as does the mortgage. (See abstract plaintiff's Exhibit "W".) When the bank commissioner made the deed out to the plaintiff he placed therein some embellishing language. (See Tr. 97.) Of course we believe, no one not even counsel for the plaintiff, Whittaker, will claim that the recitals contained in such conveyance enlarged or corrected any infirmity that theretofore existed in the title to the bank commissioner. Moreover, in such conveyance the bank commissioner did not have the temerity to describe the water right conveyed, except to state that the same came out of the 448 acres or shares of class "A" water right decreed to Richard H. Spencer. Nowhere in the entire chain of title is there a scintilla of evidence which meets the requirements laid down by the authorities above cited, namely: that when the conveyance or mortgage does not contain a description sufficient to point out the way for the identification of the land, evidence is not admissible to determine the land intended because the mortgage or other conveyance must set forth a subject matter which is certain within itself or capable of being made certain by extrinsic matters to which the instrument refers. None of the instruments through which plaintiff claims title refer to any decree or any shares of capital stock or other matters to point out the particular water stock, except the deed from the bank commissioner to the plaintiff does mention that the water conveyed came out of the 448 shares of stock once decreed to Richard H. Spencer.

In connection with the authorities above mentioned the attention of the court is directed to the provisions of *U.C.A.* 1943, 104-13-4. It is there provided:

“In an action for the recovery of real property it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.”

This court has construed the foregoing statute in *Drake vs. Smith*, 14 *Utah* 35, 45 *Pac.* 1006; *Center Creek Irrig. Co. vs. Lindsay*, 21 *Utah* 192, 60 *Pac.* 559; *Pitchsos vs. Jones, et al* 76 *Ut.* 6, 290 *Pac.* 958.

*U.C.A.* 1943, 104-37-29 provides that upon the sale of real property the officer must give to the purchaser a certificate of the sale containing:

(1) A particular description of the real property sold. So also must a judgment be certain and specific. When and only when a judgment is ambiguous may it be aided by the pleadings and other parts of the record and if the description obtainable from it and them would be sufficient if found in a conveyance to divest title of the grantor it will be sufficient to sustain sales made or possession taken under the judgment otherwise all proceedings under it must be treated as void.”

*Freeman on Judgments*, 5 *Ed.*, Vol. 1, page 165, 166, Sec. 96:

In support of the foregoing quotation of the eminent author there are collected a number of cases to which the court is referred if they should desire to examine

cases from other jurisdictions. We, however, will not burden the court with an analysis of cases from foreign jurisdictions, because, as we believe, the cases in this jurisdiction point the way to a proper determination of this phase of the case.

The question of the degree of certainty required in a judgment or decree dealing with water rights has been before our Supreme Court in a number of cases, among them being:

Elliot vs. Whitmore, 8 Utah 254, 30 P. 984.

Smith vs. Phillips, 6 Ut. 376, 23 Pac. 932.

Nephi Irrigation Co. vs. Vickers, 15 Ut. 374, 49 Pac. 301.

Sharp vs. Whitmore, 51 Ut. 14, 168 Pac. 273.

Other cases from neighboring states are:

Walsh vs. Wallace, 26 Nev. 299; 67 Pac. 914, 918.

Riverside Water Co. vs. Sargent, 112 Cal. 230; 44 Pac. 560.

Lillis vs. Emmigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108.

In the case of Sharp vs. Whitman it is said:

“One of the essentials of a valid judgment is that the judgment be definite and certain respecting the relief granted. In judgments defining and determining conflicting claims, rights, and interests in and to the use of water in this arid region is indispensable. The rule, the soundness of which is self evidence, is so well established that it would be a work of supererogation to cite authorities illustrating and supporting it.”

While the cases above cited deal with the matter of uncertainty in the quantity of water involved the prin-

ciples of law there announced are equally applicable here. It would seem to be at least as vital to the validity of a decree to identify the water sought to be decreed as it is to fix the quantity of the water affected by the decree.

The necessity of the requirement that a judgment to be valid must be certain is well illustrated by the proceedings had in this case. After the so-called judgment was rendered the sheriff, armed with a writ of assistance attempted to find the water which it was claimed had been sold under foreclosure. He was unable to do so. An officer of the banking department with the assistance of the present counsel for the plaintiff undertook in vain to find the water which he claims was conveyed to him by the purchaser under the foreclosure proceedings. The secretary of the defendant company was at a loss to know what water right was sold pursuant to the foreclosure proceedings. (Tr. 86 and 199.) Finally in desperation this action is brought to quiet title to 60 acres or shares of water right which at one time it is claimed was included in the 448 shares or acres of water owned by Richard H. Spencer.

As we have heretofore pointed out so far as appears from the description in the mortgage in the findings of fact, and in the judgment itself the sixty acres or shares now claimed by the plaintiff is equally applicable to any sixty acres or shares of the 448 acres or shares once owned by Spencer. To say that such water right was confined to a water right that was free and clear of encum-



brance is to read into the mortgage language foreign thereto. So also to argue that the decree of foreclosure described any particular sixty acres or shares of the water right formerly owned by R. H. Spencer is bottomed upon a false premise. It is of the very essence of a valid judgment that it must finally fix and determine the right of the parties on the issues submitted by specifically denying or granting the relief sought by the action. 49 C.J.S. page 5 et seq. Under the provisions of U.C.A. 1943, 104-14-4 a court may within ninety days after a judgment is rendered, upon proper showing, set aside or amend the same. In this case no application was made to amend the judgment within the time allowed by law or for that matter has such an application yet been made by any party to the judgment. Notwithstanding the plaintiff in this case was not a party to the foreclosure proceeding he is in effect seeking to amend the foreclosure proceeding under the guise of a suit to quiet title.

It is solely because of uncertainty and ambiguity of the decree of foreclosure and the sale had pursuant thereto that there is any controversy between the parties to this proceeding as to what water right was mortgaged, or as to what water right was ordered foreclosed and sold under the foreclosure proceedings. It may be that if, by proper pleading and proof, the plaintiff had alleged that Spencer intended to mortgage a specified 60 shares or acres of water right and the proofs had sustained such an averment the plaintiff would

have been entitled to a decree of foreclosure on the water right so alleged and shown. That, however, was not done. To permit the plaintiff, who was not even a party to the foreclosure proceeding, at this late date to re-litigate what should have been litigated in the mortgage foreclosure proceeding is without support in either statutory or common law and is contrary to the adjudicated cases. See 49 *C.J.S.*, page 436, *et seq.*, Section 229, 230, and cases cited in the foot notes.

In this connection it may be noted that the validity and effect of a judgment must be determined from the language contained in the judgment itself, provided if a judgment is uncertain and ambiguous resort may be had to the findings of fact and conclusions of law. 30 *Am. Jur.*, 998, *Sec.* 284 and cases cited in the foot note.

In this connection it will be observed that in case numbered 2888 it was, among other matters, decreed: "that the defendants, Richard H. Spencer, Annie H. Spencer, John Edison Spencer, Robert O. Tibbs and Elizabeth A. Tibbs be and are hereby restrained and enjoined from in any way assigning, transferring, disposing of or encumbering certificates of stock numbered 72 and 73 issued by the Indianola Irrigation Company, or the water rights represented by said certificates, or any other water right held or claimed by said defendants in the waters of Thistle Creek, clear Creek or Rock Creek until the further order of this court."

It will further be noted that neither in the original complaint or in his amended complaint did Hadlock

mention or seek to foreclose a mortgage on either certificate No. 72 or 73 or any other certificate or any specified shares or acres of water belonging to Richard H. Spencer. Hadlock was content in his mortgage foreclosure proceeding to rely on the vague, uncertain description contained in his mortgage which as we heretofore pointed out was void because of its uncertainty.

If the court that tried case No. 2888 had intended that the Hadlock mortgage should have been foreclosed as to certificates 72 and 73 it would have so ordered. The fact that it did not so order conclusively shows that the court did not so intend. Nor could the court bind the parties if it had so intended because to have so intended would have been without support in the findings and conclusions.

It is an elementary principle of law that a judgment is valid only to the extent that the same is supported by the pleadings. The law in such particular is thus expressed by our own Supreme Court in the case of *Cooke vs. Cooke*, 67 *Utah* 371, 248 *Pac.* 83, at page 104 of the Pacific reports:

“Every court must acquire jurisdiction from its record which every court must have and keep and which binds the court; and there is no principle better established than what is not juridically presented cannot be juridically decided. Just as elemental is it that pleadings are the juridical means of investing a court with jurisdiction of the subject matter to adjudicate it and

that a judgment or decree beyond or not within them is a nullity, for the court is bound by its record. These are immutable elements."

In the case of *Stockyards Nat. Bank vs. Bragg, et al*, 67 *Utah* 60; 245 *Pac.* 966 it is said that:

"Though court may have jurisdiction of subject matter and person, it may not act or make an order or render a judgment beyond or in excess of jurisdiction."

"While requisite jurisdictional facts need not be recited in order or judgment to properly invest court with jurisdiction of subject matter, they must somewhere be made to appear in record that describes matter for court's adjudication and is foundation of judgment or order."

"Judgment which is beyond or not supported by pleadings must fail."

"Judgment must fail on showing on face of mandatory record that it was obtained at variance with practice of court or contrary to well recognized principles and fundamentals of law."

"Fact apparent from mandatory record, showing that fundamental law was disregarded in establishing of judgment, will render it void for all purposes."

"Judgment founded on record, showing that fundamental law was disregarded in its establishment, is subject to direct and collateral attack, and will sua sponte be noticed by courts and acted upon by them without regard to wishes or relations of parties named on record."

The foregoing quotations are from the syllabi to the opinion and reflect the opinion of the court.

The law with respect to the necessity of judgment or decree being supported by pleadings, is discussed in *Vol. 1 Freeman on Judgments 6 Ed. Sec. 97, page 168. 49 C. J. S. page 95, et seq., sections 40 and 41.*

In connection with such law it will be noted that there is nothing in the complaint which even remotely indicates that plaintiff in 2888 sought to foreclose a mortgage on certificates 72 or 73 or any other water represented by certificates or any water right which was appurtenant to any particular tract of land. So far as is made to appear from the allegations of the complaint the plaintiff may have sought to foreclose its mortgage on any 60 acres or shares of water right owned by R. H. Spencer.

Much of the controversy in the court below centered around certificates numbered 72 and 73. The facts relating to these certificates show: On either June 1, 1918 or Nov. 25, 1931, Richard H. Spencer and Annie Spencer attempted to convey 160 shares of Class "A" stock to the Indianola Irrigation Company. (See Indianola Irrigation Company Exhibit 5) The acknowledgment of the notary says that Richard H. Spencer and Annie Spencer, his wife, together with a number of others acknowledged the conveyance on June 1, 1918. There is some evidence that the conveyance was actually made on November 25, 1931. (See Tr. 267) It of course may be that R. H. Spencer executed the instrument twice, that is to say, his original signature may have become detached from the original instrument so that it became necessary to have Mr. Spencer sign again.

It would be a very dangerous precedent to set by our courts to say that an acknowledgment of an instrument which appears regular on its face should be held for nought by the statement of a witness testifying after

the lapse of 16 years that the witness signed at a later date. The most that can possibly be said for such testimony is that it carries an inference that it was not signed before. It will further be noted that a red ink line is drawn through the words: "dated this 25th day of November, 1931." Such lines were drawn through the instrument when it was recorded. (See Tr. 43) It would seem that the only possible reason for drawing the red ink line through the date was to indicate that there was something wrong with the date. If the acknowledgment shows the instrument was actually originally signed on the date of the acknowledgment the way to make that evident would be to strike out as was done the words: "dated this 25th day of November, 1931."

Whatever the fact may be in such particular we do not, in the light of other facts appearing in the evidence, deem it of special importance.

It will be seen that the deed, Indianola Irrigation Company Exhibit 5, does not describe any particular water right conveyed or intended to be conveyed to the company. It would have been a simple matter for the one who drew the deed to have designated the particular water right that was intended to be conveyed by describing the land to which it was appurtenant. If that had been done this litigation would probably not have arisen. So long as deeds are drawn which do not meet the requirements of the law with respect to the description of the property conveyed, confusion and litigation is almost certain to follow.

We, therefore, contend that the deed which Spencer made to the Indianola Irrigation Company is void for uncertainty in that an attempt was made to convey to the company a part of a larger number of acres of water without placing in the instrument of conveyance any

information whatever which could identify the property intended to be conveyed.

In connection with what we have said about the necessity of conveyance being certain and definite we direct the attention of the court to U. C. A. 1943-100-1-11 wherein it is provided that: "water rights shall be transferred by deed in substantially the same manner as real estate." But assuming that some water right was conveyed to the Irrigation Company how stands the case?

In case numbered 2888 and in this case the defendant Indianola Irrigation Company sought to have certificates numbered 72 and 73 cancelled because it claimed that Richard Spencer had secured the issuance of such certificates by representing that he had that amount of stock free and clear of encumbrances. We shall presently point out in detail the facts in such particular. For the present if it be assumed that certificates numbered 72 and 73 were subject to cancellation and that the court properly cancelled such certificates in this action it necessarily follows that the water right represented by such certificates is and has been appurtenant to the land upon which the water was and has been used since long before the organization of the irrigation company. So far as we are advised the adjudicated cases and the text writers are agreed that when a contract is rescinded the parties thereto are placed in the same position as they were in before the contract was entered into. The law is thus stated in 12 *Am. Jur.*, page 1031, *Sec. 451*:

"The very idea of rescinding a contract implies that what has been parted with shall be restored on both sides. Releasing one party from his part of the agreement and excusing him from making the other party whole do not seem agreeable to reason or justice. Hence, the general rule

is that a party who wishes to rescind an agreement must place the opposite party in status quo."

The results are the same regardless of the reasons for making the rescission. Thus in its final analysis it is not of controlling importance whether the transaction whereby Spencer executed a purported deed to the company for certificates 72 and 73 which purported deed is void for uncertainty because not describing the water right attempted to be conveyed or whether the transaction is set aside because of misrepresentation made by Spencer. In either event the water right is appurtenant to the land. That is to say the water right would be the same as if no deed of conveyance had been made or attempted to be made. From what has been said, however, we do not concede the evidence shows that Spencer made any misrepresentations touching the number of unencumbered shares of stock he had when he made a deed to the company. The evidence shows the follows:

Spencer mortgage to the Federal Building and Loan Association was not for 285 shares or acres of water but 223 acres. (See Indianola Irrigation Company's exhibit 1) He made a mortgage to Hugentobler for 55 acres. There were 3 acres appurtenant to a small tract of land conveyed. Add to this the 160 acres of water which was attempted to be conveyed to the company we have a total of 441 acres. There is some evidence that a water right was allocated to the cemetery lot and we have heretofore directed the attention of the court to the testimony to the effect that R. H. Spencer, at one



time, used some water on a tract of Indian land, the deed to which he lost. (Tr. 390) It will be seen that all of the 448 acres of water is accounted for, except the 60 acres claimed by the plaintiff.

There is nothing in the mortgage to indicate whether it is a first or a second mortgage. It does appear that the bank was out to get all the security that Spencer had available.

Much of the difficulty that the Indianola Irrigation Company finds itself in is due to the fact that it gave to the Federal Building and Loan Association 285 shares of stock and now seeks to claim that Richard H. Spencer was responsible therefor when in truth and in fact the difficulty was apparently brought about by the company having issued certificates of stock to H. M. Spencer (the sons of R. H. Spencer and one of the mortgagors of the property mortgaged to the Federal Building and Loan Association) which stock H. M. Spencer mortgaged to the Commercial Bank of Spanish Fork. The Company then made a second issue of stock for the same water right to the Federal Building and Loan Association. The Indianola Irrigation Company is now apparently quite willing to have the decree in this case award to plaintiff Whittaker 60/1728 and to Hugentobler 55/1728 of all the class "B" water rights of its stockholders notwithstanding there is not one scintilla of evidence to justify such an award. We say that because it is reasonable to assume that the Indianola Irrigation Company took part in formulating the decree in this case. Be that as it may it

has not yet raised its voice in protest against the obvious fact that both Whittaker and Hugentobler have been awarded more water than they are entitled to, namely: 60/1728 and 55/1728, not only of class "A" water rights but also of the class "B" water of Thistle Creek and its tributaries.

Plaintiff also claims that the Spencers may not prevail in their attack on his title to the sixty shares because:

1. Both Richard H. Spencer and John Edison Spencer have in the present action disclaimed any interest to the water right in controversy.

2. That by reason of the judgment rendered in case 2888 the matter of ownership of the right to the sixty shares has been adjudicated.

As to plaintiff's claim that R. H. Spencer and John Edison Spencer have disclaimed any interest in the water in dispute in the present case the pleadings filed herein show that the water right claimed by the plaintiff was to the right to the use of water to irrigate 60 acres of land in Section 3, Township 12 South, Range 4 East, Salt Lake Meridian. (See paragraph 14 of complaint R. 7 and 8)

To the complaint John Edison Spencer and Richard H. Spencer filed their motion to strike on various grounds: Among the portions of the complaint so sought to be stricken were the first 11 lines of paragraph 14. (R. 41-44)

Richard H. Spencer and John Edison Spencer also filed a demurrer to the complaint on various grounds, among them being that it could not be ascertained from the complaint what water right the plaintiff claimed and particularly that it could not be ascertained from said complaint what particular land in Section 3, if any, the alleged water of the plaintiff was ever used.

The demurrer was upon the ground that plaintiff's claim to a water right was barred by various provisions of the statute of limitation. (J.R. 48-49) The disclaimer upon which plaintiff relies reads as follows:

“Comes now Richard H. Spencer and John Edison Spencer (spelled John Edson Spencer in plaintiff's complaint) each for himself and not one for the other and for answer to plaintiff's complaint alleges:

Defendants disclaim all right, title or interest of whatsoever character or extent, in or to any and all of the premises and water rights described in plaintiff's complaint and especially that particular alleged water right described in paragraph VIV of plaintiff's complaint.”

Larson and Larson

Attorneys for the defendants

Richard H. Spencer and John  
Edison Spencer.

The answer and disclaimer is verified by R. H. Spencer and John Edison Spencer. (J.R. 52-53 and 54)

It would seem clear from the pleadings above referred to and quoted that the subject matter thereof was

water used for the irrigation of Section 3 and no other. It could not be said to refer to the water right represented by certificates 72 or 73 because the same were not mentioned or referred to in the pleadings of the plaintiff nor were the same mentioned in the decree of foreclosure.

Moreover the plaintiff could not well have claimed any rights to the waterright represented by certificates 84 or 86 because the water right represented by such certificates come out of the water right which was foreclosed by the Federal Building and Loan Association's proceeding in which proceeding W. H. Hadlock, John A. Malia, state bank commissioner of Utah, for the use and benefit of the creditors of the North Sanpete Bank, a corporation, were parties defendants and were foreclosed from making any claim to the water appurtenant to the land and water right which was appurtenant to the land covered by their mortgage, including the 223 acres of water which R. H. Spencer mortgaged to that corporation. The Indianola Irrigation Company was also a defendant in such action and any right that it might have to the water covered by the Federal Building and Loan Association's mortgage was likewise cut off and disposed of. It thus remained for the plaintiff and the Indianola Irrigation Company to seek some means to get at certificates numbered 72 and 73 to make up for their failure to appear in the foreclosure proceeding of the Federal Building and Loan Association and defend such rights as they might have to the water right there involved.

As we have repeatedly said there is not a scintilla of evidence in this case which shows or tends to show that the plaintiff ever had or at any time prior to the present proceeding even claimed any right to certificates numbered 72 or 73 or to the water right which was appurtenant to the lands in section 5 to which such water right was appurtenant. We repeat that such results were brought about because the mortgage given to Hadlock, Bank Commissioner and the deed given to the Irrigation Company were so vague and uncertain that no one could ascertain from the language used therein what water right was intended to be mortgaged or conveyed. It is because of the results that followed in the wake of such a method of attempting to convey mortgaged property that the courts have uniformly held that the same are void. In this connection it should be noted that at the time John Edison Spencer made the disclaimer he had every reason to believe and did believe that the title to the water right represented by certificates numbered 72 and 73 belonged to Price. (Tr. 599 et seq.)

The plaintiff has pleaded *res judicata* and an estoppel as against both the administrator and John Edison Spencer and in his reply plaintiff's counsel in the court below argued such questions at considerable length at the conclusion of the trial. Of course if the mortgage given to Hadlock, the decree of foreclosure and the deeds to the Bank Commissioner and to Spencer are valid there can be no doubt, but that the Spencers are estopped from asserting any claim to the water right disposed of in

such proceeding and the conveyances made in pursuance thereof. We have not and shall not contend to the contrary. On the other hand if the mortgage given by R. H. Spencer to the bank on 60 shares or acres of water right and the proceedings had to foreclose the same or the deeds given after the mortgage was foreclosed are so uncertain and ambiguous in the matter of describing the subject matter as to render the same void then and in such case the doctrines of estoppel and res judicata have no application. We will be interested in having counsel for plaintiff cite a case or other authority where it is held that a void decree or document may work either on estoppel or be aided by res judicata. We understand the law to be that a void instrument is wholly without legal effect for any purpose.

It will also be noted that by the decree entered in this case a cloud is cast upon all of the water rights of Thistle Creek and its tributaries. It does not describe any water right by either reference to certificates of stock or by a description of the land to which it is appurtenant. Any one purchasing or taking any of the water rights of Thistle Creek will be unable to ascertain what particular water right is awarded to plaintiff. The fact that plaintiff is unable to identify his claimed water right does not entitle him to a decree clouding all the water rights in Thistle Creek.

In connection with the water right claimed by the plaintiff the court's attention is again called to the deed which Richard H. Spencer gave to John Edison Spencer

in September of 1933 (See John Edison Spencer's Exhibit 12) and the fact that he has been in possession of that property, together with the water right used thereon since that time and it is reasonable to assume that he has paid the taxes on such land, together with the water used to irrigate the same ever since the same was conveyed to him. This action was not brought until July 21, 1941, more than seven years after John Edison Spencer received the conveyance above mentioned, which it will be observed conveyed to him 80 acres of water right in Thistle Creek. It will also be noted that John Edison Spencer did not sign the mortgage which plaintiff sought to foreclose in cause numbered 2888. Under such a state of the record the plaintiff has lost any right to the water used upon the land which land and water right was so conveyed to John Edison Spencer. U.C.A. 1943, 100-1-4 and Hammond vs. Johnson 94 Ut. 20; 66 P. (2d) 894. John Edison Spencer held and used both the land and water adversely to the plaintiff and its claimed grantor or mortgagor, Richard H. Spencer, for more than the statutory period.

It will be noted that the trial court awarded judgment against John Edison Spencer and Elizabeth A. Tibbs jointly and severally in favor of the plaintiff for costs taxed at \$75.80, (J.R. 273) and likewise awarded judgment in favor of the defendant Indianola Irrigation Company, a corporation, and against John Edison Spencer and Elizabeth A. Tibbs jointly and severally costs taxed at \$154.40. We have assigned such awards as er-

ror. (Assignments 42 and 45.) We are at a loss to understand upon what theory such an award was made. If costs have any relation whatsoever to the degree of fault that the party has been guilty of in an action certainly if there was fault it was primarily the fault of Richard H. Spencer. So far as Elizabeth A. Tibbs is concerned she was an onlooker. If any costs should be awarded (which we contend it should not be) in favor of either the plaintiff or the Indianola Irrigation Company we submit that it should be against the administrator and not against either John Edison Spencer or Elizabeth A. Tibbs.

### THE WATER RIGHTS INVOLVED IN THIS CONTROVERSY ARE APPURTENANT TO LANDS OWNED BY JOHN EDISON SPENCER AND ELIZABETH A. TIBBS.

The trial court found that the water rights claimed by John Edison Spencer and Elizabeth A. Tibbs are not appurtenant to the lands conveyed to them by Richard H. Spencer. We have assigned such finding as error in assignments numbered 17 and 22, 24, 25, 26 and 27.

Whether or not water represented by stock in a mutual irrigation company is appurtenant to land so that it will pass with a deed to the land as an appurtenance is a question of fact to be decided in each case. The mere fact that water is represented by stock certificates in a water company is in no sense controlling. The question was first before our Utah Supreme Court in 1898 in the



case of *Smith vs. North Canyon Water Company*, 16 *Ut.* 194. The court there held that water represented by stock in a water company was under the facts of that case appurtenant to the land in question. The court has consistently from that date forward treated the problem as a fact question and as recently as October of 1945 reaffirmed the rule that water represented by stock in a water company could in law be appurtenant to the land upon which the water was used. See *Milford State Bank vs. West Field Canal & Irr. Co.*, 100 *Utah* 528, 162 *P.* 2d. 101. The Utah cases have never treated the fact that the water was represented by the stock in a corporation as controlling.

In the *Milford State Bank vs. West Field Canal & Irr. Co.*, case, *supra*, the owner of the land had conveyed it by instruments placed in escrow, together with all water and water rights thereunto belonging. By inadvertence a certificate purporting to represent 49 shares of water in a corporation was deposited in escrow with the land contract. The seller contended that only a portion (28 shares) of the 49 had ever been used on the land and argued that all that was conveyed by the agreement was the land and the water which was appurtenant thereto. The Supreme Court adopted this view and said: (p. 536 of the Utah reports).

“The record is sufficient to sustain the finding that Blackner bought the lands from Mrs. Daker with the appurtenant water right: that the appurtenant water right was 28 shares of the capitol stock of the irrigation company on the

basis of one share of stock to each acre of land. Shares of stock of an irrigation company issued in place of the vested water right for lands in an irrigation district are appurtenant unless they have been transferred and put to a beneficial use upon other lands.”

The court had a like problem before it in *East River Bottom Water Co. vs. Boyce*, 102 Utah 149, 128 P. 2d. 277, (1942). There had been a duplicate issue of seven shares of water stock in the plaintiff company. This duplicate issue was represented by a stock certificate which had been pledged to a bank as security for a loan. Suit was brought by the irrigation company to have the duplicate issue declared void. The bank defended on the grounds that it was a bona fide purchaser without notice. The Supreme Court decided against the bank holding that the water in the irrigation company was still appurtenant to the land and charged the bank with notice of this fact. The court said:

“The corporation was a loose sort of a mutual agreement for the unified management and distribution of the water to the owners. The limited and restrictive words for the purpose of ‘control, management and distribution’ is not a conveyance separating a water right from the land does not vest title or the right of use in the corporation within the provisions of Revised Statutes of Utah 1933, Section 100-1-10 and Section 100-1-1. . . The water right was never severed from the land and is still appurtenant thereto.”

The best discussion of this problem in the Utah cases is contained in *Re: Johnson’s Estate*, 64 Utah 114,

228 P. 748, (1924). There, by will, a testator devised specified lands to certain of his children. The remaining children were named as the residual legatees. In the devise of the land the testator failed to mention water rights for the land. The water was represented by stock in a corporation and during his life the water represented by this stock had been used on the lands specifically devised. The residual legatees contended that the stock was personal property and came to them as a part of the residue of the estate. The other children, to whom the land had been devised, contended that the stock was appurtenant to the land devised and passed with it as an appurtenance even though the will had failed to mention it. The Supreme Court held that the water was appurtenant. The problem of water represented by stock in a corporation being appurtenant to land was discussed in some detail. The court said:

“Appellants, claiming the 44 remaining shares of water stock as an appurtenant to tract A of the real estate, prayed for its distribution to them. It was alleged and not denied that the water right was used in connection with the land, and that the land is of little or no value without the water right. The trial court found that the water right had been used for the irrigation of the lands owned by the testator, but that notwithstanding such use the same was personal property, and was not included in the devise to appellants. The question is whether a water right so owned and used will pass by the devise, without mention, with the land as an appurtenance . . .” (then followed citation of and quotations from the statutes which

were what are now sections 100-1-10 and 100-1-11, U.C.A. 1943)

Referring to what is now section 100-1-10 which provides in part:

“Water rights shall be transferred by deeds in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation . . . ”

The court said:

“The latter provision is obviously intended for the conveyance of water rights in cases where the water rights are severed from the land upon which the water has been used, and separately conveyed. In such a case if the water right is represented by shares of stock in a corporation, the plain implication is that it may be transferred by a transfer of the certificate of stock, in the ordinary manner, as personal property. But that does not necessarily mean that water rights thus represented may not be an appurtenance to the land upon which the water is used, and pass as such with a conveyance of the land.”

The court then quoted with approval from Weil on Water Rights, 3d. Ed. Sec. 1269 (which is quoted below in this brief under heading “Text Writers”, and also cited with approval cases from Washington, Idaho and California, and distinguished an earlier Utah case which while using some language indicating a different view is not in conflict with the other Utah cases. It was then stated that whether water represented by stock is appurtenant is a fact question. The court went on to con-

clude that under the facts of that case the water rights represented by water stock were appurtenant to the lands devised. Said the court:

“The right to the use of water for irrigation is inseparately related to land. Without its continued use upon land the right ceases. The customary practical presumption is that water rights used upon lands are appurtenant to and a part of it . . .”

“Upon principle and authority we conclude that the water right referred to passed by the will as an appurtenance to the land selected by the executor, and that the same should be distributed to the appellants with the land.”

Other Utah cases have touched on the problem. In 1898 it was presented to the court in *Smith vs. North Canyon Water Co.*, 16 Utah 194. There a deed to lands failed to mention water. The water in question was represented by stock. The court held that the water passed with the land as an appurtenance.

In *Cortella vs. Salt Lake City*, 93 Utah 236, land owners exchanged their water for canal water from the private canal of Salt Lake City. The contention was that the water was made personal property because reduced to possession by the city in its canal. The court held that even though so reduced to possession in a private canal the water was still appurtenant to the land because it was used thereon in exchange for waters that had been appurtenant. No stock in a corporation was involved, but the case is helpful because it is generally held that water,

reduced to possession in a private canal, is personal property. Yet the court held that the water was an appurtenant (real property) because of its use and the nature of the exchange agreement.

In *Genola Town vs. Santaquin City*, 96 Utah 88, 80 P. 2d 930 the court noted the peculiar nature of ownership of stock in a mutual irrigation company. It said: (page 101)

“Stock in a mutual company entails the right to demand such stockholders aliquot share of the water in proportion as his stock holding bears to all the stock. Water rights are pooled in a mutual company for convenience of operation and more efficient distribution, and perhaps for more convenient transfer. But the stock certificate is not like the stock certificate in a company operated for profit. It is really a certificate showing an undivided part ownership in a certain water supply. It embraces the right to call for such undivided part according to the method of distribution.”

To the same effect see *Smithfield vs. Union Central Life*, 105 Utah 468.

In *Fisher vs. Bountiful City*, 21 Utah 29, plaintiffs and others associated together under the name of Barton Creek Irrigation Company. Bountiful sought to control and manage the distribution of their water rights. At page 34 of the Utah reports the court held that the rights of the plaintiffs were appurtenant to their lands. It does not clearly appear, except from the name of the company,

whether or not the water rights were represented by stock.

In *Woolley vs. Dowse*, 86 *Utah* 221, it was held that the water in question was not appurtenant to land which had been mortgaged. The holding was placed on the grounds that the water was not in fact used on the land rather than upon the grounds that it was stock in a mutual company. The fact that the holding was put on the grounds that it was not appurtenant in fact because not used on the land rather than on the fact that it was stock in a mutual company shows that the court did not consider that fact to be controlling.

In *George v. Robinson*, 23 *Ut.* 79, the court held the water there involved was not appurtenant. The suit was for breach of warranty. Plaintiff was grantee under a deed conveying land and appurtenances. Thereafter defendant lost use of the water and sued for breach of warranty. The water was represented by stock in an irrigation company. In holding that the water was not appurtenant to the land the court noted various things which it apparently considered to be important in arriving at that conclusion. It said:

“In fact, the fair result of plaintiff’s own testimony is to the effect that the water of Corn Creek, of which that in dispute is a part, is and was owned by the corporation; that each share of its capital stock represented sufficient water to irrigate one acre of land; and that stockholders only were entitled to water for purposes of irrigation. There is nothing to show that any parti-

cular share of stock represented any water for any particular land. So far as appears from the proof, each stockholder had the right to use the water to which he was entitled on any land he saw fit. Under such arrangements . . . the water cannot be appurtenant.'"

It further appears in that case that the grantor in the deed did not own any water and the grantee knew that such was the fact. Again the court failed to place the holding on the fact that the water was represented by stock. It reasoned as to whether it was appurtenant in fact and based its holding on the conclusion that it was not. Any language in the case indicating that water in a water company could not be appurtenant to land was overruled by the later opinion of *In Re Johnson's Estate, supra*, where George v. Robinson is expressly noted.

There is not a single Utah case which was disclosed by our search where the court has held that water in a water corporation cannot in law be appurtenant to land. The cases uniformly treat the matter as question of fact.

### WHEN IS WATER APPURTENANT?

If it be accepted, as well it must, that water represented by stock may or may not be appurtenant to land depending upon whether or not it is appurtenant in fact, then our problem is to determine when water is appurtenant. This is answered in the case of *Thompson v. McKinney*, 91 *Ut.* 89, 63 *P.* 2d 1056. The suit was an action to quiet title to lands and waters claimed to be



appurtenant thereto. The question was whether or not certain waters were in fact appurtenant to certain lands. The water was not represented by stock in a corporation. The court discussed many cases dealing with the question of when water is appurtenant in fact. The court rejected the contention that only those waters which were "indispensable" to the use of land were appurtenant. It quoted with approval from 2 Kinney on Irr. and Water Rights, (2d Ed.), Sec. 1011, p. 1904 as follows:

"The doctrine is well settled in the States of the arid region, that a water right used in connection with a certain tract of land for the irrigation thereof, where necessary to the beneficial enjoyment of the land, together with the ditch, canal, or other works necessary to conduct the water to the place of use, become appurtenances to the land provided they are all owned by the same parties."

This idea of being owned by the same parties is not in conflict with the concept that water represented by stock can be appurtenant because of the holding in cases such as East River Bottom v. Boyce, supra, 102 Utah 149, supra, and Genola Town v. Santaquin, 96 Utah 88, supra, holding that the owner of the stock certificate is in fact an owner in common with the other stockholders of the water. The same concept formed the basis of a later opinion by the Supreme Court in Smithfield W. Bench Irr. Co. v. Union Central Life Ins. Co., 105 Ut. 468, 142 P. 2d 866. The court there said:

“The waters of a mutual irrigation company belong to the users, the company being the mere distributing and apportioning trustee . . . The Company cannot sell any of the water without consent of the stockholders or for nonpayment of dues if the articles of incorporation make the stock liable for such costs and expenses. Likewise the company cannot permit the water to be lost by non-use thereof as long as any shareholder desires to and is in a position to use the water. Water undistributed may be used by any stockholder in a position to use it. The shareholders are in effect owners in common of the waters with certain limitations as between one another governing the use thereof.” Citing many cases.

In the *Thompson v. McKinney* case, *supra*, the court also quoted with approval from a Montana case *Lensing v. Day*, 67 Mont. 382, 215 P. 999, as follows:

“A water right, acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, is an appurtenance thereto, and as such passes with the conveyance of the land unless expressly reserved from the grant.”

It must be concluded that whenever water is appropriated for use on particular lands and is so used thereon for beneficial purposes it becomes appurtenant to that land. For other cases discussing the problem of when water becomes appurtenant to land see *Kinney*, *Water Rights*, 2d Ed., Sec. 1005-1016; *Connant v. Deep Creek & Curlow Valley Irr. Co.*, 23 Ut. 627, 66 P. 188;

Utah Metal & Tunnel Company v. Groesbeck, 62 Utah 251, 219 P. 248.

Once it is established that the water is in fact appurtenant to land (and this is always a question of fact) then the cases are numerous holding that it passes with a conveyance of the land without being mentioned in the deed of conveyance. In *Black v. Johnson*, 81 Utah 410, it was held that tax deed conveying lands sold for taxes carried with it "one city lot of water right" even though not mentioned in the tax deed. In *Thompson v. McKinney*, 91 Ut. 89, 63 P. 2d 1056 it was held that a mortgage on lands also mortgaged the water which was appurtenant to it even though no mention of the water was made in the mortgage. See also the recent case of *Petrofesa v. Rio Grande R. R. Co.*, 110 Utah ....., 169 P. 2d 808 decided in June, 1946; *Anderson v. Hanson*, 50 Utah 149, 167 P. 254; *LeBee v. Smith*, 64 Ut. 242, 229 P. 88.

TEXTWRITERS ALL HOLD THAT WATER REPRESENTED BY STOCK IN A MUTUAL COMPANY CAN BE AND OFTEN IS APPURTENANT TO LAND AND THAT IN EACH CASE IT IS A QUESTION OF FACT.

The writers of text books on water rights all agree with the Utah cases above cited that water represented by stock in a mutual company can be and often is appurtenant to the land upon which used. Whether it is or is not in each case is a question of fact. Quotation from Weil, the leading writer on western water law is

representative of the prevailing legal thought on this matter.

In *Weil on Water Rights* Section 1269, (cited with approval by the Utah Supreme Court in *In re: Johnson's Estate*, 64 Ut. 114) it is stated:

“So long as the company remains purely a mutual one, the certificate of stock represents the water right. A transfer or sale of the certificate is governed by much the same rules as those elsewhere considered regarding transfers of water rights. Whether the water right is an appurtenance to the stockholders land is a question of fact in each case, as is also whether on a sale of the land the water right passes as an appurtenance. A sale of the certificate may be made separate from the land for use on other land and will transfer the water right . . . On the other hand in the absence of any separate sale of the certificate or of any other evidence of any express intention to make a severance, a sale of the land on which the water is used will carry the water right and the right to the certificate as an appurtenance.”

The section is also cited with approval in *Berg v. Yakima C. Co.*, 83 Wash. 451, 145 P. 619.

In *Kinney on Irrigation and Water Rights*, Sec. 1484, the rule is stated that water represented by stock in a water company generally is not appurtenant. He, however, cites cases from California holding in accord with the Utah rule and the rule stated by Weil.

*Hutchings, Selected Problems of the Law of Water Rights in the West*, p. 385 cites Weil with approval for proposition that appurtenancy is a question of fact.

### CASES FOR MOTHER STATES:

Western states uniformly hold that water represented by stock in a mutual company may be and often is appurtenant to land.

CALIFORNIA: *In Re: Thomas Estate*, 147 Cal. 236, 81 P. 539, it was held that the conveyance of land by the original owner of a water right which was appurtenant to a certain tract of land to a mutual water corporation, for the better management and distribution of the water, did not segregate the water from the land as such appurtenance, but merely changed its form; and, hence under the *Civil Code, Section 1311*, providing that every devise of land conveys all the estate of the devisor, and therefore, that a devise of land carried with it the share of stock in the company as appurtenant to the land; and therefore, it was entirely proper for the trial court to direct a transfer of stock to the devisee.

COLORADO: *Denver Joint Land Bank v. Markham*, 107 P. 2d 313: Here the Court said:

“Where the water right is appurtenant to the stockholder’s land is a question of fact, as is also whether, on a sale or transfer of the land, the water right passes as an appurtenance \* \* \* The doctrine which makes it a question of fact whether the water right is appurtenant to the land and whether it passes by a lease or other

conveyance seems to us sound." (Citing other Colorado cases.)

*Comstock v. Olney Spring & Drainage Dist., Colo.* 50 P. 2d 531.

"\* \* \* where the company is a mutual irrigation company, or as here, a mutual reservoir company, organized, not for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water upon their lands \* \* \* ownership of shares of stock in the corporation is but incidental to ownership of water right, which is appurtenant to the land upon which the water is used."

IDAHO: *Ireton v. Idaho Irr. Co.*, 30 Idaho 310, 164 P. 687, 689:

Action to foreclose real estate mortgage. It was denied that the water right, represented by stock, was real property appurtenant to the land and argued that it was not covered by the mortgage on the land. The court held to the contrary stating:

"While this court has held shares in an irrigation company to be personal property the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their stock in the corporation is but incidental to the ownership of water right. Such shares are muni-

ments of title to the water right, are inseparable from it and ownership of them passes with title which they evidence."

WASHINGTON: *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 P. 619:

The question involved was whether or not water rights represented by stock certificates passed with a lease of lands. The contention was made that they were not appurtenant and would not pass as an appurtenance. The court held to the contrary stating:

"In a mutual company the stock certificate represents the water right. A transfer or sale of the certificate may be made separate from the land for use on other land, and will transfer the water right. But where it has not been thus sold or transferred, the question whether the water right is appurtenant to the stockholder's land is generally a question of fact, as is also whether, on a sale or transfer of the land, the water right pass as an appurtenance \* \* \* In the present case the water was appurtenant to the land."

MONTANA: *See Yellowstone Valley Co. vs. Associated Mortgage Investors, Inc., et al.* 88 Mont. 73, 290 P. 255.

FEDERAL: *Ackroyd vs. Winston*, 113 Fed. 2nd 657. This case arose under the laws of the State of Montana and the Circuit Court discusses cases from several western states including Utah and concludes that water represented by stock in a mutual company can be and is often appurtenant to land. It also holds that whether

it is appurtenant in a particular case is a question of fact.

## THE INDIANOLA IRRIGATION COMPANY IS A MUTUAL IRRIGATION COMPANY

Article 6 of the Articles of Incorporation of the Indianola Irrigation Company provides:

“The purpose for which this corporation is formed and the pursuit and business to be engaged in is to manage, regulate, control and distribute the waters of Thistle Creek, its branches to and among its stockholders in proportion to their and each of their respective rights to the use thereof, to construct and maintain all such dams, ditches, canals, gates, reservoirs, flumes and other and different structures and means which may be found necessary or convenient for irrigation and other purposes.”

It will thus be seen that the corporation was not, by its articles, authorized to own the water in its systems but only to manage, regulate, control and distribute the waters, under the doctrine announced in the case of *East River Bottom Water Co. vs. Boyce, et al*, supra, from which we have quoted, the water under the Indianola Irrigation Company was appurtenant to the land of its stockholders. The water represented by certificates of stock in the Indianola Irrigation Company, is, as a matter of law, appurtenant to the land upon which such water has been and is being used.

In the case of *East River Bottom Water Co. vs. Boyce, et al*, it will be noted that the majority opinion holds that a water right is not severed from being



appurtenant to land where the corporation is merely given the right to manage and control the water. It may or may not be that this court judicially or personally knows that when that case was decided many of the banks throughout the state that had loaned money on certificates of stock in irrigation companies became alarmed because under the doctrine of that case their security might become valueless. Be that as it may at the next session of the legislature following the rendering of that opinion the legislature amended *Section U.C.A. 1943, 100-1-10* so that the same should provide as follows:

“Water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, *in which case water shall not be deemed to be appurtenant to the land*, and such deeds shall be recorded in books kept for that purpose in the office of the recorder of the county where the place of diversion of the water from its natural channel is situated and in the county where the water is applied. Every deed of a water right so recorded shall, from the time of filing the same with the recorder for record impart notice to all persons of the contents thereof and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice thereof.” Laws of Utah 1943, Chapter 105, page 154.

The language in italics was added by the amendment of 1943. *U.C.A. 1943, 100-1-11* was not amended. It remained as it had been and provides as follows:

“A right to the use of water appurtenant to land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceeding the time of the execution of any conveyance thereof; subject, however, in all cases to payment by the grantee in any such conveyance of all amounts unpaid on any assessment then due upon any such right, provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance, or it may be separately conveyed.”

THE AMENDMENT TO SECTION 100-1-10, U.C.A. 1943, MADE BY THE 1943 LEGISLATURE DOES NOT HAVE THE EFFECT OF MAKING WATER WHICH WAS IN FACT APPURTENANT TO LAND, NOT APPURTENANT.

There can be no doubt that from earliest times the courts of this state and territory have held that water represented by stock in an irrigation company may be and usually is appurtenant to the lands upon which the water is used. Mutual companies were organized throughout the west for the purpose of distributing and managing the water of the corporate members, such is the expressed purpose of the incorporators of the Indianola Irrigation Company. It has been uniformly held that the stockholders are tenants in common of the water. See *Smithfield West Field Irr. Co. vs. Union Central Life*,

105 *Utah* 468; *Genola Town vs. Santaquin City*, 96 *Utah* 88, 80 P. 2d 930. Certainly no farmer in turning over to a mutual company the right to distribute and manage his water ever intended to sever the water from the land. The *Utah* cases cited above all recognize this when they hold that water represented by stock is nevertheless still appurtenant to the land upon which used. As will be hereinafter shown the legislature could not change the nature of the contract made by the stockholders among themselves in their articles without running afoul of the constitutional limitation which prohibits the impairment of the obligation of contract. This should be kept in mind in approaching the problem of the construction of section 100-1-10, as amended by the laws of 1943, wherein it is provided that water represented by stock in a corporation shall not be deemed appurtenant to land.

The word "deemed" has been given two well recognized meanings by the authorities and the one which is to be adopted in any particular instance depends upon the context. The two meanings are recognized by the standard law dictionaries. In 9 *American and English Enc.* 165 it is defined as follows:

"To deem means to judge; to determine upon consideration; to form a judgment; to conclude upon consideration. The term is also used in the ordinary sense of to think to suppose; to hold opinion."

This same definition is cited in *Bouvier, New Law Dictionary*, 1934. See also *Webster, New International Dictionary*, which is as follows:

“1. To pass judgment; to render decision; to act as judge or arbitor.

2. To have an opinion, to judge, believe, suppose \* \* ”

In 13 *Cyc.* 756 the term is defined as to adjudge and also to suppose, to believe, to think.

## CASES HOLDING THAT THE WORDS “SHALL BE DEEMED”

### RAISE ONLY A REBUTTABLE PRESUMPTION

*Miller vs. Commonwealth*, 2 *S.E.* 2d, 343, 172 *Va.* 639. Statute providing that liquor in containers not bearing the required government stamps shall be deemed to have been illegally acquired, created a presumption subject to being overcome by opposing evidence rather than a conclusive presumption.

*In re Barbour's Estate*: 173 *N.Y.S.* 280, 185 *App. Div.* 445. A tax statute provided that every person “shall be deemed” to have died a resident of New York upon living in N.Y. the greater part of any 12 consecutive months in the 24 months next preceding his death. Held this merely raised a presumption which could be overcome by proof that decedent was not in fact a resident.

*Kleepe vs. Odin tp., McHenry County, N.D.* 169 *N.W.* 313. Held that the language “and in case the board having jurisdiction shall fail to file such order within 20 days they shall be deemed to have decided against such application” raised a rebuttable presumption “that can be overcome with evidence to the contrary.”

*Cooper vs. Slaughter*, 57 So. 477. Jury was charged that if it believed that a boundary line, the location of which was involved in the action, was in dispute and that the adjoining owners caused it to be established and acquiesced in the line as established the plaintiff would be "deemed" the owners. Held that "deemed" as there used was the equivalent of "presumed." The appellant argued on appeal that the jury had been erroneously instructed that as a matter of law the plaintiff would be the owner, because the word deemed meant "considered" or "adjudged."

*Barrell vs. Pittsburg*, 62 Pa. St. 474. "But after the death of the husband the wife's legal settlement shall be deemed to be the place where he was last legally settled. This is equivalent to the expression 'shall be taken to be' and admits of the existence of a different state of facts, namely, a settlement acquired by a widow herself." To the same effect see *Miffin vs. Elizabeth* 18 Pa. St. 17.

*Jackson vs. Succession*, 47 La. Am. 1089. A statute said that a legacy made to a creditor should not be deemed to be in compensation of the debt nor a legacy to a servant to be deemed to be in payment of wages. The court said: "The word deemed, used in the article simply means no interpretation unfavorable to a creditor shall be placed on the testament by the fact alone of the legacy to the creditor. It is a question of interpretation."

The above cases are representative of the many cases holding that the language "shall be deemed" raises only a prima facie presumption which is subject to rebuttal. In each of the above cases it had been argued

that the language raised a conclusive presumption, but the contention was rejected. There are, of course, cases in which there is no room for construction and in which it clearly appears from the context whether it was intended to be a conclusive presumption or merely a prima facie one. In criminal cases for example where it could not constitutionally be conclusively presumed that a man is guilty, the court uniformly hold that the use of the word "deemed" raises only a prima facie presumption. In other types of cases the context clearly shows that the word "deemed" was intended to raise a conclusive presumption.

For example in *Irwin vs. Pickwick Stages*, 25 P. 2d 998 (Cal.), a motor vehicle registration law provided that title shall be "deemed" not to have passed until certificate issues to transferee. This was held to raise a conclusive presumption. The court cited: *In re Green's Estate*, 164 N.Y.S. 1063; *in re Waldron's Estate*, 84 Colo. 1, 267 P. 191; *McCluskey vs. Hunter*, 33 Ariz. 513, 266 P. 18; *Kerchloff-Cuzner Mill & Lumber Co. vs Olmstead*, 85 Cal. 80, 25 P. 648. The Colorado case of *In re Waldron's Estate* cites many other cases to the same effect.

In *Harder vs. Irwin*, 285 F. 502, 504 the court held that "deemed" when relating to language that a distribution of dividends should be "deemed" to have been made from the most recently accumulated undivided profits, raised a conclusive presumption. That it means "considered" or "adjudged". In accord are *Leonard vs. Grant*, 4 F. 11; *U. S. vs. Doherty*, 27 F. 730. In *King vs.*

McElroy 21 p. 2d, 80, 37 N. M. 238, it was held that where a statute deems a thing denied it is adjudged denied.

From the above cases and dictionary definitions it is clear that two distinct meanings have been given to the term. The one meaning is that it but raised a prima facie presumption or supposes a thing to be true. The other considers the word to raise a conclusive presumption. Which meaning is to be adopted in any particular case depends upon ordinary rules of statutory construction. The word itself has no clear cut definite meaning to be given in all cases. Clearly from the cases it is susceptible of more than one meaning. Whether in a given case the presumption it raises is prima facie or conclusive cannot be answered merely by noting the use of the word. Other rules of statutory construction must be used because the word "deemed" has no set and definite meaning. It is worthy of note that if the legislature had intended the word "deemed" as conclusive there was no occasion to use the word "deemed" at all. It could have provided that water represented by shares of stock in a corporation shall not be appurtenant to land. It did not so provide, apparently because it did not so intend.

It will be noted that the provisions of U.C.A. 1943, 100-1-10 deals solely with a conveyance of a water right independent of conveyance of land. The apparent purpose was to overcome any inference that may be drawn from the East River Bottom case that a water right represented by a certificate of stock could not be transferred by a transfer of the stock.

OF THE TWO RECOGNIZED MEANINGS FOR THE  
WORD "DEEMED" THE COURT IN CONSTRUING  
THE 1943 AMENDMENT TO SECTION 100-1-10  
MUST HOLD THAT IT RAISES ONLY A PRIMA  
FACIE PRESUMPTION.

It is universally recognized and established that the articles of incorporation constitute a contract; (a) between the corporation and the state; (b) between the corporation and the stockholders; (c) between the stockholders and the state; (d) between the state and third persons who have dealt with the corporation on the faith of the grant; (e) between the stockholders themselves. *Thompson on Corporations, 3rd Ed., Vol. 1, page 417.* In *Carey vs. Min. Co.*, 32 *Ut.* 497, 91 *P.* 369, 12 *L.R.A.* (N.S.) 554, it is said:

"The charter of a corporation having capital stock is a contract between three parties and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state."

When the individual farmer joined a mutual corporation to distribute and manage his water, he did not contract, according to the existing Utah cases, to sever his water from his land so that it would no longer be appurtenant. His contract was of such a nature that the water remained appurtenant even though represented by stock. This was recognized by the case cited above including two most recent Utah cases, *East River Bottom vs. Boyce*,



102 *Utah* 149; 128 *P. 2d* 277, and *Milford State Bank vs. West Field Canal & Irr. Co.*, 108 *Utah* 528, 162 *P. 2d*, 101.

It is uniformly held by all the cases that a statute which materially changes the contract made by the stockholders in the articles of incorporation is an impairment of the obligation of contract within the meaning of the constitutional limitations contained in both the state and federal constitutions. See *Fletcher on Corporation*, Vol. 7, Sec 3657; *Garey vs. Mining Company*, 32 *Ut.* 497, 91 *P.* 369, 12 *L.R.A. (N.S.)* 554; *Superior Water, Light and Power vs. City of Superior*, 263 *U. S.* 125, 68 *L. Ed.* 204, 44 *S. Ct.* 82.

If then it be admitted, as well it must, that many of the mutual companies had articles which left the water still appurtenant to the land upon which used, the legislature would have no constitutional power to enact a statute which would impair this relationship and change it by severing water which the stockholders had chosen to leave appurtenant to land, from the land. That this would be so is clearly demonstrated by our Utah Supreme Court in the *Carey vs. Mining Company* case *supra*. (There is much good language in this case. We quote only a small portion of the discussion. Cases from many states are cited and quoted from):

“In the case of *Dartmouth College vs. Woodward*, 4 *Wheat. (U.S.)* 518, 4 *L. Ed.* 629, it was held that the charter from a state to a private corporation created a contract within the meaning of the federal constitution, forbidding any state to pass any law impairing the obligation of

contracts, and hence the federal Constitution prevented a change by legislative enactment of a charter so issued."

"From the texts and the cases it will be seen that under the reservation the state is not only unauthorized to alter or amend charters of existing corporations in such a way as will change the fundamental character of the corporation, impair the object of the grant, or rights vested thereunder, but it is also unauthorized to alter or amend them in such a way as will impair the contractual relations or rights of the stockholders among themselves, or between the corporation and its stockholders; and it will also be seen that under the reserved power the Legislature has only the right to amend the charter, or laws with respect thereto, which it would have had in the event it had been decided in the Dartmouth College Case that the federal Constitution did not apply to corporate charters. The Dartmouth College case did not call in question nor involve any right or relation of the corporators among themselves. It involved only the relation of the corporation and the state. Without the reservation it was held that even such relation cannot be changed without doing violence to the federal Constitution. Because of the reserved power the state may now amend or alter the charter, so far as affecting the contract with itself, and so long as it does not change the fundamental character of the corporation or impair any vested rights acquired thereunder. But, as stated by the authorities, the right is reserved for the benefit of the state and of the public and for public purposes. The power can only be exercised to the extent that the state is interested."

“Bearing in mind that the corporate charter is a dual contract--one between the state and the corporation and its stockholders, the other between the corporation and its stockholders--and that under the reserved power the state may alter or amend the former, but not the latter, the question is: Under which do the legislative enactment of 1930 and the action taken by the majority of the stockholders fall? We are of the opinion that they do not pertain to any right, privilege, or immunity which the state had granted to the corporation or to its stockholders, and that the action by such stockholders in no wise affected or was related to the contract existing between the state and the corporation. It merely pertains to and affects the contract existing among the stockholders themselves.”

“In the original articles of incorporation each stockholder agreed, one with the other, that his full-paid capital stock should be nonassessable. This provision might have been omitted or inserted as the incorporators saw fit to agree among themselves. Neither the state nor the public were concerned, whether they agreed upon one or the other. No franchise or privilege granted by the state to the defendant or its members was dependent upon this provision. The same grant, franchise, and privileges would have been granted had the provision been omitted. Had it been omitted, no other or greater liability would have been created in favor of the creditors or the public than was created by its insertion. Such a stipulation did not, then, in any wise pertain to the contract between the state and the corporation. It was manifestly intended to concern and fix the reciprocal rights of the stockholders among themselves, and to place a limit upon the amount of

money or capital that each was required to put into the enterprise and contribute to the corporation. The whole consideration for the agreement that no further contribution of capital to the corporation should be exacted was the mutual promise of the stockholders, the one to the other. Neither the state nor the public had anything to do with it, nor was either in any wise concerned therewith. The corporators had the undoubted right, as among themselves, to stipulate and agree as to the extent of their contributions."

Since a construction that the legislature intended by use of the word "deemed" to raise a conclusive presumption that stock in a water company could not be appurtenant to land would be of doubtful constitutionality, the court should adopt the other construction, that there is merely a presumption that it is not appurtenant. The legislature would not have the power; and common sense dictates that the court not impute to the legislature the intent to sever water which was in fact appurtenant to the land. The stockholders in organizing mutual companies elected to leave their water rights appurtenant to their lands. Thousands of mutual companies were organized all over the west. Courts from every western state have held that the water in such mutual companies is held by the stockholders as tenants in common--that it is in most cases still appurtenant to the land upon which used. No legislature could impair the obligation of contract and defeat the stockholders intent to have the water remain appurtenant.

The legislature was without authority to deprive John Edison Spencer of the water right conveyed to

him in 1933 by both the certificate numbered 73 and the deed. (See John Edison Spencer's Exhibit 12). Such an attempt would offend against Article One, Section 10 and the 5th and 14th Amendment of the Constitution of the United States and Article 1, Section 7 and 18 of the Constitution of Utah. In this connection see also deed to Elizabeth A. Tibbs copied into the transcript at pages 35-61.

It is a well established rule of statutory construction that if one possible construction would render a statute of doubtful constitutionality and another equally logical construction would leave the constitutionality of the statute free from doubt, the courts should adopt the latter construction. The legislature may constitutionally raise a presumption that water represented by stock in a corporation is not appurtenant. It could not as to companies already organized conclusively presume that the water was not appurtenant to the land. The court should therefore adopt the view that the language of the statute means at most only that it will be presumed that water represented by stock is not appurtenant, but that this presumption can be rebutted.

In this case the evidence is all to the effect that the water right in dispute was at all times used on the land owned by Spencer and his successors in interest, and therefore the same was appurtenant to such lands.

It will also be noted that the amendment of 1943 does not have any retroactive effect. See *U.C.A.* 1943, 88-2-3. The certificates of stock here involved were all

issued before the amendment of 1943. See also cases cited in foot notes to U.C.A. 1943, 88-2-3.

“Certificates of stock, together with the charter or articles of incorporation and the statute under which the corporation was organized are evidence of a contract between the corporation and the persons named therein or subsequent holders thereof by proper assignment or transfer and between the various stockholders, etc.” 14 *C. J.* page 479, *Sec.* 699 and 18 *C.J.S.* page 723, *Sec.* 258, *subdivision* (b).

# INDEPENDENT OF THE LAW AS TO APPURTEN- ANCY OF WATER TO LAND EDISON SPENCER AND ELIZABETH A. TIBBS OWN THE WATER REPRESENTED BY THE CERTIFICATES.

Of the 448 acres of water right decreed to Richard H. Spencer there are now outstanding the following certificates: No. 86 for 160 shares, 84 for 125 shares, 73 for 80 shares, 72 for 80 shares and 3 acres of uncertificated water right; total 448 acres or shares.

Under the evidence in this case there can be no serious doubt about Edison Spencer being the owner of certificates numbered 73 for 80 shares of stock and certificate numbered 86 for 160 shares of stock.

As to certificate numbered 73 it recites that Edison Spencer is the pledgee. The evidence further shows that it was delivered to Irwin M. Price as security for money borrowed from Price by Richard H. Spencer. If and when the loan was paid by Richard H. Spencer to Irwin

M. Price the title to certificate numbered 73 which was given by Edison to Price to secure his father's loan reverted to Edison. Richard H. Spencer could not acquire title to the certificate thus loaned to him to secure his obligation by the process of paying off the loan. There is nothing in that certificate which even remotely shows that Richard H. Spencer has any right, title or interest therein. Price having disclaimed any interest in that certificate the same belongs to Edison Spencer.

Moreover in 1933 R. H. Spencer by warranty deed conveyed 80 shares of water in Thistle Creek to John Edison Spencer (See John Edison Spencer Exhibit 12). That one may convey a certificate of stock by any writing not on the certificate itself is provided by U.C.A. 1943, 18-3-1 and 1943, 18-3-16.

What has been said about the ownership of certificate numbered 73 applies to certificate 86 for 160 shares of stock. That certificate has been assigned to Edison and the land upon which the same has been and is being used has been conveyed to Edison who in consideration of such transfer and conveyance assumed and paid off the obligation that stood against the certificate and land at the time the conveyance was made.

As to certificate 72 for 80 shares a slightly different question is presented. The evidence shows that such certificate was during the course of this litigation for the most part in the possession of counsel for Edison Spencer, Richard H. Spencer and Irwin M. Price. A futile attempt was made at the trial to show that Irwin

M. Price had not employed counsel. We shall not enlarge upon what we have already said with respect to the affidavit of Price which, of course, was not competent evidence, except to show that he did not claim any water right.

As to certificate numbered 72 the evidence without dispute shows that R. H. Spencer so far as he was able to do gave the water represented by such certificate to Mrs. Tibbs, not only by conveying to Mrs. Tibbs the land upon which the water was used but by word of mouth. He also gave Mrs. Tibbs a deed in which he conveyed to her 20 shares of primary water right. The deed is dated May 21, 1931. (Tr. 35). The evidence further shows that Richard H. Spencer was enjoined from transferring any water right. It may well be that the injunction in such particular was a nullity, but Richard H. Spencer could not be expected to take the chance of being punished for contempt if and when he made a formal transfer of the water. It is contended by plaintiff, to which contention we do not agree, that Richard H. Spencer did not claim such water right is conclusively made evident by the fact that as late as 1944 he disclaimed any and all right to the water represented by such certificate. If, as the plaintiff claims, Richard H. Spencer solemnly disclaimed any and all interest in certificate numbered 72 in 1944 it is indeed difficult to conceive of any law that would permit the administrator of his estate to successfully maintain a claim that he had such an interest. In this connection it will be recalled



that there is a total absence of any evidence showing or tending to show that Richard H. Spencer acquired any right, title or interest in certificate numbered 72 and 73 since he filed his disclaimer in this action. The administrator of the estate of Richard H. Spencer having offered in evidence the affidavit of Price to the effect that Price relinquished all right he had in certificates numbered 72 and 73 in 1941 it follows that if R. H. Spencer did make the disclaimer as contended for by the plaintiff the administrator could not successfully set aside such disclaimer. Therefore if, as appears, Price relinquished his claim to certificates numbered 72 and 73 in 1941 and if as plaintiff contends Richard H. Spencer disclaimed any interest in certificates numbered 72 and 73 in 1944 and there is no evidence whatsoever that Richard H. Spencer has acquired any interest in certificates 72 and 73 since he made his alleged disclaimer in 1944 it necessarily follows that the administrator of the estate of Richard H. Spencer has completely failed to show any title or interest in either certificates 72 or 73.

On the other hand the evidence shows without conflict that Edison Spencer had an agreement with Irwin M. Price in July, 1946 just after the death of Richard H. Spencer wherein and whereby Edison Spencer agreed to carry on the litigation then pending in court to clear up the title to such certificate to pay the costs of such litigation and if successful to pay to Bonnie, the minor daughter of Irwin M. Price, the sum of \$1000.00 and transfer certificate 72 to his sister, Mrs. Tibbs, and that

such arrangement had received the approval of Richard H. Spencer prior to his death. That Edison Spencer is carrying out his part of such agreement is obvious in that he is prosecuting this action notwithstanding if he is successful he will be out the expenses he is put to in so doing and will not even if successful receive the water right represented by certificate numbered 72.

Coming now to certificate numbered 84. The evidence shows that such certificate was delivered to Edison Spencer by his father prior to his death; that Edison took the certificate to Mr. Houtz, the secretary of the Indianola Irrigation Company, to have the same transferred but the secretary refused to transfer the same. There is language in the decree entered in case numbered 2888 which seems to enjoin Richard H. Spencer from transferring any water rights. We doubt that the court had jurisdiction to issue such injunction but it may be that Richard H. Spencer hesitated to make any transfer of such certificate or any certificate for fear that he might be cited into court for contempt.

During the course of the trial counsel for the administrator of the estate of Richard H. Spencer attempted to impeach the testimony of Mrs. Louise Spencer, the wife of Edison, by reading to her some purported testimony given at the time of the hearing had on the petition to appoint an administrator and on the hearing had in the proceedings wherein it was sought to ascertain the nature and amount of property owned by Richard H. Spencer at the time of his death. In such former pro-

ceeding Mrs. Spencer gave evidence touching the papers that were delivered by Richard H. Spencer to his son Edison and Mrs. Tibbs after the same were received from Mr. Beal. It was such papers that were apparently being inquired about. The fact that Mrs. Spencer testified that no other papers were then delivered may not be said to detract from her testimony. She was not asked about any water certificate; that she had in mind the deeds and papers brought from Mr. Beal's office is made evident by the fact that she did not mention the assignment of the ear mark which assignment was executed at about that time. Moreover the circumstances surrounding the delivery of the deeds and the certificate for 125 shares tends to corroborate the testimony of Edison Spencer and his wife.

It is difficult to concieve of Mr. Spencer, the father, transferring to his daughter and son the land which he conveyed to them and then make such land worth only a fractional part of what they are worth as irrigated land by withholding the water right used thereon. Such a transaction is contrary to all human experience. The evidence shows that the land in question was of the probable value of \$100.00 per acre with a water right and from \$10.00 to \$20.00 without a water right. (Tr. 814 to 818 and 820 to 821) It is submitted that it is extremely improbable that Richard H. Spencer intended any such results on the eve of his passing away.

Moreover the record shows that Richard H. Spencer had had considerable trouble and litigation touching his

water rights. It is difficult to concieve of Mr. Spencer, the elder, not making some provision of the manner in which such water rights should be disposed of if and when the same could be transferred. In this connection the attention of the court is directed to *U.C.A.* 1943, 18-3-9 wherein it is provided:

“The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby but with intent to transfer such certificate or shares shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.”

Thus if, as the evidence shows, stock certificate No. 84 was delivered to Edison Spencer with the intention that he should have the water represented thereby then it follows that he is entitled to the water represented thereby. See also in this connection *U.C.A.* 1943, 18-3-10.

If it be said that Edison disclaimed the right to certificate numbered 73 in the disclaimer filed in 1944, the same as did his father, it will be noted that at that time the stock certificate appeared to be owned by Price; that Price was willing to relinquish his claim thereto only on condition that Edison pay to Bonnie, the daughter of Price, the sum of \$1000.00 and deliver certificate No. 72 to Mrs. Tibbs. It was after the disclaimer filed

in 1944 that Edison made the agreement with Price. In this connection the attention of the court is directed to the testimony of Edison at the time of the hearing of the petition for the appointment of an administrator and the proceeding had for the discovery of the assets of the estate. The fact should not be overlooked that Elizabeth A. Tibbs kept house for her father for many years. (Tr. 879) and that John Edison Spencer, who was 42 years of age at the time of the trial, had spent his matured years in helping his father to acquire and save the property which he owned at the time of his death. (Tr. 597)

At the trial counsel for the administrator seemed to place considerable stress on the evidence of Edison at the time proceedings were had for the appointment of an administrator to the effect that he claimed only some three acres of uncertified water. Doubtless Edison had in mind the water right to which he had the legal title. Nothing could possibly be gained by Edison representing that he disclaimed the right to acquire the legal title to the water right which he now claims. There could be no conceivable reason for him to disclaim the right to pursue his legal right to acquire the water right which he is here seeking.

In conclusion it is the contention of Edison Spencer and Elizabeth A. Tibbs:

1. That the Hadlock mortgage is void for uncertainty.

2. That the decree of foreclosure is void for ambiguity and uncertainty in so far as it relates to 60 shares or acres of water.

3. That the plaintiff herein may not, under the guise of a suit to quiet title, in effect amend, modify or render certain either the Hadlock mortgage or the decree of foreclosure in case 2888 civil, because:

(a) The court is without power at this late date to in effect modify, amend or render certain such decree.

(b) That the plaintiff not being a party to the mortgage foreclosure proceeding may not be heard to complain about its terms.

(c) That the only evidence permissible to ascertain the meaning of the decree of foreclosure is the judgment roll itself and such judgment roll is fatally defective in that it does not disclose the subject matter of the foreclosure proceedings.

(d) That there is no pleading in the Hadlock complaint to foreclose on any particular shares or acres of water right.

4. That the deed made by Spencer and his wife to the Indianola Irrigation Company is void for uncertainty.

5. That in any event the decree entered in this case may not be affirmed because it awards to the plaintiff and Hugentobler more water than they are entitled to

and by such decree all of the water rights in Thistle Creek and its tributaries are clouded.

6. That the water right represented by the certificates of stock is appurtenant to the land upon which such water right is and has been used, which land now is owned by Edison Spencer and Elizabeth A. Tibbs.

7. That even if it should be held, contrary to our contention, that the water right represented by the certificates is not appurtenant to the land Edison Spencer and Elizabeth A. Tibbs are the equitable owners of such certificates and entitled to have their titles thereto quieted, provided, that John Edison Spencer shall when such title is quieted, pay to Bonnie, the minor daughter of Irwin M. Price, the sum of \$1000 and transfer certificate No. 72 to Elizabeth A. Tibbs.

8. That the administrator of the estate of Richard H. Spencer has completely failed to establish any interest in any of the water right in question.

9. That the judgment for costs awarded against John Edison Spencer and Elizabeth A. Tibbs should be reversed.

10. That Edison Spencer and Elizabeth A. Tibbs are entitled to a judgment for their costs herein expended.

*Respectfully submitted,*

Elias Hansen

*Attorney for Defendants and  
appellants, John Edison Spencer  
and Elizabeth A. Tibbs*