

1952

# Salt Lake City v. Paul McFarland : Brief of Defendants and Appellants

Utah Supreme Court

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McKay, Burton, McMillan and Richards; Attorneys for Defendants and Appellants;

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In the Supreme Court  
of the State of Utah

FILED

SEP 15 1952

SALT LAKE CITY, a municipal corporation,

*Plaintiff and Respondent,*

vs.

PAUL McFARLAND and MRS. PAUL  
McFARLAND,

*Defendants and Appellants.*

Clerk, Supreme Court, Utah

Civil No. 7870

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Brief of Defendants and Appellants

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McKAY, BURTON, McMILLAN AND RICHARDS

*Attorneys for Defendants and Appellants*

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## Brief of Defendants and Appellants

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### STATEMENT OF FACTS

This action was brought by Salt Lake City against the defendants named to recover for water allegedly furnished by plaintiff to defendants. Plaintiff's theory is announced in the following paragraph of the complaint:

"3. That on or about January 3, 1950, the defendants and each of them became indebted to plaintiff for water furnished by said plaintiff to said defendants at their special instance and request in the agreed sum of One Hundred Eighty-four and 31/100 (\$184.31) Dollars (R. 1).

The right to the use of the waters of Big Cottonwood Creek was originally determined in the decree referred to as the "Morse Decree," dated April 13, 1944. (The Progress Company, a corporation, vs. Salt Lake City, a municipal corporation, and numerous other persons and parties; District Court of Salt Lake County Decree No. 8921) (R. 118-131). The owners of the rights of the irrigation ditch known as the "Green Ditch" were confirmed and defined in that decree.

On or about March 22, 1915, the owners of those rights incorporated under the name "Green Ditch Water Company." The Articles of Incorporation of this corporation are introduced in evidence in this action as "Exhibit 2." The powers of the corporation, insofar as they are pertinent to this action, are as follows:

"to own, hold, maintain, operate, encumber, contract to sell, sell and convey reservoirs, and to acquire by appropriation, purchase or otherwise, and to own, lease, sell, exchange, distribute and dispose of all water and water rights for every purpose whatsoever; to acquire title to the Green Ditch situate in Sections 8, 9, 10, 14, 15 and 16, Township 2 South, Range 1 East, Salt Lake Meridian, Salt Lake County, Utah, together with the easements and servitudes and the property rights incident thereto; to acquire the title to the water rights of all waters of Big Cottonwood Creek distributed through said Green Ditch; to maintain and keep in repair said Green Ditch and all of the structures used in connection therewith; to control the distribution between the stockholders of this corporation and owners of the waters of said Big Cottonwood Creek which would properly be distributed through the Green Ditch; to fix, charge and collect from its stockholders reasonable tolls, rentals, maintenance and

service charges in such manner as may be determined upon by regulation or bylaws adopted for that purpose, or by means of assessments levied upon its capital stock in accordance with the laws of the State of Utah, and to fix such remedy or penalty as its board of directors may decide upon for the non-payment of such charges so fixed or assessed against its stockholders."

The Articles further provide in Article VIII:

"Each share of stock of this corporation shall represent a water right equal to 1/2280 part of the water decreed to the Green Ditch in the suit pending in the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake, wherein The Progress Company is plaintiff and Salt Lake City and others are defendants, being Case No. 8921."

Article XIV provides:

"This corporation has acquired title to the Green Ditch situated in Sections 8, 9, 10, 14, 15 and 16, Township 2 South, Range 1 East of Salt Lake Meridian, and the waters of Big Cottonwood Creek, Salt Lake County, Utah, which have heretofore been distributed to the owners thereof through the Green Ditch, which is of a fair cash value of Twenty-two Hundred Eighty Dollars, and it has accepted the same in payment in full for the stock subscribed by the incorporators of this company as above set forth."

Article XV provides:

"No lands, interest in land, water or water rights shall be purchased or sold for or on behalf of this corporation by its board of directors except upon approval thereof by an affirmative vote of all of the capital stock of this corporation issued and outstanding at a meeting duly called to consider such question."

There is no provision in the Articles for their amendment.

On or about December 15, 1920, an agreement was entered into between Salt Lake City, a municipal corporation, plaintiff in this action, and part of the stockholders of the Green Ditch Corporation. A copy of the agreement is introduced in this action as "Exhibit H." It provides that the stockholders

"do hereby transfer and convey to Salt Lake City all rights, title and interest in and to the perpetual use of the waters of Green Ditch to which each respectively is entitled; subject, however, to the reservations, terms and conditions in this agreement set forth.

"Each of the parties hereto reserves an ownership in and the right to the constant and perpetual use during the winter season of each year, to-wit: from October 1st to April 1st following, of water in said Green Ditch equivalent to and upon the basis of 500 gallons per daly for each acre of land owned by any such party under the Green Ditch; and during the summer months of each year, to-wit: from April 1st to October 1st following, of water equivalent to and upon the basis of 900 gallons per day for each acre of land owned by any such party under the Green Ditch. The exact acreage owned by each of the parties hereto in whom said 500 gallons of water in the winter season and said 90 gallons of water in the summer season per acre, as above set forth, is reserved and title thereto retained is as follows: \* \* \* "

The agreement provided further that the said water so reserved "to be distributed and delivered by Salt Lake City to said parties shall be distributed and delivered by Salt



Lake City free of all charge and expense to the respective owners through water mains to be laid and maintained by Salt Lake City, as hereinafter more specifically set forth." The agreement further provided that Salt Lake City should furnish and deliver to the stockholders designated amounts of water suitable for irrigation purposes.

The contract was explicit that the water delivered by Salt Lake City for other than irrigation purposes in the amounts specified should be based upon the *acreage* of the person who signed the agreement. (See for example Page 5 of Exhibit H). The agreement provided further:

"If any such water owner uses water in excess of the quantity of water to which he is entitled, he shall pay for the same at the regular Salt Lake City water rate charges at the time of use. Any water owner, his successors and assigns, shall have the right to use the waters of Salt Lake City through said pipe line in excess of the quantity of water so owned and reserved by him upon the payment by him to Salt Lake City of the regular Salt Lake City water rate charges at the time of use, subject, however, to the same rules and regulations as apply to the residents of Salt Lake City at the time of use." (Exhibit H, Page 6).

It appears at Entry No. 8 of Exhibit G, an abstract of title to the property owned by the defendant Paul McFarland in this action, that the predecessor-in-interest of the defendants signed this agreement with Salt Lake City.

Exhibit 2, the Articles of Incorporation of Green Ditch Water Company, indicates that there is only one class of

stock of this corporation, and that the corporation has no basis for the recognition of stockholders by class, type of water used, or upon any other basis.

The record shows that the defendants to this action, Archie Paul McFarland and Lorna Ruth McFarland, his wife, received a deed as joint tenants to approximately three acres of land on June 26, 1945 (Exhibit G, P. 43), and that included with said land were "three shares of Green Ditch irrigation water stock and one share of Green Ditch culinary water stock." Plaintiff's counsel stated that defendants owned 2.88 acres of land (A. 100). The record shows further that in addition to the four shares of stock therein mentioned defendants are the owners of one additional share of stock in the corporation (R. 50). The stock shown on the certificates obtained with the deed to the land has not been transferred to the names of defendants because of the stand taken by the board of directors that there were not several classes of stock or two classes having culinary and irrigation rights, but only one class under the corporation Articles (R. 88, 89, 90, 91). In other words, Mr. and Mrs. McFarland were the owners of a stock certificate obtained from a Mr. Pace for four quarter-acre shares (R. 50 and 60), and in addition were the owners of a certificate representing shares which were listed on the books of the corporation as belonging to one Mr. Jacklin. Defendants, however, paid assessments since the time of acquisition, and the possession of this stock in defendants was recognized by the corporation (R. 90-91).

Mr. Berrett of the City Water Department testified that his calculation of the amount due in this action by the de-

fendant was based upon the assumption that the defendants owned only one share of stock. If they were the owners of two or three or four shares of stock, then there would be no indebtedness due to Salt Lake City (R. 37, 38). This calculation is based solely upon the ownership of a single share of stock. If defendants were entitled to use water based on the ownership of two, three or four acres of land, rather than one share of stock, they would likewise owe nothing to Salt Lake City for the use of water, the amount of which is not in dispute in this action.

## STATEMENT OF POINTS RELIED UPON

### POINT NO. I

THE COURT ERRED IN FINDING AND CONCLUDING THAT DEFENDANTS ARE LIABLE UPON THE THEORY THAT THEY HAVE A CREDIT OF 900 GALLONS PER DAY PER SHARE OF CULINARY STOCK.

(a) *The 1920 contract provides that the contracting parties should be entitled to a credit of 900 gallons per day per acre of land.*

(b) *The Court erred in arbitrarily amending the Articles of Incorporation to recognize more than one class of stock.*

### POINT NO. II

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT THE WATER RIGHTS ADJUDI-

CATEDIN THE SO-CALLED "MORSE DECREE" ARE OWNED BY THE GREEN DITCH WATER COMPANY.

### POINT NO. III

THE COURT ERRED IN FAILING TO FIND THAT THERE IS NO PRIVITY OF CONTRACT BETWEEN SALT LAKE CITY AND THE DEFENDANTS IN THIS ACTION, AND THAT THE DEFENDANTS ARE NOT LIABLE TO SALT LAKE CITY ON A CONTRACT THEORY.

### POINT NO. IV

THE COURT ERRED IN COMPUTING GALLONAGE CREDIT ON A MONTHLY BASIS.

## ARGUMENT

### POINT NO. I

THE COURT ERRED IN FINDING AND CONCLUDING THAT DEFENDANTS ARE LIABLE UPON THE THEORY THAT THEY HAVE A CREDIT OF 900 GALLONS PER DAY PER SHARE OF CULINARY STOCK.

(a) *The 1920 contract provides that the contracting parties should be entitled to a credit of 900 gallons per day per acre of land.*

The Court found in Paragraph 3 of the Findings of Fact that on or about December 15, 1920, stockholders of said

company (Green Ditch Water Company), including the stockholder predecessors-in-interest of defendant Paul McFarland entered into an agreement with plaintiff, Salt Lake City, by the terms of which said stockholders transferred to Salt Lake City their rights to the use of Big Cottonwood Creek water to which they were entitled, reserving, however, the right to use water for culinary purposes as follows: A constant and perpetual flow of 500 gallons of water per day for each acre of land in and under the Green Ditch from October 1st to April 1st of each year, and 900 gallons of water per day for each acre of land in and under the Green Ditch from April 1st to October 1st of each year.

It is true that this is a correct summary of the agreement introduced as "Exhibit H" insofar as the contracting parties are concerned. Salt Lake City obtained from those persons under that agreement the right to certain use of the water and the persons to the agreement reserved the amount indicated.

Even if it is admitted for the purpose of argument that the stock owned by the defendants in some mysterious way became committed by the agreement of the owner of the stock, notwithstanding the fact that there is no evidence to the effect that the defendants had any notice of any such agreement, the Court in this case nevertheless misconstrued the contract in this action. It based the liability of the defendants upon the number of shares they owned and assumed that they owned only one share. The fact of the matter is that the *land*, the only pertinent consideration under the contract, which is owned by the defendants, is described as follows:

“Beginning at a point 789.36 feet North and 392.7 East and North 3° East 544.48 feet from the Southwest corner of the Northeast Quarter of Section 9, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 3° East 260.72 feet, more or less to the center line of Big Cottonwood Creek; thence following the center line of said creek South 75° 30' East 3.30 chains; thence North 74° 45' East along the creek bed 6.60 chains to the north end of Big Cottonwood Bridge; thence South 31° West along the center of County Road 2.41 chains; thence South 6° West 123.01 feet to a point North 86° 07' East 549.59 feet from the point of beginning; thence South 86° 07' West 549.59 feet to the place of beginning \* \* \*.”

Exhibit G, Entry 43. The other entries in the abstract are conclusive that this is the property owned by the defendants in this action. The amount of acreage in their piece of land can be mathematically computed and is therefore subject to judicial notice from this evidence. Plaintiff's counsel at the trial admitted that defendants owned 2.88 acres. It is referred to generally in this brief as 3 acres.

It thus appears that even if the Court was correct in its conclusion and finding that the defendants are bound by the contract between certain stockholders of record of 1920 and Salt Lake City, it is nevertheless clear that the application of that contract does not result in any liability on the part of these defendants. They own three acres of land. The contract between the stockholders and Salt Lake City sets forth as a criteria of liability and as a determination of the amount of reserved water the amount of land owned by the persons under the contract. Defendants are entitled to a credit of 500



gallons of water per day during the winter months and 900 gallons during the summer months per acre of land owned. The calculations of Mr. Berrett, of the City Water Department, are based upon the assumption that the defendants own only *one share of water*. Defendants owned not only one, but *five* shares of stock in the Green Ditch Company. They owned three acres of land. The calculations of Mr. Berrett and those of the Court are clearly inapplicable (R. 37-38).

The Court did not have the power to re-write the 1920 contract even if it was so inclined. The language of the contract is not ambiguous. Even if it is, there is no evidence in support of any interpretation similar to that of the trial court.

It is therefore submitted that the Court clearly erred in holding defendants liable under the contract on the theory that they have a credit of 500 gallons in the winter and 900 gallons per day per share of stock. Failure to make a finding based upon their ownership of acreage, as the contract specifies, constitutes reversible error.

(b) *The Court erred in arbitrarily amending the Articles of Incorporation to recognize more than one class of stock.*

The Court found in Paragraph 4 of the Findings of Fact:

“That since entering into said agreement the stockholders of said company divided the water-rights they had heretofore owned into two classes, irrigation rights still distributed by the Green Ditch Water Company, and the quantity of water reserved by the owners for culinary purposes in the quantities above specified. That the total number of acre shares of said Company entitled to use said culinary water is 572.”

The Court further found and stated in its memorandum decision that the real nub of the dispute "seems to grow out of the fact that, after the exchange agreement was made, the waters of the stockholders in the Green Ditch came to be known as irrigation water rights and as culinary water rights. \* \* \* "

The Court stated that the defendants contended that they were entitled to draw the gallonage applicable under the agreement for each of their four shares, "contending that the Green Ditch Company only recognizes one kind of stock, and does not recognize a difference between culinary and irrigation rights. When the exchange agreement was made between the City (plaintiff) and Green ditch people, it was made by the City on the one hand and by the individual water users on the other. The Green Ditch Water Company was merely a trustee as distributing agent for water users under the Green Ditch, the real title to the water being in individual users. \* \* \* Such reserved water right was transferable by the owners thereof. The stockholders of the Green Ditch thus by their own act, lawfully divided the water rights they had theretofore owned into two classes: irrigation rights still to be distributed by the trustee, Green Ditch Company; and the quantity of water reserved by the owners for culinary purposes became the culinary right on the 500 and 900 gallon basis per acre right owned or transferred by the owner."

The Court then undertook to further amend the Articles of Incorporation for the stockholders in defiance of all of the rules of corporate law and held that the defendants were the owners of three shares of irrigation water rights and one share of culinary water.



It is submitted that not only was the trial court in error in taking upon itself the prerogative of amending the corporate Articles, but also that the stockholders themselves who were parties to the agreement with Salt Lake City could not have amended the Articles and did not purport to amend them in this respect.

Article V of the Articles of Incorporation (Exhibit 2, Page 2) provides:

“The amount of the capital stock of this corporation shall be twenty-two hundred eighty dollars, divided into twenty-two eighty shares of the par value of one dollar each.”

Article VII (Exhibit 2, Page 3) provides in part:

“Each share of stock of this corporation shall represent a water right equal to  $1/2280$  part of the water decreed to the Green Ditch in the suit pending in the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake, wherein the Progress Company is plaintiff and Salt Lake City, et al. are defendants, being Case No. 8921.”

The Articles provided, as elsewhere stated in this brief, that the water rights and the land owned by the organizers of the corporation were taken by the corporation in consideration for the issuance of its stock.

Article XV provided (Exhibit 2, Page 6):

“No lands, interest in lands, water or water rights shall be purchased or sold for or on behalf of this corporation by its board of directors, except upon approval thereof by an affirmative vote of all of the capital stock of this corporation issued and outstanding at a meeting duly called to consider such question.”

The finding of the trial court that the stockholders had amended the Articles of Incorporation by dealing with certain rights as irrigation rights and certain others as culinary rights or culinary stock cannot be supported in law and is not supported by the evidence in this action. Certainly the district court cannot arbitrarily amend the Articles of Incorporation and conclude in effect that there are two different classes of stock when there has been no compliance or even attempted compliance with the statutes of this state concerning such amendments.

Section 18-2-44 UCA, 1943, as amended, provides that articles of incorporation may be amended by a vote representing at least,

“a majority in amount of the outstanding stock thereof entitled to vote at a stockholders’ meeting called for that purpose as prescribed in Section 18-2-45; provided, that, if all the stockholders entitled to vote vote in favor of such amendment at any meeting of the stockholders, the notice required by Section 18-2-45 need not be given; and provided further, that the original purpose of the corporation shall not be altered or changed without the approval and consent of all the outstanding stock, but the adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation \* \* \* .”

This requirement has been a part of the Utah law since 1880. See *Keetch vs. Cordner*, 90 Utah 423, 427; 62 Pac. (2d) 273; 108 A.L.R. 52.

Does the amendment apparently made by Judge Larson in this action to the Articles of Incorporation relate to “the

original purpose of the corporation? We do not know because the amendment is not clearly defined. Presumably, it has something to do with the agreement between a portion of the stockholders and Salt Lake City. All the stockholders were not parties to the agreement. Therefore, they did not assent to the amendment. It appears clearly, therefore, that the amendment could not have been in conformity with the Utah law if it was related to the "original purpose of the corporation," and it must have been related to the original purpose because it apparently had something to do with the ownership and/or control and/or distribution of the water, for the handling of which the corporation was organized.

Nor can it be argued successfully in this case that the decision of the trial court did not amount to an amendment of the Articles. Judge Larson does not explicitly state in his memorandum decision or findings that the Articles were amended to recognize two classes of stock, but he does state in the face of the record which is that the defendants owned five shares of stock, that the plaintiff should recover because defendants own only one share. The only way by which this result can be obtained is by asserting and sustaining the proposition that the ownership of the stock which was called "irrigation stock" in the deed of conveyance was something different than stock in the Green Ditch Water Company concerned with the agreement with Salt Lake City. In other words, if the plaintiff is to recover in this action by the application of the 1920 contract, and if the ownership of stock is to be the criteria for the amount of credit received by defendants, then the plaintiff must establish how much stock

defendants own in order to apply the formula set out in the contract.

The only evidence in this case is that the defendants owned five shares of stock. The one share of so-called "culinary stock" was presented to plaintiff at the time the application for water was signed by Mrs. McFarland, but the deed of conveyance to defendants included one additional share of culinary stock and three shares of irrigation stock. It therefore appears that the Court was in the dilemma either of recognizing the validity of the five shares of stock as had been recognized by the corporation (the evidence of this recognition is that defendants paid the assessment on all five shares; R. 89; see also R. 86 to the effect that the records of the corporation had been noted to show defendants' ownership of the shares); and see R. 99 to the effect that the water master distributed water based on the recognition of defendant's ownership of  $4\frac{1}{2}$  shares, or the Court had to find that the so-called "irrigation stock" was invalid in some way or did not come within the meaning of the Salt Lake City contract. Apparently the Court chose to take the latter course, but in so doing it in effect amended the Articles of Incorporation in derogation of the rights of the stockholders and in the face of the Utah statute.

## POINT NO. II

THE COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT THE WATER RIGHTS ADJUDICATED IN THE SO-CALLED "MORSE DECREE" ARE OWNED BY THE GREEN DITCH WATER COMPANY.

The plaintiff in this action bottomed its complaint on the premise that "on or about January 3, 1950, the defendants and each of them became indebted to plaintiff for water furnished by said plaintiff to said defendants at their special instance and request," in the amount claimed. The plaintiff thereby undertook to sue upon the theory of goods sold and delivered. It is hornbook law that part of plaintiff's burden was to prove that the title to the later allegedly delivered was in the plaintiff and that it had the right to deliver the same.

Defendants' motion to make more certain the complaint by setting forth more explicitly the terms of any implied or other contract was denied (R. 3). Defendant Paul McFarland then answered that:

"The Green Ditch Water Company has had decreed to it, and is the owner of, the right to the use of a portion of the flow of the water of the Big Cottonwood Creek in Salt Lake County, Utah; that said right is represented in the decree of the Third Judicial District Court of the State of Utah, dated April 13, 1914, and affirmed by the Supreme Court of the State of Utah in Case No. 8921; that the said Green Ditch Water Company has been at all times mentioned in the complaint, and is at the present time the owner of the right to use all of the water so allocated to it by said decree. \* \* \*

"That all the waters which the defendant has received and used on his premises in Salt Lake County have been taken and used by defendant as a stockholder and are waters to which he is entitled as a stockholder of the Green Ditch Water Company, and the defendant alleges that he has not at any time used water in excess of the amount to which he is entitled from said company." (R. 7, 8).

In his third defense, defendant Paul McFarland sets out again that Salt Lake City has distributed through a certain pipe line various waters to certain stockholders of the Green Ditch Water Company, and thatt here is no contract in effect between Green Ditch Water Company and Salt Lake City. Defendant alleges that he is the owner of stock in the corporation and is entitled to a proportion of the water owned by the Green Ditch and that he is accountable only to Green Ditch Water Company for any water received through its system.

One of the basic issues in this case, therefore, was whether the plaintiff could recover from these defendants for water which it did not own but which was owned by the Green Ditch Water Company and to the use of which the defendants had an undivided share.

The Court's attention is particularly invited to the fact that the defendant does not claim *under this particular point* that plaintiff could not theoretically recover on a cause of action of a different type than is here alleged. As to whether or not it could is entirely beside the point. In order to recover on the cause of action stated it must prove title to the goods allegedly sold and delivered. Defendants set up specially that plaintiff did not have title to the water and could not therefore recover on this theory.

It is noted that in Paragraph 2 and Paragraph 3 of the Findings of Fact (R. 108, 109) the Court stated that "the beenficial ownership of the right to use said water was vested in the stockholders of said company, sair company being the



distributive agent of the said water to its stockholders.” And further:

“That on or about December 15, 1920, stockholders of said company, including the stockholder predecessors in interest of defendant McFarland, entered into an agreement with plaintiff Salt Lake City, by the terms of which said stockholders transferred to Salt Lake City their rights to the use of Big Cottonwood Creek to which they were entitled \* \* \* .”

There was, however, absolutely no evidence on the latter point, particularly with respect to the one share of water received by defendants from Mr. Pace (R. 60). The record does not show whether the predecessor-in-interest of this stock was a party to the 1920 Agreement. It will be noted (Exhibit H) that a large number of stockholders of the Green Ditch Water Company did not enter into a contract with Salt Lake City. The agreement referred to by the Court would, of course, not be binding upon any of these stockholders. Insofar as the Court holds to the contrary, the Finding and Conclusion are absolutely unsupported by the evidence in this case.

Equally basic was the Court's error in finding that the title to the water was in the stockholders at the time of their agreement with Salt Lake City.

This case is unlike *East River Bottom v. Boyce*, 102 Utah, 149; 128 Pac. (2d) 277 (1942), where the object of the corporation was to “control, manage and distribute” the water. The language “control, manage and distribute” does not operate to sever the water from the land. It is submitted that the Boyce case and the other cases which hold that language

of this type is inoperative to vest water-rights in the water company are not in point. The object of the corporation here was, among other things, "to acquire the title to the water-rights of all waters of Big Cottonwood Creek distributed through said Green Ditch" (Exhibit 2). Article XV of Exhibit 2 is explicit:

"No lands, interest in land, water or water-rights, shall be purchased or sold for or on behalf of this corporation by its board of directors except upon approval thereof by an affirmative vote of all of the capital stock of this corporation issued and outstanding at a meeting duly called to consider such question."

Article VII of the Articles specifies:

"Each share of stock of this corporation shall represent a water-right equal to  $1/2280$  part of the water decreed to the Green Ditch in the suit pending in the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake, wherein the Progress Company is plaintiff, and Salt Lake City and others are defendants, being case No. 8921."

Article XIV provides that the corporation has acquired title to the Green Ditch and states that the Green Ditch has been conveyed to the corporation, and that the fair cash value has been accepted *as payment in full* for the stock subscribed by the incorporators. See also R. 97.

The powers and purposes of an irrigation company must, of course, be determined from its Articles of Incorporation. *North Point Consolidated Irrigation Company v. Utah and Salt Lake Canal Co.*, 16 Utah 246, 52 Pac. 168 (1898).



The argument made under Point I that the Court was without authority to amend the corporate articles is equally applicable to the Court's finding with respect to the ownership of the water. That ownership was vested in the corporation and the stockholders had neither the right nor the power to divest it without a compliance with the Utah statute relating to amendments of articles of incorporation.

Attention is invited to the fact that the error of the Court in this respect was not inconsequential. Since the title was in the corporation and only a bare right to the use of the water in the stockholder, the 1920 Contract would be applicable only as an agreement between Salt Lake City and the parties to the contract. Certainly if the contract was held to "run with the land," then the defendants in this action are entitled without question to obtain the benefits of the contract, based upon the amount of acreage they own. If the contract does not "run with the land," then the argument made under Point III of this brief that it is not binding upon defendants because there is no privity between defendants and Salt Lake City is applicable. It is therefore necessary to determine in this action the owner of the water.

It is submitted that the analysis of the trial court to the effect that the title was in the stockholders in the case a bar is erroneous. This case should clearly be distinguished from the *Boyce* case, *supra*, inasmuch as under are Articles of Incorporation here the purpose of the corporation was to acquire title in the water rights, and since the articles have never been amended in this respect, the corporation still owns them.

### POINT NO. III

THE COURT ERRED IN FAILING TO FIND THAT THERE IS NO PRIVY OF CONTRACT BETWEEN SALT LAKE CITY AND THE DEFENDANTS IN THIS ACTION, AND THAT THE DEFENDANTS ARE NOT LIABLE TO SALT LAKE CITY ON A CONTRACT THEORY.

As already noted in this brief, the plaintiff in this case sued upon the theory of general assumpsit. That is the only theory of liability stated in the complaint (R. 1, Par. 3). The plaintiff did not frame its complaint to sue upon a special contract theory at all.

During the course of the trial, however, plaintiff did make a half-hearted effort to fasten liability upon defendants on the theory that there was a special contract and explicit agreement between Salt Lake City and these defendants. In an answer to a written interrogatory, Mr. E. R. Berrett, office manager of the Water Department of the City, stated that there was a contract made between him, acting for the City, and Mrs. McFarland, at the time she signed a regular application card for water (R. 5).

On cross-examination, however, Mr. Berrett finally admitted that he did not know of any contract between Salt Lake City and the McFarlands (R. 44). What he previously had explained in his testimony was a contract, he admitted on cross-examination to be nothing more than a tradition or custom of Salt Lake City (R. 43-44). The fact of the matter is that the custom or tradition apparently referred to by Mr. Berrett had its roots in the contract identified in this case

as "Exhibit H" between Salt Lake City and various stockholders of the Green Ditch Water Company. Plaintiff's counsel admitted that it could not prove a chain of title in the stock from the stockholders who signed to defendants (R. 67). That contract was made on or about December 15, 1950. The defendants in this action were not parties to it. There never was and is not now a contract between defendants and Salt Lake City. Salt Lake City has promised these defendants nothing and they have promised nothing in return. Salt Lake City has made no offer to defendants and has proved no consideration to the McFarlands or any other persons in support of any alleged promise or performance to the McFarlands.

Certainly it cannot be argued that the 1920 contract was an incident of the ownership of realty, and that defendants are in privity with Salt Lake City on that theory, without admitting the validity of the argument made in Point I (a) of this brief. If the 1920 agreement be considered as a limitation on the right to use the stock, then these defendants are not liable, for there is no evidence that they ever had any notice of such agreement at the time they obtained the stock certificates. It cannot be said that they had constructive notice by reason of the filing of the contract in the County Recorder's office unless it is also admitted that the contract was an incident to the ownership of the real property, thus admitting the validity of the argument made in Point I (a).

The Court's attention is again invited to the fact that the only contract the Court can look to is the one in fact made in 1920. The contracting parties did not agree to the surrender of the stock certificates to Salt Lake City in such a way that

the City might have protected itself against the possibility of share certificates being issued to persons without notice of the contract. The fact that Salt Lake City might have protected itself is immaterial. It did not.

In any event, the defendants expressly pleaded that there was no contract between defendants and Salt Lake City. Failure to make findings on this point constitutes gross error. The only findings that the Court could have made under the evidence in this case would have been that there was no contractual relationship existing between the parties to this action.

#### POINT NO. IV

#### THE COURT ERRED IN COMPUTING GALLONAGE CREDIT ON A MONTHLY BASIS.

Exhibit H provides that the parties to the contract are to receive a credit of 500 gallons per day per acre during the winter season and 900 gallons per day per acre during the summer. There is no provision in Exhibit H for determination of a period of time in which the credit is to be computed. If one of the parties consumes only 200 gallons during one day and 1500 gallons on a day in the subsequent month, Exhibit H does not specify whether he is to be charged for the full credit on the day in which the lesser gallonage was used, nor does it provide any accounting period or other period for determination of the credit.

The City, in this action, arbitrarily assessed liability on a monthly credit basis. The trial court accepted the City's de-

termination. In this respect the trial court committed clear error.

We think the court will take notice of the fact that exchange agreements are generally made in contemplation of the benefits that accrue to the parties. Both Salt Lake City and the stockholders who were parties to the 1920 contract must have had in contemplation the relative rights to the use of the water not on any particular day or not even any particular week or month. The contract refers to the winter season and the summer season. The court might have interpreted the contract reasonably as providing for credit based upon these seasons. We think the court more correctly would have interpreted the contract to provide for accounting on an annual basis. In either event, the court clearly erred in computing the credit on a monthly basis. The interpretation of this contract is squarely before this court on this question.

## CONCLUSION

The Trial Court erred in each of the particulars set out in this brief. The judgment should be set aside and instructions should be issued to the Trial Court to enter judgment for defendants. In any event, the Court should award a new trial to defendants and should require the Trial Court to make findings upon the issues raised in the defendants' answers.

Respectfully submitted,

McKAY, BURTON, McMILLAN AND RICHARDS

*Attorneys for Defendants and Appellants*