

1949

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  
Cross-Appellant and Respondent Richard Leo  
Spencer, Administrator of the Estate of Richard H.  
Spencer, deceased, and Substituted Party,  
Defendant

Utah Supreme Court

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Allen G. Thurman; Attorney;

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In the Supreme Court of the  
State of Utah

FILED

AUG 23 1943

JAMES C. WHITTAKER,

*Plaintiff,*

vs.

RICHARD LEO SPENCER, Administra-  
tor of the Estate of Richard H. Spencer,  
Deceased, JOHN EDISON SPENCER,  
ELIZABETH A. TIBBS, VORD SPEN-  
CER, IRWIN M. PRICE, QUE JEN-  
SEN, INDIANOLA IRRIGATION  
COMPANY, a corporation, and THE  
STATE OF UTAH,

*Defendants.*

CLERK, SUPREME COURT, UTAH

No. 7181

Appeal From  
the Seventh  
Judicial District  
Sanpete County

BRIEF OF CROSS-APPELLANT AND RESPONDANT  
RICHARD LEO SPENCER, ADMINISTRATOR OF THE  
ESTATE OF RICHARD H. SPENCER, DECEASED, AND  
SUBSTITUTED PARTY, DEFENDANT.

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# In the Supreme Court of the State of Utah

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JAMES C. WHITTAKER,

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(Note: See Page 4 for indicia, aliases and reference  
symbols used in this brief.)

## INDICIA, ALIASES, REFERENCE SYMBOLS

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The letters T. T. indicate transcript of testimony, and when followed by numerals indicate the page thereof referred to.

The letters J. R. indicate Judgment Roll, and where followed by numerals indicate the page thereof referred to.

The exhibits will be referred to as follows:

Exhibit 1-A John Edison Spencer, et. al., will be referred to as (Ex. 1-A, J.E.S.); Plaintiff's Exhibit B as (Ex. B); Exhibit 5 Indianola Irrigation Company as (Ex. 5, I. I. Co.); Exhibit 12, Administrator's as (Ex. 12, Adm.); and Exhibit 3, Que Jensen as (Ex. 3, Q.J.), etc.

Persons whose names frequently appear in the record will sometimes be referred to as follows:

Federal Building and Loan Association as F. B. & L. A.

Federal Land Bank of Berkeley as F. L. B. of B.

Richard H. Spencer as Richard.

Annie H. Spencer, his wife, as Annie.

John Edison Spencer, as Edison.

Indianola Irrigation Company as I. I. Co.

## INTRODUCTION

Subsequent to the commencement of this action in the Court below, and prior to the trial thereof, the defendant, Richard H. Spencer died and the administrator of his estate, Richard Leo Spencer, was substituted as a party defendant. Also during the pendency of the action, the interest of the defendant

Simon Hugentobler by mean conveyances passed to Que Jensen, who was substituted as a party defendant.

The writer of this brief did not participate in the proceedings below. As a result and owing to the complicated nature of the conflicting claims of the parties, their involved pleadings and the voluminous testimony taken at the trial, he has found it difficult to piece together any kind of coherent factual picture pertaining to the questions involved, notwithstanding both Judge Hansen and Judge Wooley have given rather full statements of fact in their briefs. In view of this difficulty the writer feels that it will make his position more easily understood and be of some assistance to the reader if he were to make a statement of facts, as he understands them, emphasizing those which he deems pertinent to his case, clarify those already given, where deemed necessary, and supply those that may have been omitted, even at the risk of wearying the reader with seemingly needless repetition.

The action was originally commenced by the plaintiff for the purpose of quieting title to sixty (60) shares of Class "A" stock or acres of primary water rights in Thistle Creek, Rock Creek and Clear Creek that had originally belonged to the defendant Richard H. Spencer, but had, through mean conveyances, including a mortgage foreclosure, passed to the plaintiff. Each of the defendants answered and asked for affirmative relief, either by counterclaim, cross-complaint or otherwise, against one or more of the other parties to the action. By the time the trial was concluded and judgment rendered, there was in controversy the ownership of 448 shares of

stock, more or less, in the Indianola Irrigation Company, representing 448 shares of Class "A" stock or acres of primary water rights owned at one time by Richard H. Spencer in the water of said Thistle Creek and its tributaries.

### STATEMENT OF FACTS

Richard and his wife Annie were among the original settlers of Indianola, a farming and ranching community in the north end of Sanpete County, Utah. They resided there from some time prior to 1918 until their deaths, which in the case of Richard was June 3, 1946, and in the case of Annie some time prior thereto. It was there also that they raised a large family of children, the survivors of whom together with the heirs of any deceased child, are interested in these proceedings as the heirs of Richard. The defendants, John Edison Spencer and Elizabeth A. Tibbs are children of Richard and Annie and are not only interested as heirs, but in their own respective personal rights. The defendants, Richard Leo Spencer and Vord Spencer, are also children, but claim no personal interest other than heirs, except in the case of Richard Leo, who is acting in a representative capacity as administrator of Richard's estate.

---

By the year 1918, Richard had acquired considerable land at Indianola and water rights in Thistle Creek and its tributaries, Clark Creek and Rock Creek. On June 21, 1918, parties owning similar lands and water rights organized the Indianola Irrigation Company (Ex. 7, I. I. Co., T. T. 274). The pertinent provisions of its articles of incorporation are set

forth in appellant's brief and will, therefore, not be repeated here. We will, however, by way of emphasis, call attention to the provisions of Article 18 thereof, which in substance provides that subscriptions to the capital stock of the corporation shall consist of the subscribers conveying to the corporation by good and sufficient deed one acre of primary water from the waters of Thistle Creek its branches and tributary, for every share of Class "A" stock of the corporation, etc.; *and that future subscriptions to any capital stock shall be made only upon such terms.* Richard appears from the articles as an incorporator and subscriber to 457½ shares of the Class "A" stock of the I. I. company. His name, however, does not appear among those who signed the articles.

In connection with and as a part of the organization of the I. I. Co. there was executed and delivered to the corporation what was designated "Deed to Water-Rights." (Ex. 5, I. I. Co., T. T. 270-5). By its terms the instrument is an indenture and the signers thereof grant, bargain, sell, assign, transfer and quit-claim to the company all their rights, titles and interests, claims and demands in the waters of Thistle, Rock and Clear Creeks, their tributaries and branches in the respective amounts and classes set opposite their respective names on the basis of one acre foot of primary water for one share of Class "A" stock in the corporation, etc. It is dated June 21, 1918, purports to be signed as of that date by all of the incorporators and bears the rights conveyed expressed in acres of primary or secondary water in connection with each signature. The signature of Richard H. Spencer and his wife affixed thereto, however, appear somewhat irregular. They



appear to be witnessed as of November 25, 1931, and the water right intended to be conveyed, 160 shares Class "A" stock. A red line is drawn through the date of November 25, 1941. John Edison Spencer, appellant and one of the defendants, testified that Richard and his wife signed the deed in 1918. The witness J. C. Houtz, who was one of the witnesses to the signing of the deed by Richard and his wife, Annie, says it was signed the date it bears, i. e., November 25, 1931. (T. T. 263, et. sec.) The trial Court so found, and it will be assumed by the writer that that was the fact. At T. T. 351-2, it appears that at the trial the parties stipulated that the only direct conveyance of any water rights by Richard H. Spencer to the company was this conveyance of November 25, 1931, of 160 acre feet, and that he received therefor certificate No. 57 representing 160 shares of Class "A" stock.

---

It was not long after the incorporation of the company that differences arose over the ownership of the waters of Thistle Creek and its tributaries between the company and others on one side and Richard, members of his family and others on the other side. Suit was instituted, but before trial, apparently, a compromise was reached and a consent or stipulated decree entered. The decree (T. T. 23, 24) was entered on May 6, 1920, and by its terms provided that all the water of Thistle Creek and its tributaries be divided between the parties, including the stockholders of the company, into 1,728 shares of Class "A" Stock and 490 shares of Class "B" Stock, and in substance that Richard H. Spencer was the owner of

448 shares of Class "A" Stock which had not yet been conveyed to the company. Pertinent parts of the decree are as follows: (Ex. A).

"1. \* \* \* that the rights in and to all the waters of said streams (Thistle Creek, Clear Creek, and Rock Creek) were heretofore settled, quieted and confirmed" (by prior Court decree September 9, 1894.)

\* \* \* \* \*

"3. 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 the said Indianola Irrigation Company, said streams 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 were decreed water rights in the total amount of 1728 shares of Class "A" stock and 490 shares of Class "B" stock, including 448 shares of Class "A" Stock decreed to Richard above referred to. The decree then continues:

"And it is hereby further ordered, adjudged and decreed that the said 1728 shares of Class "A" Stock and the 490 shares of Class "B" Stock hereinbefore described represents the entire interest of each and *all* of the parties hereto including the stockholders of the plaintiff corporation (I. I. Co.) in and to *all* of the waters of Thistle Creek, Clear Creek and Rock Creek."

It would seem that the expressions "Class 'A' " Stock and "Class 'B' " Stock were intended to denote the respective interest of the parties in the waters of the streams in question,

whether they had conveyed those rights to I. I. Co. or not instead of denoting the number of shares they respectively owned of the capital stock of I. I. Co.

Richard owned at that time 448 acres of irrigated land and presumably it was the intention of the decree to and it did allot one share of Class "A" Stock (water rights) for each acre of land owned by him. (T. T. 650, 347, 361, Ex. 29, I. I. Co.) The land owned by him and for which the 448 shares of Class "A" stock were allotted to him as follows:

160 acres in the SE $\frac{1}{4}$  of Sec. 8 (Jim Onump)—160 shares.

160 acres in the S $\frac{1}{2}$  of the N.W. $\frac{1}{4}$  and the N $\frac{1}{2}$  of the SW $\frac{1}{4}$  Sec. 5 (Wansits)—160 shares.

73 acres in 3 parcels in the E $\frac{1}{2}$  of Section 5 (Wapitz)—73 shares.

80 acres in Lot 4, Sec. 5 and Lot 1 Sec. 6 (Ponawats)—55 shares.

TOTAL.....448 Shares

These 448 shares allotted to Richard together with the balance of the 1728 shares of Class "A" stock and the 490 shares of Class "B" stock represented all the water in Thistle Creek and its tributaries.

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On January 3, 1922, Richard and his wife, Annie, executed a mortgage in favor of Simon Hugentobler on Lot 4 in Section 5 and Lot 1 in Section 6, Township 12 South and Range 4 East Salt Lake Meridian, together with 55 acres of primary water right in the water of Thistle Creek to secure

the payment of a note in the principal amount of \$2,577.91, (T. T. 27). Attention is called to the fact that the water included in this mortgage is in the form of acres of water rights and not stock in the I. I. Co., and pertains to particularly described land. Said note not having been paid within the time as therein provided or at all, and the said Simon Hugentobler having been made a party to a proceeding then pending referred to in these proceedings as Case No. 2888, which involved the title and ownership of land and water rights of Richard including that mortgaged to him, filed on June 5, 1936, therein a counterclaim and cross petition whereby he sought to foreclose his mortgage (T. T. 75, 76). On December 3, 1936, the Court made and entered its judgment whereby, among other things, Hugentobler's mortgage was foreclosed and in due course, the mortgaged property was sold to him by the Sheriff in satisfaction of his judgment. Thereafter, as above stated, both the land and the water by mean conveyance passed to the defendant Que Jensen, (T. T. 907-911).

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On November 9, 1926, Richard, together with two sons and their respective wives, mortgaged to the Federal Building and Loan Association 73 acres of land in the east half of Section five and all of the southeast quarter of Section 8, Township 12 South 4 east, Salt Lake Meridian, together with 285 shares of the Capital stock of the I. I. Co.; also all water and water rights appertaining to or used upon or in connection with the described real estate, whether for domestic, irrigation or culinary purposes, and whether the same

risers upon said land or not, (T. T. 30, 31, 704). On the same day and presumably as a part of the same transaction, Richard executed and delivered to the F. B. & L. A. an assignment of all his right, title and interest in 223 shares of Class "A" Stock in the I. I. Co., and any additional interest in said stock that may accrue to him, which was then unissued. (Ex. 1, I. I. Co., T. T. 227, 230, Appellant's brief, page 10). The note, the payment of which was secured by said mortgage, not having been paid as therein provided for or at all, the mortgage was duly foreclosed on June 17, 1933, and the land and water rights therein described sold to the F. B. & L. A. in satisfaction of its judgment on April 17, 1934. No redemption having been made, in due course a sheriff's deed covering the land and water described in the mortgage and judgment issued to the F. B. & L. A. On March 2, 1935, the F. B. & L. A. executed and delivered to the I. I. Co. a quit claim deed to all water and water rights acquired by it in the foreclosure proceedings last above referred to and received in consideration therefor Certificate No. 81 representing 160 shares of its class "A" stock. (Exs. 2, 11, I. I. Co., T. T. 230, 297, 298.)

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In the fall of 1935 Richard opened negotiations with the F. B. & L. A. with a view of purchasing back the land and water rights it had taken from him on the foreclosure of the mortgage. He had applied for and obtained debtors relief during the pendency of the foreclosure proceedings and as a result his personal credit at that time was none too good. (T. T. 795). In view of this a plan was adopted whereby title to

but part of the land and water, i. e. the southeast quarter of Section 8 and 160 shares of Class "A" stock in I. I. Co. would be taken in the name of Robert D. Tibbs, a son-in-law of Richard, for the latter's use and benefit, application would be made in the name of Tibbs to the Federal Land Bank of Berkeley for a loan with which to buy the land and water and a mortgage given thereon to secure the loan, (Ex. 20, J. E. S., et. al., T. T. 884). In the furtherance of this plan, the F. B. & L. A. had certificate No. 81 for 285 shares of Class "A" stock previously issued in its name split up into two certificates; one No. 84 for 125 shares issued in its name (Ex. 20 A, I. I. Co. T.T. 368-370) and the other No. 86 for 160 shares issued in the name of the "Federal Land Bank of Berkeley, pledgee for Robert D. Tibb." The loan was obtained and the land and water mortgaged as planned. (T. T. 765, Ex. 3 and 4 Adm.) The balance of the land and water, consisting of 74 acres of land in the E1/2 of Section 5 and 125 shares of Class "A" Stock in I. I. Co. represented by Certificate No. 84, was held by the loan association pending the payment of a balance of \$3,000.00 or \$4,000.00 still due it under his mortgage of November 9, 1926. This amount was soon paid by Richard and the remaining land and water was duly transferred to him. (T. T. 773, 800). Exhibits 19 and 20 of the I. I. Co. bear directly on this phase and for the convenience of the reader are quoted here at length.

Ex. 19, Indianola Irrigation Co.  
Original letter

"Indianola, Nov. 30, 1938.

Federal Building & Loan Association.

My Dear Sirs:

Enclosed please find check for \$158.39 to balance my account with you and many thanks for the kindnesses you have shown me. Please send all papers to me including water stock. I do not want the water stock to go to the Indianola Irrigation Co. We are not settled on the water question yet. Give my best regards to Mr. Andrews, and oblige,

Yours respectfully,  
R. H. Spencer."

Exhibit 20, Indianola Irrigation Co.  
Copy of letter

December 1, 1938

Mr. Richard H. Spencer,  
Indianola, Utah.

Dear Mr. Spencer:

Thank you kindly for your letter of the 30th together with remittance to take up the balance of your note with this association.

We are returning herewith your cancelled note, special warranty deed from this association to you, (Ex. 22 J.E.S. T.T. 889), water stock certificate No. 84 for 125 shares Class "A" Stock of the Indianola Irrigation Company, Abstract of Title No. 49679 to your 59.46 acres; abstract No. 49679 to 120 acres now owned by Tibbs, I presume; and abstract to 1.70 acres also in Sanpete County.

We thank you for taking care of this, Mr. Spencer, and we are indeed happy that you have been successful in arranging your affairs to now have your home clear and free of

incumbrances. We appreciate all the courtesies you have extended to this association.

Very truly yours,  
Loan Department"

After the death of Richard, Edison attempted to have the F. B. & L. A. change the endorsement on the back of Certificate No. 84 from Richard H. Spencer to his name. F. B. & L. A. refused to comply with his request. (Administrator's Exhibits 6 and 7, T. T. 428, 429).

As of the date of the death of Richard, June 3, 1946, the loan from the F. L. B. of B. had not been paid in full, and the Robert D. Tibbs mortgage on the southeast quarter of Section 8 and on Certificate 86 for 160 shares of Class "A" Stock in I. I. Co. was still outstanding and unpaid. On September 8, 1938, however, R. D. Tibbs (Robert D. Tibbs) and wife conveyed by warranty deed the southeast quarter of Section 8 to Richard for a nominal consideration. (Ex. 21, J. E. S., et. al., T. 887). Also on December 5, 1945, R. D. Tibbs and Elizabeth A. Tibbs assigned to R. H. Spencer for a nominal consideration 160 shares of I. I. Co. represented by Certificate No. 86. Prior to November 25, 1946, within six months of the death of Richard the balance due on the indebtedness was paid by Edison Spencer and the Tibbs mortgage was duly satisfied and certificate No. 86 for 160 shares returned on or about January 16, 1947, to Edison with a release of the lien of the F. L. B. of B. on the shares represented thereby duly endorsed thereon (Ex. 4A, 11, J. E. S., et. al.)

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On October 16, 1931, Richard, together with three sons and their wives executed and delivered to W. H. Hadlock, State Bank Commosioner, a mortgage upon certain water interests and 280 acres of land in Section 3, Township 12 South, Range 4 East, Salt Lake Meridian, to secure the payment of a series of notes: (Ex. E. T. T. 37).

The provisions of the mortgage pertaining to the water rights will be considered at some length hereafter, and for the convenience of the reader are as follows:

“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 othrwise, and together with sixty (60) shares or acres of water rights 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.”

The indebtedness was not paid when due or at all, and the law suit No. 2888 above referred to was instituted for the purpose among other things of foreclosing the mortgage. Judgment was entered on December 3, 1936 in the usual form, describing the land and water in the identical language in which they were described in the mortgage. The sheriff sold the property to the plaintiff, State Bank Commisioner of Utah, on December 26, 1936, and in due course a sheriff's certificate of sale and later a sheriff's deed issued. In both the certificate and the deed the property was again described in the identical language as that contained in the mortgage.

(Decree and sheriff's return in Case No. 2888, Ex. 14, 14A, J.E.S., T. T. 576, 583). On May 31, 1939, Rulon F. Starley, Bank Commisioner of the State of Utah, sold to James C. Whittaker, the plaintiff in the instant case, the 60 shares or acres of water rights that R. H. Spencer had presumably mortgaged to his predecessor in office and presumably the 60 acres described and involved in the foreclosure proceeding and sheriff's sale above referred to. (T. T. 96-98).

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At this point attention is again called to the execution by Richard and Annie, his wife, of the "Deed to Water-Rights" (Ex. 5 I. I. Co., T. T. 270-275) on November 25, 1931, by which they conveyed to the I. I. Co., 160 acres of primary water rights or Class "A" shares in the water of Thistle Creek and its tributaries. In consideration of said transfer, the company issued to Richard 160 shares of its Class "A" capital Stock. At first certificate No. 57, dated November 25, 1931, representing 160 shares, was issued in the name of the State of Utah, pledgee of Richard H. Spencer. This certificate was later exchanged for certificate No. 72, dated December 30, 1933, representing 80 shares of Class "A" Stock, issued in th ename of the Federal Land Bank of Berkeley, pledgee of Richard H. Spencer, and Certificate 73, likewise dated December 30, 1933, representing 80 shares of Class "A" stock, issued in the name of the Federal Land Bank of Berkley, pledgee of John E. Spencer.

Edison explains this transaction in the following manner. (T. T. 628, et. sec.)

Questions by Judge Hansen:

"Q. Well, what about certificate 73?"

\* \* \* \* \*

"A. At one time my father was trying to get a loan through and did get the loan through the State of Utah at one time, and there was a certificate by the number of 57 which was issued to R. H. Spencer from the Indianola Irrigation Company, and he pledged that to the State of Utah for a loan, and they held that certificate for two years and the land (Ex 1A. J. E. S. land was  $S\frac{1}{2}$  of  $N.W.\frac{1}{4}$  and  $N.\frac{1}{2}$   $S.W.\frac{1}{4}$  Sec. 5) and we couldn't get any satisfaction out of the State, so they withdrew that loan and delegated that certificate into 72 and 73 and 73 was made to the Federal Land Bank of Berkeley, pledgee, John E. Spencer for the purpose of getting a loan, and Mr. Blaine at that time was a representative of the Federal Land Bank of Berkeley and he said we would get a loan through much quicker by putting in for two small loans than we would for putting in for one, and my father transferred that certificate to me and we got the loan through the State."

"Q. Now, you say 'transferred.' Do you know just how the company over there actually handles those matters?"

"A. Well, all I know the certificate (57) was given into the Indianola Irrigation Company and they issued two certificates for the one."

"Q. All right. Now tell us what then happened to that certificate."

"A. With the certificate or the loan?"

"Q. Well, take the certificate."

\* \* \* \* \*

"Q. Talking about 73."

"A. As soon as the loan was approved, the North Sanpete Bank, a man by the name of Mr. Laury notified

the bank that the loan should go through their bank. The money should go through their bank, and they also notified my father and me, and we discontinued the loan, calling for the certificate and that is when Mr. Price demanded or called for the certificates when they came back from the Federal Land Bank of Berkeley.”  
(T.T. 632)

“Q. All right, Mr. Spencer.”

“A. Going back to this loan my father had borrowed from Irwin M. Price, I think the sum of Six Hundred Dollars, something like that to pay off a judgment to the North Sanpete Bank had on him for stock, which he owned in the bank, and before he could continue his loan through the bank at Berkeley he had to clear this judgment up in the bank, and Mr. Price loaned him his money to clear the judgment up, then after we got the loan started and they stopped it, then Price wanted some security for that money which he had loaned that money to pay that judgment off in the North Sanpete Bank, and he wanted some security after he had foreclosed.”

“The Court. What certificate?”

A. 72 and 73.”

J. C. Houtz, Secretary of I. I. Co., testified (T. T. 267) that on the evening of November 25, 1931, Richard H. Spencer came to the home of his father, J. A. Houtz, who was then Secretary of the I. I. Co. and told his father in effect that he had 160 shares of water that had not been mortgaged or deeded to I. I. Co., that he wanted to deed them to I. I. Co., get the stock shares for the same and use them as security. The witness also testified that the half sheet of paper attached to the “Deed of Water Rights” (Ex. 5, I. I. Co.), on which

the signatures of Richard and Annie appear was attached to the deed and the writing and signatures were placed thereon that evening (T. T. 268), and that it was all done in his presence. On the same day and presumably as a part of the same transaction, I. I. Co. issued and delivered to Richard H. Spencer its certificate No. 57 for 160 shares of its Class "A" Stock as above stated.

On February 27, 1932, Richard H. Spencer and wife mortgaged to I. M. Price the N $\frac{1}{2}$  of the SW $\frac{1}{4}$ , the S $\frac{1}{2}$  of the NW $\frac{1}{4}$  Sec. 5, 12 S, 4E, together with 160 acres of water; also SE $\frac{1}{4}$  of SW $\frac{1}{4}$ , SW $\frac{1}{4}$  or SE $\frac{1}{4}$ , E $\frac{1}{2}$  of SE $\frac{1}{4}$ , Sec. 33, 11S, 4E, Utah County; also NW $\frac{1}{4}$  of SW $\frac{1}{4}$ , Sec. 34, 11S, 4E, Utah County. No mention is made in the mortgage as to the 160 acres of water included therein being represented by Certificates 72 and 73 of I. I. Co., or any other certificates or stock. Edison alleges in his answer and cross-complaint in the instant case and in particular in Paragraph 11 thereof, however, that said water-right mortgaged to Price was evidenced by Certificates 72 and 73; that they were taken by Price in good faith, that they were validly issued by the I. I. Co.; that Price foreclosed his mortgage and purchased said certificates Nos. 72 and 73 in said foreclosure sale and that ever since he has been and now is the owner and holder thereof. (T. T. 455). His counsel, Leland Larson, made in the course of the trial the following statement: (T. T. 568).

"Q. Our contention will be, Your Honor, that this 160 shares of stock, the land was mortgaged to Mr. Price in 1932 in February, as I remember it, and that the certificates were outstanding in the hands of the State of Utah, and then in the Federal Land Bank of

Berkeley; that they weren't available at the time this mortgage was made to be delivered with it, but after they were returned from the Federal Land Bank of Berkeley and long before anything was said about 72 and 73 in case No. 2888 they had been turned over to Mr. Price as security, together with his 160 acres of land and the water right upon which he had a mortgage, and that the water at the time it was mortgaged to Mr. Spencer (sic.—should be Price) was appurtenant to the land at which he took a mortgage and was not appurtenant upon any land on which Hugentobler or the plaintiff in this action had any mortgage.”

When Certificates 72 and 73 were received back from the Federal Land Bank of Berkeley by Richard they were turned over to I. M. Price where they remained until the commencement of this action, at which time they were delivered to Mr. Lou Larson, who was at that time attorney for Richard, Edison and I. M. Price in this case. Both certificates are endorsed to I. M. Price by Richard and Edison. Edison says he endorsed the one bearing his signature in the office of I. M. Price's attorney after the certificates were returned from the Federal Land Bank of Berkeley. (T. T. 668).

During the trial below there was received in evidence the administrator's Exhibits 12 and 16, the former purporting to be a deposition and the latter a quit-claim deed of I. M. Price in both of which he repudiates the authority of his purported counsel in this case, the ownership of certificates 72 and 73 or the water represented thereby, states that he returned said certificates to Richard several years ago, the debt for which he held the same as security having been paid and quit-claims any interest that he had or might have therein to the adminis-

trator of Richard's estate. Judge Hansen in Appellant's Brief at Page 52 says:

"Under such circumstances the writer of this brief has concluded to take Mr. Price at his word, namely: That he secured the water certificate 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."

### SUMMARY OF DATES PERTINENT OCCURRENCES

- June 21, 1918.....Indianola Irrigation Company (I. I. Co.)  
incorporated (Ex. 7, I. I. Co.)
- May 20, 1920.....Decree rendered in water adjudication  
action. Case No. 1406 (Ex. A)
- June 5, 1922..... Hugentobler morgage executed by Richard,  
et, al. (Ex. C)
- November 9, 1926.....F. B. & L. A. Mortgage executed by  
Richard, et. al. (Ex. C)
- October 16, 1931.....Hadlock mortgage executed by Rich-  
ard, et.al. (Ex. E)
- November 25, 1931.....Deed to 160 shares of Class "A"  
Stock or acres of primary water in  
Thistle Creek and its Tributaries ex-  
ecuted and delivered by Richard and  
Annie to I. I. Co. for which they re-  
ceived Certificate No. 57 in I. I. Co.

for 160 shares of Class "A" Capital  
Stock (Ex. F, Ex. 8, I. I. Co.)

February 27, 1932.....I. M. Price Martgage executed by  
Richard. (Ex. 13, J.E.S., T.T. 574).

March 28, 1933.....Suit to foreclose F. B. & L. mort-  
gage, Case No. 2730, commenced.

June 17, 1933.....Judgment entered in Case No. 2730..

December 30, 1933.....Certificate No. 57 exchanged for  
for certificate No. 72 for 80  
shares Class "A" Shock in the name  
of F. L. B. of B., Pledgee R. H.  
Spencer and Certificate No. 73 for  
80 shares of Class "A" Stock in name  
of F. L. B. of B.; pledgee of John  
E. Spencer (Ex. 10, I. I. Co.)

September 4, 1934.....Suit to foreclose Hadlock and Hu-  
gentobler mortgages. Case No. 2888,  
commenced.

March 2, 1935.....Certificate No. 81 for 285 shares Class  
"A" Stock in I. I. Co. issued to  
F. B. & L. A. (Ex. 11, I. I. Co.)

September 25, 1935.....Certificate No. 84 for 125 shares  
Class "A" Stock in I. I. Co. issued  
to F. B. & L. A. (Ex. 13, I. I. Co.,  
T. T. 298).

September 27, 1935.....Certificate No. 83 for 160 shares of  
Class "A" Stock in I. I. Co. issued  
to F. B. & L. A. (Ex. 12, I. I. Co.  
T. T. 297).



- February 20, 1936.....Certificate No. 83 surrendered and Certificate No. 86 for 160 shares of Class "A" Stock in I. I. Co. issued in lieu thereof to F. L. B. of B. Pledgee Robert D. Tibbs.
- December 4, 1936.....Decree entered in Case No. 2888; Hugentobler and Hadlock mortgages foreclosed.
- December 26, 1936.....Sheriffs deed issued on Hadlock mortgage foreclosure.
- November 13, 1937.....Sheriff's deed issued on Hugentobler mortgage foreclosure.
- December 9, 1937.....Sheriff's deed for 60 acres of primary Class "A" water Thistle Creek issued to Bank Commissioner.
- December 1, 1938.....F. B. & L. A. delivered to Richard Certificate 84 for 125 shares Class "A" Stock in I. I. So. (Ex. 20-A I. I. Co.)
- May 31, 1939.....Deed for 60 acres primary water rights from Bank Commissioner to plaintiff, James C. Whittaker.
- October 20, 1944.....Deed from Simon and Susannah Hugentabler to Andrew T. Hartley of 55 acres of primary water right.
- November 23, 1945.....160 shares of Class "A" Stock in I. I. Co. represented by Certificate No. 86 assigned by Robert D. Tibbs to Richard (Ex. 1, Q. J.)

- March 1, 1946.....Deed from Andrew T. Harley to Que Jensen for 55 acres primary water right (Ex. 1, Q. J.)
- May 14, 1946.....160 shares of Class "A" Stock in I. I. Co. represented by Certificate No. 86 assigned by Richard to Edison (Ex. 3, J. E. S.)
- Exact date unknown.....80 shares of Class "A" Stock in I. I. Co. represented by Certificate No. 72, assigned by Richard to I. M. Price.
- Exact date unknown.....80 shares of Class "A" Stock in I. I. Co. represented by Certificate No. 73, assigned by Edison to I. M. Price.
- July 4, 1947.....Quit-claim deed from I. M. Price to Estate of Richard of all interest in stock represented by Certificates Nos. 72 and 73.

## CROSS-APPEAL

### *Assignment of Errors*

The defendant and cross-appellant, Richard Leo Spencer, as administrator of the estate of R. H. Spencer, makes the following assignments of error upon which he relies for a reversal of the part of judgment appealed from by him and for an order of this Court directing the making of Findings of

Fact and Conclusions of Law, and the entering of a judgment granting the full relief prayed for by him.

### I

The Trial Court erred in making that part of its finding No. 7 wherein it found that on November 9, 1926, Richard mortgaged to F. B. & L. A. 285 shares or acres of his said 448 acres of primary water rights. Such finding is not supported by the evidence and is contrary to the preponderance thereof.

### II

The trial Court erred in making that part of its finding No. 7, wherein it found that the conveyance to the I. I. Co by Richard on November 25, 1931 of 160 shares of rights in the water of Thistle Creek and its tributaries includes the 55 acres previously mortgaged to Simon Hugentobler on June 6, 1922, and the 60 acres previously mortgaged to W. H. Hadlock, State Bank Commissioner of Utah on October 16, 1931. Such finding is not supported by the evidence and is contrary to the preponderance thereof.

### III

The Trial Court erred in making that part of its finding No. 8 wherein it found that the mortgage to the F. B. and L. A. covered 285 acres of the 448 acres of primary or Class "A" water right owned by R. H. Spencer, and that the F. B. & L. A. became the purchaser thereof at the sheriff's sale upon the foreclosure of said mortgage. Such finding is not supported by the evidence and is contrary to the preponderance thereof.

### IV

The Trial Court erred in making that part of its finding No. 20 wherein it is found that Richard Leo Spencer as Ad-

ministrator of the Estate of Richard, deceased, is entitled to and owns but 45 shares of the Class "A" Stock in the I. I. Co. represented by certificates 72 and 73, and in effect that Irwin M. Price held a lien upon said certificates subsequent to the entry of the decree in case No. 2888. Such finding is a conclusion and is not supported by any evidence and is contrary to the preponderance thereof.

## V

The Trial Court erred in making that part of Finding No. 21, wherein it found that prior to his death, Richard caused to be transferred to John Edison Spencer Certificate No. 86, representing 160 shares of Class "A" stock of the I. I. Co., and that the said John Edison Spencer is now the owner and entitled to the possession thereof and that he is the owner of the land in said finding described, and three additional shares of water right in Thistle Creek and its tributaries. Such finding is not supported by the evidence and is contrary to the preponderance thereof.

## VI

The Trial Court erred in making that part of its finding No. 28, wherein it found that the disclaimer of Richard has never been withdrawn, modified or questioned in this action, and is still binding upon him and all persons claiming under him. Such finding is not supported by any evidence and is contrary to the preponderance thereof.

## VII

The Trial Court erred in making that part of its conclusion of law No. 1 wherein it states that the plaintiff is entitled to 60/1728ths of the flow of Thistle Creek, and its tributaries

from March 1 to November 1, of each year. Such a conclusion is not supported by any finding or evidence and is contrary to the preponderance of the evidence.

### VIII

The Trial Court erred in making that part of its conclusion of Law No. 2, wherein it states that the defendant Que Jensen is entitled to 55/1728ths of the flow of Thistle Creek and its tributaries. Such a conclusion is not supported by any finding or evidence and is contrary to the preponderance of the evidence.

### IX

The Trial Court erred in making its conclusion No. 3, and the whole thereof. Such a conclusion is not supported by any sufficient finding or evidence and is contrary to the preponderance of the evidence.

### X

The Trial Court erred in making its conclusion No. 4, and the whole thereof. Such a conclusion is not supported by any sufficient finding or evidence and is contrary to the preponderance of the evidence.

### XI

The Trial Court erred in making that part of its conclusion No. 5, wherein it states that the ownership of Richard Leo Spencer as administrator in certificates No. 72 and 73 is subject to the right of the I. I. Co. to have the same surrendered up for cancellation and to have issued to him in lieu thereof 45 shares of the Class "A" Stock of said Company. Such conclusion is not supported by any sufficient finding or evidence and is contrary to the preponderance of the evidence.

## XII

The Trial Court erred in making that part of Paragraph No. 1 of its judgment wherein it decrees that the plaintiff is the owner of 60/1728ths of the flow of Thistle Creek from March 1 to November 1 of each year. Such judgment is not supported by any sufficient finding, conclusion or evidence and is against law and the preponderance of the evidence.

## XIII

The Trial Court erred in making that part of paragraph No. 2 of its judgment wherein it decrees that the defendant, Que Jensen, is the owner of 55/1728ths of the flow of Thistle Creek. Such judgment is not supported by any sufficient finding, conclusion or evidence, and is against law and the preponderance of the evidence.

## XIV

The Trial Court erred in making Paragraph No. 3 of its judgment and the whole thereof. Such judgment is not supported by any sufficient finding, conclusion or evidence, and is against law and the preponderance of the evidence.

## XV

The Trial Court erred in making Paragraph No. 4 of its judgment and the whole thereof. Such judgment is not supported by any sufficient finding, conclusion or evidence and is contrary to law and the preponderance of the evidence.

## XVI

The Trial Court erred in making that part of Paragraph No. 5 of its judgment, whereby the defendant Richard Leo Spencer is awarded by 45 shares of the 160 shares represented by Certificates 72 and 73 for 80 shares each of the Class "A"

Stock of the I. I. Co. Such judgment is not supported by any sufficient finding, conclusion or evidence and is contrary to law and the preponderance of the evidence.

## XVII

The Trial Court erred in permitting Edison to testify over objection to the execution and delivery by Richard H. Spencer of Ex. 3, J. E. S., (T. T. 476,477,480) the same being the assignment of 160 shares Class "A" Stock in I. I. Co. from Richard to Edison, dated May 14, 1946, and for failure to strike the same on motion, which said objections and motion were timely made.

## POINTS ON CROSS-APPEAL AND IN ANSWER TO APPEAL

1. The Trial Court erred in awarding to plaintiff 60/1728ths and to the defendant, Que Jensen, 55/1728ths of the flow of Thistle Creek and its tributaries.

2. The issuance by the Indianola Irrigation Company to the Federal Building and Loan Association of 285 shares of its Class "A" Capital Stock represents an over issue of 51 shares.

3. The over-issuance of 51 shares of its Class "A" Capital Stock by the Indianola Company to the Federal Building and Loan Association was the result of its own negligence.

4. The issuance by the Indianola Irrigation Company to R. H. Spencer of 160 shares of its Class "A" Capital Stock represents an over-issue of 51 shares.

5. The decree in case No. 2888, enjoins and restrains R. H. Spencer, John Edison Spencer, Robert D. Tibbs and Eliza-

beth A. Tibbs from transferring, assigning, encumbering or disposing of Certificates 72, 73, 84 and 86 of the Indianola Irrigation Company or the water rights represented thereby or any other water rights in Thistle Creek, Rock Creek, or Clear Creek, and should be enforced herein pro tanto.

6. R. H. Spencer had always been the equitable owner of Certificates 72, 73, 84, and 86 of the Indianola Irrigation Company, and the water rights represented thereby and at the time of his death was also the legal owner and holder thereof, and there is no competent evidence to the contrary.

7. The water rights represented by Certificates 72, 73, 84 and 86 are not appurtenant to any land.

## ARGUMENT AND AUTHORITIES

### POINT I

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

Judge Hansen has raised and considered in Appellant's Brief the identical question here involved. What he has said on the subject we adopt in the belief that it is sufficient to sustain both his and our position.

It may be in the interest of clarity, however, to again call attention to the provisions of the decree in Case No. 1406 (Ex. A) entered on May 20, 1920, hereintofore referred to, wherein the Court divides the waters of Thistle Creek and its



tributaries into 1800 shares of Class "A" Stock and 500 shares of Class "B" Stock, and decrees to the parties their respective interests described as so many shares of Class "A" Stock, irrespective of whether any such party had conveyed his rights to the I. I. Co., or still retain them as so many acres of primary or secondary rights. No mention is made in the decree as to the nature of the rights included within these classes. Presumably the Court had in mind the Capital Stock classification of the I. I. Co., and intended that its classification would be the same, i.e., one share of Class "A" Stock would represent one acre of primary water rights and one share Class "B" Stock would represent one acre of secondary water rights, etc. (See Ex. 7, I. I. Co. for description of primary and secondary water rights.)

This, to the writer, is rather an unusual method of designating water right units, which generally are described in second feet, acre feet, fractional parts of streams or flows, etc. Also, much of the confusion and difficulty incident to this case may be the direct result of such method of designating the units of water rights involved. In any event, this matter should be borne in mind in attempting to understand the dealings of the parties as hereinafter related.

As the only water rights that Richard H. Spencer ever owned were those designated as Class "A" Stock and as both the plaintiff and Que Jensen claim under him, it follows that all they could possibly get would so many shares of Class "A" Stock. The decree in the instant case states that the plaintiff is the owner of  $60/1728$ ths of the flow of Thistle Creek, etc., the same being 60 acres of the 448 acres or shares of primary

Class "A" Water right of the said Thistle Creek heretofore owned by Richard H. Spencer. The latter portion may be sufficiently consistent with the rights designated in the articles of incorporation of I. I. Co., the decree and the custom of the users of the water to be understandable, but to describe it as 60/1728ths of the flow is obviously what was not intended.<sup>1</sup> In any event, there is an ambiguity which should not be permitted to stand and may well be corrected on this appeal.

<sup>1</sup>Such a designation does not take into consideration the class "B" Stock which no doubt is a substantial part of the total flow of Thistle Creek and its tributaries, and gives to the plaintiff more than was obviously intended.

## POINT 2

THE ISSUANCE BY THE INDIANOLA IRRIGATION COMPANY TO THE FEDERAL BUILDING AND LOAN ASSOCIATION OF 285 SHARES OF ITS CLASS "A" CAPITAL STOCK REPRESENTS AN OVER-ISSUE OF 51 SHARES.

The decree in Case No. 1406 entered May 20, 1920, specifically provided that the 1728 shares of Class "A" Stock and 490 shares of Class "B" Stock represented the entire interest of each and all the parties to the action in and to all of the water of Thistle Creek and its tributaries. In other words, that decree adjudicated all of the water rights in said stream and the separate rights of each and every owner thereof. Richard was a party to that action and decreed to be the owner of 448 shares of Class "A" Stock "not yet conveyed to the corporation," which represented rights in said waters that could be

conveyed to I. I. Co. for 448 shares of its Class "A" Capital Stock, and which in turn represented 448 acres of primary water rights in said streams. An acre of primary water rights, as that term was used, was that amount of water needed to irrigate during the irrigating season, i.e., from March 1 to November 1, one acre of land. Richard had at the time the decree was entered 473 such acres. He was decreed by 448 owing to the fact that he had theretofore conveyed away 25 acres of his primary water rights.

On June 5, 1922, he and his wife executed and delivered the Hugentobler mortgage, which included the two lots of land, heretofore referred to, each containing 40 acres together with 55 acres of primary water rights in Thistle Creek and its tributaries. These shares was all the water that Richard was then using upon those two lots. Deducting the 55 acres from a total of 448 acres of primary rights or Class "A" shares of stock left him with 393 acres or shares free and unencumbered.

On November 9, 1926, he and two sons and their wives executed the F. B. & L. A. mortgage. The land covered by this mortgage consisted of 74 acres, more or less, in the East  $\frac{1}{2}$  of Section 5, and all of the S. E.  $\frac{1}{4}$  of Section 8. The water included was specifically described as follows: (Ex. 30, I. I. Co.)

"Together with two hundred eight-five (285) shares of the capital stock of the Indianola Irrigation Company, a corporation. Also all water and water rights appertaining to or used upon or in connection with the above described real estate, whether for domestic, irrigation or culinary purposes, and whether the same arises upon said land or not."

On the same day and presumably as a part of the same transaction, he executed the stock assignment to the F. B. & L. A. (Ex. 1, I. I. Co.). Attention is called to the following language therein:

*"For value Received, I have bargained and sold \* \* \* to the Federal Building and Loan Association \* \* \* all my right title and interest in 223 shares Class "A" Stock in the Indianola Irrigation Company \* \* \*; and I further assign \* \* \* any additional interest in said stock that may accrue to me in said stock, which at this time is unissued \* \* \* ."*

At the time these two instruments were signed, he had no shares of stock in I. I. Co. of any nature whatsoever. He still had not conveyed to that company the water that had been awarded to him by the decree of May 20, 1920, in case No. 1406, or any part thereof. As a result, the only water that could come within the mortgage would be that which "was appertaining to or used upon or in connection with" the 234 acres of land described, i.e., 234 shares of Class "A" Stock in the waters of Thistle Creek and its tributaries (as described in Case No. 1406) or 234 acres of primary water rights in said creek and not 234 shares of the Class "A" Capital Stock of I. I. Co. He could not mortgage that which he did not have. The land covered by this mortgage was land owned by him at the time of said decree and the water appertaining thereto was part of the 448 shares awarded to him thereby. The 234 shares or acres of primary rights properly included within the mortgage made a total of 289 shares or acres which he had up to that time encumbered, leaving a balance of 159 shares or acres, which he held free and clear. The mortgage, decree of foreclosure there-

of, together with the sheriff's certificates of sale and deed, all describes the water in identical terms.

On March 2, 1935 the F. B. & L. A. quitclaimed to I. I. Co. its right acquired under that decree, specific reference in the quit-claim deed being made thereto. Also in the latter, the following language appears:

"It is the express intention of the parties, however, to include in this conveyance only the water rights not represented by shares of capital stock in the Indianola Irrigation Company of the right to have capital stock issued by the Indianola Irrigation Company to the Federal Building and Loan Association, but only such rights as are based on prior Court decrees and appropriations \* \* \*."

All that such language means may be anyone's guess. One thing that it does mean, however, is that only water rights appertaining to the particular land were being conveyed and that not any shares of the Capital Stock of the I. I. Co. was being conveyed. Notwithstanding this, and with full knowledge that there were only 234 acres of primary water rights mortgaged, foreclosed upon, sold by the sheriff to the F. B. & L. A. and in turn included within the covenance of the latter to it, the I. I. Co. in consideration of such conveyance issued its certificat No. 81 for 285 shares of its Class "A" Capital Stock in direct violations of its Articles of Incorporation, which provides that its said stock shall be issued only on the basis of one share thereof for one acre of primary water rights. In short, I. I. Co. just over-issued its said stock in that transaction in the amount of the difference between 234 and 285 or 51 shares.

On March 12, 1936, the I. I. Co. defendant in case No. 2888, filed a cross-complaint in said case and in Paragraph 5 thereof, alleged as follows:

"5. That prior to the 9th day of November, 1926, defendant Richard H. Spencer was the owned of 448 acres of decreed water rights in said Clear, Thistle and Rock Creeks, all of which were uncertificated water rights. That on or about November 9, 1926, 233 shares of said uncertificated water rights were mortgaged and assigned to the defendant Federal Building and Loan Association by said R. H. Spencer and wife, Annie H. Spencer, to secure a loan, which was foreclosed in June, 1933; that on or about March 2, 1935, certain of said water rights which were supposed to be equivalent to 285 shares of certificated water, were deeded to the said irrigation company by said defendant Federal Building and Loan Association, and upon its representations, request and transfer of said water rights, stock certificate No. 81 of said irrigation company was issued to said loan association for 285 corporate shares of certificated water stock in said irrigation company, of which said stock said defendant loan association now has and possesses; 125 shares shown by certificate No. 84 and the Federal Loan Bank of Berkeley pledgee of Robert D. Tibbs has 160 shares represented by Certificate No. 86; that each share of said certificated stock represents one share of uncertificated water."

The author of the above paragraph states that there were 233 shares of certified water rights mortgaged and assigned to F.B. & L.A. by Richard. This approximates the number of 234 heretofore used by us. It is obvious that the author of the paragraph and we reached our respective figures by adding the number of acres of land covered by the mortgage and taking one share of certified stock in the I. I. Co., as representing one

acre of uncertificated water. The difference between the two figures can be reconciled on the basis that the acreage covered in the mortgage refers to fractional parts of acres, "more or less."

From the foregoing, we also conclude that on March 12, 1936, the I. I. Co. knew that it had issued 285 shares of its corporate stock in consideration of but 233 or 234 shares of uncertificated water rights in Thistle Creek and its tributaries.

### POINT 3

THE OVER-ISSUANCE BY THE INDIANOLA IRRIGATION COMPANY OF 51 SHARES OF ITS CLASS "A" CAPITAL STOCK TO THE FEDERAL BUILDING AND LOAN ASSOCIATION WAS THE RESULT OF ITS OWN NEGLIGENCE.

The 285 shares of Class "A" Capital Stock of I. I. Co. represented by Certificate No. 81 was sold by the F. B. & L. A. to Richard for a valuable consideration. Certificate 81 was re-issued into Certificates 83 and 84 for 160 and 125 shares respectively and in the name of the F. B. & L. A. Later, Certificate 86 for 160 shares in the name of the F. L. B. of B. pledgee of Robert D. Tibbs. Certificate 84 remained in the name of the F. B. & L. A.

The facts as established by the evidence as to how Richard purchased back from the F. B. & L. A. the land and water taken from him in the mortgage foreclosure proceedings are set forth in full in the foregoing statement of facts, and will not be repeated here. Suffice it is to say that he was not a party to the

transaction between I. I. Co. and the F. B. & L. A., wherein the later acquired the 285 shares in question, and that he paid the full prevailing market price for his land and the 285 shares of Class "A" Stock in I. I. Co., plus an additional amount on account of costs and interest added. The fact that the assignment, executed at the same time as the mortgage, refers to 223 shares of stock in I. I. Co. seems to indicate that it was intended that all Richard was to mortgage was 223 acres of primary water rights. The total amount of land mortgaged, aggregated it is true, 234 acres, but of this number 10 acres belonged to H. M. Spencer, one of the mortgagors, who also was awarded 42½ acres or shares of Class "A" Stock "not yet conveyed to corporation" by the decree of May 20, 1920. The difference of 224 is the number of acres of land actually owned by Richard. It is certain that he never drew either the mortgage nor the assignment and the fact that the scrivener described the unit of water rights intended to be mortgaged as shares of Class "A" Stock in the I. I. Co. instead of shares of Class "A" Stock in the waters of Thistle Creek and its tributaries is understandable in view of the looseness in which such rights have been described, not only by the water users themselves, but by Court and Counsel.

The I. I. Co. alone was possessed of sufficient knowledge and facts to have completely understood what was going on and to stop or correct the error being committed. Its failure to do so was the result of its own negligence and it should not now look to the estate of Richard for reimbursement or to be made whole for the loss resulting therefrom, and if said estate is the loser as matters now stand it should be made whole at the expense of I. I. Co.



## POINT 4

THE ISSUANCE BY THE INDIANOLA IRRIGATION COMPANY TO RICHARD H. SPENCER OF 160 SHARES OF ITS CLASS "A" CAPITAL STOCK REPRESENTS AN OVER-ISSUE OF 61 SHARES.

On October 10, 1931, Richard and Annie executed and delivered to W. H. Hadlock, the Bank Commissioner of the State of Utah, their mortgage on the land in Section 3 together with the water which the owners or the described land may be entitled to, and together with 60 shares or acres of water rights owned by Richard in the waters of Indiaola Creek Thisle Creek and Rock Creek, in addition to waters now used for the irrigation of the above described land, i. e., the land in Section 3. None of the land owned by Richard for which he was awarded the 448 shares of Class "A" stock or acres of primary water rights by the decree of May 20, 1920, was contained or located in Section 3. At the time he executed the Hadlock mortgage, he owned all of the 448 shares that had originally been awarded to him. He had, however, as hereinbefore stated, encumbered the following lots thereof: 55 shares or acres to Hugentobler, 234 shares or acres to F. B. & L. A., and 60 shares or acres to Hadlock, if the mortgage of the latter be included, making a total of 349 shares or acres out of a total of the 448 originally awarded to him, leaving a balance of 99 acres or shares which he still owned free and uncumbered. It should be borne in mind that, as of the date the Hadlock mortgage was given, i. e., October 16, 1931, none of the prior mortgages had been foreclosed nor had suit to that end been commenced.

On November 25, 1931, he and Annie executed the "Deed to Water-Rights," whereby he conveyed to I. I. Co. 160 acres of primary water rights. At that time, he was still the owner of 448 acres, 99 of which were free and unencumbered. It might with some propriety be argued, that he had a lawful right to do just as he did in that the legal effect of what he did was to convey 99 shares or acres free and uncumbered and 61 subject to a prior existing mortgage or mortgages. Certainly, he had some interest in the 61 shares encumbered, such as right of redemption, user pending absolute foreclosure, etc.

The evidence it to the effect, however, that Richard represented to I. I. Co. that he had 160 acres or shares of primary water rights in Thistle Creek that had not been mortgaged or deeded to I. I. Co., that he wanted to deed them to I. I. Co., get the stock shares therefore and use them as security. (T.T. 268). Had the prior mortgages given by Richard on his water rights been paid without foreclosure, all would have been well and good. The I. I. Co. would have gotten 160 acres of Primary water rights and Richard would have had 160 shares of the Class "A" Capital stock of I. I. Co., plus 448 less 160 or 288 acres of primary water rights. But the inevitable happened, the depression was on and Richard's finances were in a bad condition. He could not pay the mortgages and they were foreclosed. What was the result? On March 28, 1933 suit in case No. 2730 to foreclose the F. B. & L. A. mortgage was commenced; June 17, 1933, judgment of foreclosure was entered in the F. B. & L. A. suit; September 4, 1934 suit in case No. 2888 to foreclose the State Bank Commissioner and the Hugentobler mortgages was commenced; November 13,

1937, Hugentobler received a sheriff's deed to 55 acres of primary water rights; December 9, 1937 the State Bank Commissioner received a Sheriff's deed to 60 acres of primary water rights. All the mortgages were recorded at the approximate dates of their execution, and prior mortgages foreclosed as against subsequent ones, as a result of which we have the following: On June 17, 1933, 234 acres of primary water rights were taken from Richard on mortgage foreclosure proceedings; on November 13, 1937 55 acres, and on October 9, 1937, 60 acres, or a total on three occasions of 349 acres. As the rights under all of these mortgages accrued as of the dates of their respective recordings, all of which were prior to the assignment of the 160 acres by Richard to I. I. Co. on November 25, 1931, the legal effect was, in general, that as of the latter date Richard had but his original 448 acres of primary water rights less the 349 acres taken by the foreclosure proceedings which left him with but 99 acres that in law he could convey to I. I. Co. for which he received Certificate No. 57, representing 160 shares of its Class "A" Capital stock. As a result there was an over-issue of 61 shares, which Richard received.

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## POINT 5

THE DECREE IN CASE NO. 2888 ENJOINS AND RESTRAINS R. H. SPENCER, JOHN EDISON SPENCER, ROBERT D. TIBBS, AND ELIZABETH A. TIBBS FROM TRANSFERRING, ASSIGNING,

ENCUMBERING OR DISPOSING OF CERTIFICATES 72 AND 73 OF THE INDIANOLA IRRIGATION COMPANY OR THE WATER RIGHTS REPRESENTED THEREBY OR ANY OTHER WATER RIGHTS IN THISTLE CREEK, ROCK CREEK, OR CLEAR CREEK AND SHOULD BE ENFORCED HEREIN PRO TONTO.

Case No. 2888 was commenced September 4, 1934. At that time, the Hugentobler, F. B. & L. A. and Hadlock mortgages were outstanding and the assignment of the 160 acres of primary water right to the I. I. Co. had been made. The action as set forth in the original complaint of the Bank Commissioner sounded in fraud and prayed that certain conveyances alleged to have been made by Richard to his children to defraud his creditors be set aside. An amended complaint combined the elements of the original with those of an action to foreclose the Hadlock mortgage. The relief sought was the foreclosure of the mortgage, the sale of the property covered thereby, an injunction against the defendants from disposing of certain described property, a sale of the property alleged to have been conveyed in fraud of Richard's creditors or so much thereof as was necessary to pay the judgment, together with the usual prayer for general relief.

Richard, Annie, Edison, Robert D. Tibbs, Elizabeth A. Tibbs, the I. I. Co. and R. Leo Spencer were all named as defendants therein, and all appeared by their attorneys J. D. and E. J. Skeen. They demurred, filed motions to strike, to make more definite and certain and finally answered. On

December 3, 1936, the Court made and entered its decree and judgment, wherein it decreed, among other things, that the Hadlock mortgage be foreclosed, the land covered thereby sold, and that the defendants, Richard H. Spencer, Annie H. Spencer, John Edison Spencer, Robert D. Tibbs and Elizabeth A. Tibbs be restrained and enjoined from in any way assigning, transferring, disposing of or encumbering certificates of stock No. 72 and 73, issued by the I. I. Co., 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 said Court, and that the Court retained jurisdiction of the cause for further hearing upon the rights of I. I. Co. against said defendants.

From the foregoing, it is apparent that the Court in Case No. 2888 had at least jurisdiction of the parties if not of the subject matter. Judge Hansen states that because of the indefiniteness of the mortgage sought to be foreclosed by the plaintiff the Court in Case No. 2888 acquired no jurisdictions for the purpose of foreclosing the mortgage. Assuming that to be the fact, but not admitting that it is, that does not mean that the Court in that case did not have jurisdiction of the parties. The cross-complaint filed in Case No. 2888 by I. I. Co. against the Spencers raises the very question now before the Court in the instant case, i. e., the ownership of certain shares of the Class "A" capital Stock of I. I. Co. In its judgment, the Court expressly decreed that it would retain jurisdiction of the case before it to try at a future date that very issue, and in the furtherance thereof enjoined the Spencers

from transferring any water rights owned or claimed to own in Thistle Creek and its tributaries or stock in I. I. Co. representing the same.

It is submitted that no hardship was created thereby, and that the parties were permitted to go into that case and seek and obtain any relief from such a judgment that they might be entitled to. In the mean time, however, if judgments are to mean anything, they could not transfer their claimed water rights or the stock in the I. I. Co., and it is incumbent upon this Court to enforce that decree and if it is enforced, it simply means that certificates 72 and 73 and the water represented thereby beyonged to Richard at the time of his death, and are now the property of his estate.

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## POINT 6

R. H. SPENCER HAS ALWAYS BEEN THE EQUITABLE OWNER OF CERTIFICATES 72, 73, 84 AND 86 OF THE INDIANOLA IRRIGATION COMPANY, AND THE WATER RIGHTS REPRESENTED THEREBY AND AT THE TIME OF HIS DEATH WAS ALSO THE LEGAL OWNER AND HOLDER THEREOF AND THERE IS NO COMPETENT EVIDENCE TO THE CONTRARY.

There is no question but what Richard was the owner and entitled to the possession of certificate 57 representing 160 shares of the Class "A" Capital Stock of I. I. Co. at the time he

received it on or about November 25, 1931, in exchange for the assignment to I. I. Co. of 160 acres or shares of the primary water rights in Thistle Creek and its tributaries. He got it for the purpose of pledging it for a loan. The witness Houtz testified to that as hereinbefore stated (T.T. 267). Edison Spencer testified to the same effect, also as hereinbefore stated (T.T. 628). Edison also testified that Mr. Blane, field agent of F. L. B. of B. told him that two small loans could be obtained easier than one large one, so certificate 57 for 160 shares was exchanged for Certificates 72 and 73 each for 80 shares and sent to F. L. B. of B. with applications for two loans. For some reason the loans failed to be consummated and the certificates were returned, presumably to Edison and his father, Richard, and forthwith were pledged to I. M. Price as part security for a loan of \$600.00 to Richard used by the latter to pay a judgment outstanding against him in favor of the North Sanpete Bank (T.T. 568, 632, 668). Edison in his answer in the instant case says that Certificates 72 and 73 belong to I. M. Price. The latter says that he held them as security for a loan to Richard, that the loan has been paid and that he returned the certificates to Richard. Judge Hansen in his brief states that he has concluded to take Price at his word, which means, we assume, that he has no evidence that will prove anything to the contrary.

Judge Hansen, however, and not withstanding he is seemingly forced to take Price at his word argues that Edison has possession of the certificates and the law presumes from such that they were given to him. If there is any such presumption in law it does not apply to the facts in this case.

In the first place, the record shows that the certificates were delivered to Lou Larsen as attorney for Richard in the present case, and stops there. There is positively no evidence that they were given by Richard to Edison or anyone else; and in the second place, the decree in Case No. 2888 forbids and enjoins a transfer of them or the water represented thereby. If it be claimed that Edison testified that they were delivered to him, such testimony is incompetent (T.T. 640) and contrary to the testimony of both Elizabeth A. Tibbs and Louise Spencer, the wife of Edison, who both testified that Richard during his lifetime and shortly before his death stated in effect that he could do nothing about the water now as it was tied up in the Courts, but that as soon as Court proceedings were over and the water rights were settled, he was going to distribute the water.

It is equally well established by the evidence that at the time Richard purchased back from the F. B. & L. A. the 285 shares of the Class "A" Stock of I. I. Co., represented by Certificate No. 81, that he was the legal as well as the equitable owner thereof. And all of the evidence tends to establish the fact that Certificate 81 was ultimately transferred into certificates 84 and 86, and that 86 was placed in the name of F. L. B. of B., pledgee for Robert D. Tibbs, solely for the purpose of enabling Richard to obtain a loan in the name of Tibbs for the purpose of getting back the property that had been taken from him by the F. B. & L. A. Tibbs paid nothing for the stock, and his pledging the same and obtaining the loan from F. L. B. & B. was purely an accommodation for Rachard. Certificate No. 84 for 125 shares of the Class "A"



Stock of I. I. Co., it will be recalled, was issued in the name of the F. B. & L. A., and finally endorsed by that association to Richard when he had finally paid off the balance of the purchase price to regain his property. Subsequent to the time that Richard purchased from the F. B. & L. A. the 285 shares represented by Certificate No. 81, neither the whole or any part thereof nor any certificate representing the same was sold or given to anybody for a valuable consideration other than as a pledge for a loan.

Indeed, the claim of Edison to the stock represented by Certificate 86 is based wholly upon the alleged assignment by Richard dated May 14, 1946, 19 days prior to the death of Richard, the same being Ex. 3, J.E.S. The execution and delivery of this exhibit was testified to by Edison alone, whose testimony thereto was timely objected to by counsel, and received in evidence over such objection, and after motion to strike the same had been denied (T.T. 640, 475, 477, 480). But for the testimony of Edison as to the execution and delivery of the Exhibit, the record contains not a cintila of evidence of any other witness that would lay the foundation for the introduction of the exhibit into evidence.

It is our position that the testimony of Edison flies directly in the face of the so-called "Dead Man's Statute."

This law is embodied in Section 104-49-2, U. C. A. 1943 and in effect makes incompetent as witnesses "parties or assignors of parties to an action or proceedings or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against

the estate of a deceased person as to any matter of fact occurring before the death of such deceased." Certainly Edison was a party to the proceeding. Not only that, but he was interested in the event of the proceeding. As a party to such proceeding, his adversary, as it is made to appear from his position, was the personal representative of the deceased, Richard H. Spencer, or R. Leo Spencer, the Administrator. Certainly the latter opposes, sues, claims and defends the demands of Edison as the administrator of his deceased father's estate. Edison's testimony clearly relates to a transaction between him and Richard had during the latter's lifetime, and also equally within the knowledge of both Edison and his father. If his testimony is accepted, it will be proof which will have the effect of tending to diminish the estate of Richard. Edison was not called to testify on behalf of the administrator. In fact the administrator, by his counsel, did everything humanly possible to prevent Edison from testifying, by making timely objections, motions to strike, etc.

Mr. Justice Wolfe of this Court, considered the provisions of the statute in consideration in an article written for the Rocky Mountain Law Review. It appears in Volumn 13 at Page 282 of that review as of June, 1941. In his article he makes the following statement:

"A rule of thumb which may not be of universal application but which is at least helpful is as follows: On one side is a person who is seeking to protect the integrity of the estate or to recover assets claimed to belong to it; on the other side is a person who seeks to substract from the estate or resist recovery of claimed assets. The statute is for the benefit of the first side and operates against the opposing party. Therefore, when one stands on the state, affirms and acknow

ledges it for the support of his interest or claim whether that interest be derived directly or through the estate he can take advantage of the statute. But he whose claim depends upon subtracting from an estate or on establishing the fact that the property did not belong to or was derived from the estate is made incompetent by the statute."

Most, if not all, of the Utah Cases bearing on the question are collected in that paper and in support of our contention, we respectfully refer thereto. A repetitious statement of the authorities cited and the reasoning advanced in that article would serve no good purpose at this time. We will rest our discussion on that point under immediate consideration with the reference made.

#### Point 7

### THE WATER RIGHTS REPRESENTED BY CERTIFICATES 72, 73, 84, AND 86 ARE NOT APPURTENANT TO ANY LAND.

By way of introduction to our consideration of this question, we will adopt a statement contained in Judge Woolley's brief, appearing at Page 31 thereof, as follows:

"A water rights which is appurtenant to a particular tract of land because it is used thereon, may be severed from the land and thereby cease to be appurtenant. One way of effecting a severance is by a deed of conveyance of the water right without the land, another way is to convey the land and reserve the water right, and still another way is to mortgage the water right but not the land and then have the mortgage foreclosed."

Section 100-1-10 Utah Code Annotated 1943, provides

that water rights shall be transferred by a deed in substantially the same manner as real estate, *except when they are represented by shares of stock in a corporation*. By use of the expression "represented by shares of stock in a corporation," the implication is that when water rights are represented by shares of stock in a corporation they may be transferred by assignment and delivery of the certificates as shares of stock or transferred in other corporations. Section 100-1-11 provides among things that the right to use water appurtenant to land, or any part thereof may be reserved by the grantor in a conveyance of the land by making reservation in express terms in such conveyance, or it may be separately conveyed.

That when water appurtenant to land is reserved in a conveyance of that land, or conveyed expressly from the land, ceases to be appurtenant, is too well established in the law of this State to justify further consideration or citation of authority. At least for our purposes, we will assume that to be the law.

The water rights represented by certificates 84 and 86 were conveyed separate and apart from the land upon which they were applied as early as March 2, 1935, if not earlier. At least as of that time when the F. B. & L. A. quit-claimed the water right that it had acquired from Richard, et. al. on the foreclosure of the mortgage of November 9, 1926, there was a complete severance of the ownership of the land on which the water so conveyed had been used and the ownership of the water itself. Following close on that transaction, the waters represented by certificate 86 were separately transferred and conveyed to Robert D. Tibbs, and in turn mortgaged to the F. L. B. of B., and in turn were separately conveyed back to

Richard. The waters represented by certificate 84 were separately conveyed to him by the F. B. & L. A. and retained from that time to his death.

The water rights represented by Certificates 72 and 73 were conveyed to the I. I. Co. on November 25, 1931 separate and apart from the land on which they had up to that time been used. When Richard first received the prior certificate, i. e., 57, representing those same rights, he mortgaged that certificate and the water represented thereby to the State of Utah. When that mortgage finally failed to be consummated certificate 57 was converted into 72 and 73 and proffered to the F. L. B. of B. as security for a loan from that source, and when that loan failed to mature the uncontradicted evidence is that certificates 72 and 73 and the rights represented thereby were pledged with I. M. Price as security for a loan to Richard.

Edison Spencer in his testimony given at the trial testified that the water rights originally decreed to Richard under the Decree of May 20, 1920 had been used on various parcels of land other than those on which they were used at the time of the decree; that parts of such land from time to time would be summer-followed, at which time no water would be used upon it, and the water that had been used upon it would be applied to other lands; that the water of Thistle Creek represented by stock in I. I. Co. was generally sold separate and apart from the land; leased from period to period for use on lands other than those of the lessor; and encumbered separate and apart from any encumbering of the land. The testimony of the witness Houtz is significant as to the attitude of Richard himself when he conveyed his water rights to the I. I. Co. for the 160 shares

ofits Class "A" Capital Stock that ultimately become certificate 72 and 73. His testimony was that Richard went to I. I. Co. and stated that he had 160 acres of primary water rights that he had not mortgaged, which he wanted to convey to I. I. Co. for stock so that he could pledge the stock and raise some money.

The question has been before this Court in several instances and with one possible exception the holdings of this Court have been uniform. In *Snyder vs. Murdock*, 59 P. 91, the 4th paragraph of the syllabas reflects the holding of the Court on the question, which reads as follows:

*"Water stock in an incorporated company is personal property, which may be transferred by assignment and by delivery of the certificates of stock under chapter 87, Page 304, Session Laws of 1896."*

In *Fisher vs. Bountiful City*, 59 P 520, the principle is again recognized and is stated in Paragraph 4 of the syllabas as follows:

*"Under Section 1281, Revised Statute, 1898, water rights appurtenant to land pass by deed to the land, unless reserved, or the same may be treated as personal property and separately conveyed."*

In *George vs. Robinson*, 63 P. 819, plaintiff sued the defendant for a breech of warranty on the ground that the covenant of the deed of land conveyed a water right to the land as an appurtenant. The syllabas of the case consisting of two paragraphs reads:

*"1. A deed of general warranty of quiet and peaceable possession does not warrent water rights unless they are appurtenant to the land."*

*2. Water rights represented by shares of stock in a water company are personal property and may be sold and transferred independent of any land, and the water represented by such shares cannot be considered as appurtenant to the land upon which it is used."*

The facts in each of these cases were simple and the holding of the Court plain and unambiguous. The process of converting water rights theretofore appurtenant to land into personal property was simple. All that the owner had to do was to execute a conveyance to the water rights the same as in real estate, that segregated the water right from the land, whether the deed was made to a private individual or to a corporation. In the latter case, the owner received in exchange stock representing the extent of his right in the corporation. The rights represented by this stock were declared by law to be personal property and transferable as such on the books of the company, and when transferred to a bona fide purchaser was binding upon all persons whomsoever.

In the case of *In Re Johnson's Estate*, 288 P. 748, the exception, this Court held that water rights represented by certificates of stock in a water corporation were appurtenant to the land on which the water had been used, and therefore, passed with a devise of the land in which the water was not separately mentioned. To understand this case and its holding in light of the holding of other cases of this jurisdiction, it is important to consider its particular facts. There, a testator devised lands without any reference to water rights. A question arose between the devisees and the executor as to the title or right to the use of water represented by shares of stock in an incorporated water company, the waters of which were and

had been used and applied on the devised land at the time the will was made and at the death of the testator. The testator had owned the shares of stock for a long time; they had neither been mortgaged, pledged, transferred or exchanged during the entire period of their ownership by him, and the water represented thereby during all of such time had been used on the land. In considering what is now Section 100-1-11, U. C. A. 1943, the Court, among other things, stated that if the water right is represented by shares of stock in a water corporation the plain implication is that it may be transferred by a transfer of the certificates of stock in the ordinary manner as personal property. But that does not necessarily mean that water rights thus represented may not be an appurtenant to the land upon which it is used and passes with a conveyance of the land. The Court approvingly quoted from Weill On Water Rights, from which we quote the following: (Weil on Water Rights in the Western States, 3rd Ed., Section 1269.)

"So long as the company remains purely a mutual one, the certificate of stock represents the water rights. 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 appurtenant to the stockholder's 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 any other evidence of any express intention to make a separate sale of the land on which the water is used will carry the water right and right to the certificate as an appurtenance."



At this point, and before leaving a consideration of the Johnson case, it may be well to call to the Court's attention the fact that the question there decided by the Court was not at all necessary to the decision. The same result could have been reached by the Court in holding alone that the devisees of the land were entitled to the water that had been used on it, because the testator in willing the land to them clearly and unmistakably intended that they should have the water as well as the land.

If in *Re Johnson's Estate* is held to be authority for the proposition that water, represented by shares of stock in an incorporated company, used and applied on particular lands mortgaged or conveyed when the mortgagor or grantor was the owner and holder of the shares may under some circumstances be regarded as an appurtenant to the land and pass with the grant thereof, unless separately reserved, it should not be extended in its application to cases the facts of which are not similar to its own. In other words, it should not be extended to, and in the writer's opinion certainly is not authority for, the proposition that water, represented by stock in a corporation is appurtenant to the land on which it is used where previously the stock had been assigned, transferred, pledged or mortgaged. The facts in the instant case are so dissimilar to those of the Johnson case and the authorities therein referred to that it, in the writer's opinion, cannot be considered as binding upon this Court in a determination of the question here presented.

A close reading of prior holdings of this Court reveals that they are all clearly distinguishable in their facts from the instant case. Not one of them, it is contended, varies the rule of

law pronounced in the Snyder, Fisher, and George cases above referred to, excluding, however, the case of *In Re Johnson's Estate*.

The case of *Milford State Bank vs. Westfield Canal & Irrigation Company*, 162, P. 2d 101 is a case in point. There the court had before it, the construction of a contract which was for the sale of certain farm lands together with all water and water rights *thereunto belonging*. The evidence showed that a certificate of 49 shares of stock in an irrigation company was deposited in escrow together with the contract and deed, and that the water actually used upon the land was the equivalent of 23 shares of stock in the corporation, and that never had the water represented by the 49 shares been used on the land. On these facts this Court held that all the grantor intended to convey was the water represented by the 23 shares of stock, which as a matter of fact was "all water and water rights thereunto (to the land) belonging;" and all that the parties intended should be conveyed.

The other cases cited by Judge Hansen are equally distinguishable on the facts with the exception as stated, of the *Johnson Case*, which in the opinion of the writer stands out as a sore thumb in a uniform line of cases decided by this Court under the peculiar laws of this State to the effect that where the owner of water rights separately conveys those water rights to a company and receives in exchange therefore stock in the company, the water ceases to be appurtenant to the land, is represented by the stock received, and passes only upon proper assignment of the stock.

Judge Hansen tries to get around the effect of the amendment of 1943 to Section 100-1-10 by quibbling as to the meaning of the phrase "not be deemed" appearing in the amendment. The original statute in part is as follows:

"Water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares in a corporation; and such deed shall be recorded in books kept for that purpose," Etc.

The amendment reads 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 deed shall be recorded, etc."

It is contended that the phrase in question raises merely a prima facie presumption that the water is not appurtenant to the land when represented by stock in a corporation. To support this, much argument and citing of authorities is restored to. In making his argument and citing his authorities, Judge Hansen, however, fails to take into consideration the legislative history back of the amendment, the purpose for the amendment and what was intended to be accomplished thereby. Clearly the legislature had in mind the ruling in the Johnson Case, and no doubt intended by what it did to obviate the effect thereof insofar as the question pertaining to the appurtenancy to land, of water represented by stock in a corporation is concerned, and to put at rest the highly controverted question in this state as to when such waters are and are not appurtenant.

## CONCLUSION

In conclusion respondent and cross-appellant, R. Leo Spencer, administrator and substituted party herein for Richard H. Spencer, deceased, contends:

1. That of the 448 shares or acres of primary water right from Thistle Creek and its tributaries decreed to Richard by the decree of May 20, 1920, the following number of shares or acres were lost to him by foreclosure of mortgages; that is to say, 55 shares or acres to Hugentobler, 60 shares or acres to the Bank Commissioner of the State of Utah, and 234 shares or acres to F. B. & L. A., making a total of 349 shares or acres so lost.

2. That as of the time of the trial, the 55 and 60 shares or acres referred to in Paragraph 1 were not certificated with the I. I. Co. and were owned by the defendant Que Jensen as successor to Hugentobler and the plaintiff as a successor of the Bank Commission, respectively.

3. That the 234 shares or acres referred to in Paragraph 1 was assigned to I. I. Co. for 285 shares of its Class "A" Capital Stock, making an unauthorized over-issue of that stock of 51 shares.

4. That on November 25, 1931 when Richard purportedly conveyed 160 shares or acres to I. I. Co., he owned but 99 free and unencumbered, which after the Hugentobler, F. B. & L. A. and Bank Commissioner mortgage foreclosures were all the shares or acres of primary water right that I. I. Co. received for the 160 shares of its Class "A" water stock that it had issued to Richard, which resulted in an over issue of its Class "A" stock in the further amount of 61 shares.

5. That the aggregate amount of primary water right lost by Richard on mortgage foreclosures and conveyances or assignments, as aforesaid, aggregated 448 shares or acres, 115 shares, consisting of the Hugentobler 55 and the Bank Commissioner's 60, of which had not been conveyed to I. I. Co. and 330 of which had been so conveyed.

6. For the 330 shares or acres conveyed to I. I. Co., it had issued respectively 285 shares and 160 shares of its Class "A" Capital Stock or a total of 445 shares, which represented an over-issue of 112 shares of its said stock for which it had not received consideration provided for in its Charter or any consideration at all.

7. Of the 112 shares of over-issued stock as in the next numbered paragraph hereof referred to, 51 shares had been over-issued to the F. B. & L. A., and 61 shares had been over-issued to Richard.

8. Of the 445 shares of the Class "A" Stock of I. I. Co. issued and outstanding represented by Certificates 72, 73, 84 and 86, 112 should be ordered delivered to the I. I. Co. and cancelled, which when added to the three shares already uncertificated will leave 115 shares or acres of primary water right originally owned by Richard uncertificated and available to be certificated for the 55 shares or acres of primary water right owned by Que Jensen and 60 shares or acres owned by the plaintiff.

9. The remaining 330 shares should be ordered delivered to I. I. Co., and reissued to R. Leo Spencer, Administrator of the Estate of Richard H. Spencer, deceased, in toto.

10. The testimony of John Edison Spencer as to the execution and delivery of the assignment of water stock represented by certificate 86 for 160 shares Class "A" Stock of I. I. Co., is wholly incompetent and should be disregarded. There being no other evidence in the record before this Court of the execution and delivery of said stock certificates to John Edison Spencer, or any other person, this Court should order judgment to the entered decreeing said Certificate and the stock represented thereby to be the property of the estate of Richard H. Spencer, deceased.

11. The decree of the Court in Case No. 2888 is binding upon R. H. Spencer, deceased, John Edison Spencer, Elizabeth A. Tibbs, and Robert D. Tibbs, in that it enjoins and prevents any of them conveying any water right in Thistle Creek and its tributaries, whether represented by stock or otherwise from and after the date of its entry, which was December 4, 1936, and should be enforced by this Court.

12. The water rights represented by Certificates 72, 73, 84 and 86 are not appurtenant to any land.

13. Richard H. Spencer, deceased, at the time of his death was and at all times prior thereto had been the equitable owner of the stock represented by Certificates 72, 73, 84 and 86 of the I. I. Co., and the water rights represented thereby, and at the time of his death was the legal owner thereof.

Respectfully submitted,

ALLEN G. THURMAN

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Cross Appellant.