

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 : Reply  
Brief of Appellants

Utah Supreme Court

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

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# IN THE SUPREME COURT of the State of Utah

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JAMES C. WHITTAKER,

*Plaintiff,*

vs.

RICHARD H. SPENCER, (in whose name  
RICHARD LEO SPENCER, as Ad-  
ministrator has been substituted, JOHN  
EDISON SPENCER, ELIZABETH A.  
TIBBS, VORD SPENCER, IRWIN M.  
PRICE, SIMON HUGENTOBLE, (in  
whose place Que Jensen has been sub-  
stituted,) INDIANOLA IRRIGATION  
COMPANY and the STATE OF UTAH,

*Defendants.*

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## REPLY BRIEF OF APPELLANTS

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

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JOHN A. HOUGAARD, JUDGE

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ELIAS HANSEN

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

**FILED** **SEP 24 1938**  
ELLAS G. THURMAN  
*Attorney for defendant and appellant,  
Richard Leo Spencer, Administrator*  
NORRIS ERICKSON  
DILWORTH WOOLLEY

*Attorneys for Plaintiff*  
CLERK, SUPREME COURT, UTAH  
JENSEN & JENSEN

*Attorneys for defendant and cross complainant,  
Indianola Irrigation Company*

JOHN S. McALLISTER

*Attorney for defendant Que Jensen*

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COMPANY and the STATE OF UTAH,

*Defendants.*

Case No.  
7181

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There are some matters discussed in the briefs of the respondents and cross appellant which appellants deem of sufficient importance to require a reply brief. In order to avoid repetition we shall discuss all of the questions argued in the various briefs, in this, appellant's reply brief.

In the brief filed on behalf of Que Jensen it is conceded, as we understand it, no claim is made that he is

entitled to more than 55 acres or shares of class "A" water right. He makes no claim that he is entitled to any right to Class "B" water right. That being so there is no controversy between appellants and respondent, Que Jensen, as to the amount of water to which he is entitled. Appellants do contend, however, as pointed out in our original brief that the Jensen water right is represented by certificate No. 84 for 125 shares and not otherwise.

It is argued on page 46 of the plaintiff and respondent Whittaker's brief that because Whittaker had never become a stockholder of the Indianola Irrigation Company and because the appellants are not the owners of any class "B" water right they may not be heard to complain because Whittaker was awarded 60/1728th of the total flow of Thistle Creek and its tributaries. It will be noted that in the mortgage given to Whittaker and in the various proceedings had in the attempted foreclosure of that mortgage and in the sheriff's deed no mention is made of 60/1728ths of the flow of Thistle Creek and its tributaries. The language used in the various instruments is "together with sixty (60) shares in the waters of Indianola Creek, Thistle Creek and Rock Creek in addition to water now used for the irrigation of the above described lands." So far as the record shows R. H. Spencer never did own any class "B" stock. While the evidence shows that he once owned 448 shares of class "A" stock he, so far as the evidence shows, never owned 448/1728th of the right to the use of the waters of Thistle Creek or its tributaries.

Moreover, it will be noted that by the terms of Article 5 of the articles of incorporation of the Indianola Irrigation Company it is provided that from March 15th to June 15th the owner of class "B" stock shall be entitled to the same quantity of water per share as the class "A" stock. (See plaintiff's Exhibit 7). Thus by awarding to Whittaker 60/1728ths of the water of Thistle Creek he is given more water than he is entitled to and the same is taken from the other water right owners, both the class "A" and class "B". The evidence also shows that the waters of Thistle Creek and its tributaries were distributed by the Indianola Irrigation Company without regard as to whether the same was represented by shares of stock or otherwise.

The fact that the court below awarded to Whittaker 60/1728ths of the waters of Thistle Creek further shows that the Whittaker mortgage is so vague and uncertain that neither the trial court nor counsel who drew the decree can tell what water was mortgaged or foreclosed.

Notwithstanding the evidence is all to the contrary counsel for Whittaker bases much of his argument on the erroneous assumption that R. H. Spencer mortgaged 285 shares or acres of stock to the Federal Building and Loan Association. That mortgage was executed by H. M. Spencer, Ida Spencer, R. Leo Spencer, Grace Spencer, R. H. Spencer, Leo Harold Spencer and Fern Spencer. (See Exhibit G) The land covered by that mortgage did not belong to R. H. Spencer. That R. H. Spencer mortgaged only 223 acres or shares of water is made

undisputably evident by the assignment. (Irrigation Co. Exhibit 1) Neither of the appellants, John Edison Spencer or Elizabeth A. Tibbs were parties to that mortgage or the foreclosure thereof.

On pages 13 to 15 of the Whittaker brief some comfort seems to be derived from giving bad names to the parties who are resisting plaintiff's claim. We are at a loss to see wherein such argument can add to plaintiff's claimed title to the water right claimed by him or detract from the appellants claim to such water right. It would have been very enlightening if counsel had cited some authority bearing upon the question of the materiality of what someone might think of his adversary has upon the question of the rights of the parties to the controversy. We have always understood the law to be that such matters are not germane to a civil action. If plaintiff's title to the water right is valid or invalid it is so without regard as to who may or may not be the parties litigant. As to the Price affidavit as we pointed out in the original brief the same is not competent evidence to prove the absence of title in the appellants.

Beginning on page 15 of respondent's brief it is argued that Hadlock had not lost his right to the use of the water right in controversy because he did not secure the sheriff's deed until December 9, 1937. Plaintiff overlooks the fact that on October 29, 1933 Richard H. Spencer and Annie Spencer conveyed to appellant John Edison Spencer the South one-half of the Southeast quarter of Section 5, Township 12 South, Range 4

East, Salt Lake Meridian, together with 80 acres of water in what is known as Thistle Creek. This action was not commenced until July, 1941 which was more than 7 years after John Edison acquired the water right represented by certificate 73. John Edison Spencer owned, occupied and used the land and water right adversely to the claim of the plaintiff and all the world for more than the statutory period. That the statutes of limitations ran against the plaintiff is the holding of this court in the case of Boucofski vs. Jacobson, 104 Pac. 117; 36 U. 165. Neither of the appellants was a party to the Hadlock mortgage.

Beginning on page 17 of the Whittaker brief it is argued that appellants are estopped from claiming that the Whittaker mortgage is void. We again call the attention of the court to the fact that neither of the appellants was a party to the Hadlock mortgage and so they could not be held to any covenants in that mortgage. Moreover if the mortgage is void, as we contend, it is void for all purposes. As we have pointed out in our original brief an instrument which is void is without legal effect. It is the same as if the instrument did not exist.

We have heretofore in our original brief discussed the claimed disclaimer of the appellants. The claimed disclaimer did not apply to the water right then claimed by Whittaker. The principal difficulty with plaintiff's contention is that no one can tell what 60 acres of water was the subject matter of that action. Apparently the

court in the judgment and decree in this case and counsel who drew the same abandoned all claim of a right to 60 acres of water and concluded that plaintiff was entitled to 60/1728ths of the water of Thistle Creek and its tributaries. There is a substantial difference between 60 acres or shares of water in Thistle Creek and 60/1728ths thereof.

It is further contended that appellants are estopped by the judgment rendered in case No. 2888 Civil. Of course if that judgment is valid they are estopped but if void for uncertainty, as we contend, they are not estopped. A void judgment is the same as no judgment. That being so it cannot work on estoppel. To say that the judgment constitutes an estoppel is to give it at least some validity. We have no quarrel with the law cited on pages 21 to 24 of plaintiff's brief. The difficulty with the law there cited is that it has no application to the facts in this case. The law there cited applies to valid judgments or judgments that are at most voidable. If a judgment is void there is nothing to appeal from because in law it does not exist. A void judgment cannot settle any rights because in contemplation of law it does not exist.

In this connection we direct the attention of the court to the findings and attempted judgment or order touching the matter of the Spencers transferring water certificates or conveying water right. We have heretofore, in our original brief, pointed out that such matters were without any issues raised by plaintiff's complaint and the answers thereto. Moreover, such findings and



judgment do not fall within the rule of res adjudicata.

In paragraph 14 of the decree of foreclosure in case 2888 it is, among other things, provided that: "The court hereby retains jurisdiction of this cause for further hearing upon the rights asserted by the Indianola Irrigation Company against said defendants." So far as we have been able to ascertain the courts uniformly hold that the doctrine of res adjudicata applies only to final judgments. 31 Am. Jur., Sec. 436, page 95 and cases there cited. Moreover, as pointed out in the original brief there is nothing which specifically awards to the plaintiff any right to the water right claimed by the appellants, especially is that so as to the water right evidenced by certificates 72 and 73. If the court will read the decree of foreclosure in 2888 it will look in vain to find any language therein which foreclosed the mortgage on the water right represented by certificates 72 or 73 or any other water right that can be identified.

Beginning on page 29 and extending to page 46 of the Whittaker brief much is said about the elusive character of a water right and of the difficulty of describing the same with any degree of accuracy. If a water right is appurtenant to land and as such real property all that one need to do is to describe the land to which it is appurtenant. On the other hand if it is represented by shares of stock all that need be done is to describe the certificate giving the number thereof, the number of shares, the date of issue or other identification marks so that persons dealing with the right or the courts in

fixing the rights may determine with some degree of certainty what is the subject matter of the mortgage or conveyance. Anything short of that is certain to lead to confusion and makes property and property rights dependent upon a mere guess as to who is the owner thereof or has an interest therein.

It is the function of the law to prevent such results. If the mortgage in this case had described the land upon which the water right was used that plaintiff claims was covered by the mortgage we would not be here attacking the validity of the mortgage.

If the Hadlock mortgage or the decree of foreclosure thereof is held to be valid no one could buy or take a mortgage on any part of the 448 shares or acres of water right owned by Spencer without running the risk of being confronted with the claim that the Hadlock mortgage covered the particular 60 shares or acres of such water right that may have been purchased or taken as security for a loan.

On page 33 of the Whittaker brief there is a quotation from the case of Payton, et al, vs. Browning, 290 Pac. 253. The citation is apparently in error as no such case is reported in 290 Pacific. However, the citation sounds like good law. It is difficult to see how the law there announced can aid the plaintiff in this case. There is nothing in the mortgage here involved which indicates the particular water right that was intended to be covered by the mortgage. Even if it should be concluded that the mortgage covered the water right evidenced by

certificates 72 and 73 the uncertainty is by no means removed. The most that can be said is that the field of uncertainty is narrowed down to 160 acres or shares instead of 448. If as plaintiff seems to contend the mortgage covered the water which was appurtenant to the land upon which the water represented by certificates 72 and 73 was used. If so which 60 acres of the 160 acres of water right was covered by the mortgage? No one can tell either from the language of the mortgage or from any evidence offered at the trial. To say that the mortgage covered any particular water right is a mere guess. If it covered the water represented by certificate 73 then and in such case the Hadlock mortgage is barred because John Edison Spencer at the time the action was brought had owned and used the water for more than 7 years. If it is the water represented by certificates 84 or 86 for 125 and 160 shares or acres of water then and in such case the plaintiff is precluded from asserting any such claim because he is bound by the foreclosure proceeding had by the Federal Building and Loan Association. W. H. Hadlock and John A. Malia, State Bank Commissioner, through whom plaintiff claims title were parties defendant in that proceeding. It is of course elementary that a judgment is binding on those who are in privity with a party to a judgment. That leaves the water right represented by certificate number 72 for disposition. Is there any evidence in the mortgage or for that matter in the evidence which shows or tends to show that the parties intended that the Hadlock mort-

gage covered the water right represented by certificate numbered 72.

In its finding numbered 19 the trial court found that the 55 shares of water right to Simon Hugentobler and the 600 shares of water right to the State Bank Commissioner should come out of certificates 72 and 73. J. R. 261 and 262. We have already pointed out that John Edison Spencer had used that water for more than 7 years. Such use was adverse to his father, R. H. Spencer, Hugentobler, the plaintiff and his predecessors in title. That being so neither plaintiff nor Hugentobler have any valid claim to that water. If Hugentobler's right is to be taken out of certificate 72 there remains only 25 shares for plaintiff from that source. To say that the parties to the Hadlock mortgage intended that the same should cover that mortgage is a mere guess, and is at variance with the claim made by the Bank Commissioner in his mortgage foreclosure. It is likewise at variance with the decree entered in this case.

On pages 17 and 18 counsel for the plaintiff discusses the covenants contained in a mortgage. Even if we should concede all that is there said about covenants in a mortgage such concession would add nothing to the description contained in the Hadlock mortgage. The most that could be said with respect to any covenants contained in the mortgage is that if the covenants were broken a cause of action for damages would accrue to the coveantee. That is the remedy awarded for the breach of a

covenant. Obviously neither the mortgage foreclosure nor this proceeding is such an action.

On page 41 is quoted a provision from Compiled Laws of Utah, 1888 to the effect that: "The right to the use of water may be measured by fractional parts of the whole source of supply, or by fractional parts, with limitation as to period of time when used." In our view the law just quoted makes against plaintiff in that it requires that a right to the use of a water must be definite. The description of the water right mentioned in neither the Hadlock mortgage nor the decree of foreclosure describe or even tend to describe a fractional part of any whole source of supply or limitation as to period of time of use.

In his brief plaintiff seems to be under the impression that we are questioning the sufficiency of the language of 60 acres or shares of water right. That is not the basis for our contention. Our contention is that there is no way of determining or identifying any particular 60 acres or shares out of the 448 acres or shares of water right that was owned by Spencer. Of course if Spencer had mortgaged or conveyed all of the 448 shares or acres of water right which he owned there could be no uncertainty or ambiguity. All that need be done in such case is to ascertain the number of shares or acres that were owned by Spencer. When the Federal Building and Loan Association conveyed its water right to the Indianola Irrigation Company the conveyance covered all its water right in Thistle Creek. Such a conveyance so far

as our investigation reveals has met with uniform judicial approval.

On page 44 of plaintiff's brief it is argued that Spencer mortgaged a water right to Thistle Creek. With that we agree. It is also said that it is clear that Spencer did not intend to give a second mortgage. With that we cannot agree. It is by no means unusual to give a second mortgage or for a mortgagee to accept a second mortgage, especially when the mortgagor is in financial difficulties as was R. H. Spencer when he gave the mortgage.

It is also said that the water right mortgaged was on Section 5, the Wansits Farm. That is where counsel for plaintiff not only engages in speculation but departs from the claim made by Hadlock in his complaint and from the decree of foreclosure in neither of which is mention made of certificates 72 or 73 or the land situated in Sections 5 or 8. Moreover, even if the Hadlock mortgage may, contrary to our contention, claim that the Hadlock mortgage covers a water right represented by either certificates numbered 72 and 73 or land in Sections 5 or 8, which certificates or what land to which water is appurtenant is covered by the mortgage. No one knows or has the means of finding out. It was evidently because of such unsurmountable difficulty that plaintiff was awarded 60/1728th of the water of Thistle Creek, an award wholly without support in the evidence.

The conclusion that may be reached by this court is fraught with far reaching importance. If the Hadlock

mortgage and the decree of foreclosure thereof is held to be valid no one can safely purchase or take a mortgage on a water right lest some one who claims a lien on some indefinite part thereof shifts his claimed lien to such a part as may suit his convenience.

The questions discussed in the brief of the Indianola Irrigation Company is for the most part discussed in our original brief and elsewhere in this brief. It is true as stated in the brief of the Indianola Irrigation Company that Elizabeth A. Tibbs testified that she had never received the twenty acres of primary water right mentioned in the deed dated May 31st, 1931 from R. H. Spencer and his wife, Annie H. Spencer. That conveyance is a fact in the case and shows that the father and mother of Mrs. Tibbs intended that she, Mrs. Tibbs, should have a water right with the land which was conveyed.

It is further argued that appellants in the court below claimed that all the certificates of water right were valid. It is true that appellants made such a claim and made the further claim that without regard to whether the certificates were or were not valid the water right represented by the certificates, in dispute, was appurtenant to the land upon which said water right was and for many years last past had been used.

It was the Indianola Irrigation Company that made the attack on certificates No. 72 and 73. That Company seems to take the inconsistent position that it can repudiate the issuance of the certificates and still maintain the claim that Spencer conveyed to the Indianola Irriga-

tion Company 160 acres or shares of water right in Thistle Creek. As we pointed out in our original brief the authorities hold that if a transaction or contract is rescinded it must be rescinded in toto. The law does not permit a partial rescision. If the transaction whereby certificates 72 and 73 are revoked it necessarily follows that the water right represented by such certificates is and always has been appurtenant to the lands conveyed to John Edison Spencer and Elizabeth A. Tibbs.

There are a few matters discussed in the cross appeal of Richard Leo Spencer, administrator, which we deem require a reply. On pages 43 to 45 it is argued that because of the provisions contained in case No. 2888 restraining Richard H. Spencer from disposing of certificates 72 and 73 or any other water rights held by him that any transfer of water rights in Thistle Creek and its tributaries are a nullity. We have already discussed that matter in our original brief and shall not here repeat what is there said.

Even conceding that the court, contrary to our contention, had jurisdiction to make such an order the same could not possibly be of any aid to R. H. Spencer's administrator because; First, Richard H. Spencer had made two conveyances of the water represented by certificate No. 73 before the judgment in case 2888 civil was entered. As far back as September 15, 1933 Richard H. Spencer and his wife, Annie H. Spencer, conveyed to John E. Spencer the South one half of the Southwest Quarter of Section 5, Township 12 South, Range 4 East,



Salt Lake Meridian, together with 80 acres of water in what is known as Thistle Creek. On October 29, 1933 a new deed was given to correct the description of the land. That deed also recites: "Together with 80 acres of water in what is known as Thistle Creek." Both deeds were placed on record soon after they were executed. (See transcript pages 51 and 52 and John Edison Spencer's Exhibit 12) Second, neither R. H. Spencer nor his administrators may now be heard to attack his own wilful acts on the ground that he was enjoined from conveying away his water rights. The provisions in the decree relied upon were not intended for his protection. Nor may he nor his representative take advantage of his own acts upon the ground that he was enjoined from performing the same. The law in such particular is discussed at some length in 24 Am. Jur. page 263, Sec. 114; page 265, Sec. 116; page 267, Sec. 118; page 289, Sec. 150; page 290, Sec. 151. Numerous cases will be found collected in the foot notes to the text which support the same.

The authorities above cited in the main deal with fraudulent conveyances. The principles of law are however applicable here in that if the injunction, even if valid, was obviously intended to prevent the certificates or water rights owned by them from coming into the possession of an innocent purchaser for value.

Moreover the provisions of the claimed injunction does not even purport to enjoin the Spencers and the Tibbs from making transfers among themselves. As they are all enjoined it could not possibly make any dif-

ference to any one for whose benefit the purported injunction was issued as to which one of the enjoined parties might hold the title to the water right referred to in the alleged injunction. It will be noted that they are all enjoined from making a transfer. There is nothing in the language which purports to prevent them from making a transfer among themselves and no useful purposes could be served by so restricting the right of Richard H. Spencer from dealing with his property. Certainly he could not be enjoined from making a will disposing of his property, including his water right. By the same token when he knew that his end was near, to say that he was enjoined from fixing up his property among his children is, in our view, wholly without support in the records before the court.

On pages 33 to 42 of the brief of the administrator it is argued that there was an over issue of stock by the Indianola Irrigation Company. Obviously there was no over issue directly to R. H. Spencer because at no time was there any stock issued to Richard H. Spencer other than the certificate for 160 shares.

It is argued in the brief of the administrator of the estate of R. H. Spencer that there is no competent evidence showing that R. H. Spencer conveyed the 160 shares of water evidenced by certificate 86 to John Edison Spencer. We have discussed that phase of the case in our original brief.

We again direct the attention of the court to the fact that the administrator offered evidence as to what

John Edison Spencer had testified to on a prior hearing as to the water right in dispute. That being so the administrator in legal effect made John Edison Spencer his witness. The administrator could not procure from John Edison Spencer evidence favorable to his side of the controversy and then prevent John Edison Spencer from testifying as to matters that were unfavorable to the administrator. Under such circumstances the authorities teach that the incompetency of a witness is waived.

On pages 50 to 58 of the administrator's brief it is contended that the water right represented by the certificates is not appurtenant to the land upon which the same was used throughout the years. We have covered that question in our original brief. We shall not repeat what is there said, except to again observe that at no time was the water right owned separate and apart from the owner of the land.

When the land was mortgaged the water right was mortgaged. When the mortgages were foreclosed such foreclosure was had on both the land and the water right used thereon. There were times when there was only a small flow of water and all of the water was put into one stream, but even then the water was always applied to the lands upon which the water had always been used. Indeed so far as the evidence shows there was no other land upon which it could be used.

We submit that the judgment and decree of the court below should be reversed to the end that the plaintiff is without right to the water right claimed by him,

that Simon Hugentobler be awarded only 55 shares or acres of water right; that the other water rights be awarded 80 shares or acres to Mrs. Tibbs and the remainder to John Edison Spencer and that appellants be awarded their costs incurred in this court and in the court below.

Respectfully submitted,

ELIAS HANSEN,

*Attorney for Appellants.*