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Salt Lake City v. Paul McFarland : Brief of Plaintiff and Respondent

Utah Supreme Court

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Case No. 7870

IN THE SUPREME COURT
of the
STATE OF UTAH

SALT LAKE CITY, a municipal corporation,

Plaintiff and Respondent,

— vs. —

PAUL McFARLAND and MRS.
PAUL McFARLAND,

Defendants and Appellants.

FILED

OCT 25 1952

Clerk, Supreme Court, Utah

BRIEF OF PLAINTIFF AND RESPONDENT

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INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS RELIED UPON :	
POINT No. I.	
Mere ownership of a stated acreage of land is not proof of the nature and extent of water rights of the owner of land.	10
POINT No. II.	
The mere fact that the exchange agreement provides for acre shares does not show defendants are entitled to culinary water on the basis of 2.88 acres.	11
POINT No. III.	
The share holders of the green ditch had the right to make the exchange agreement and to convey their water rights to the city, reserving culinary water in certain quantities.	16
POINT No. IV.	
Under the ordinances and the exchange agreement, the city may make monthly billings.	19
ARGUMENT	10
Point No. I.....	10, 11
Point No. II.	11, 12, 13, 14, 15
Point No. III.....	16, 17, 18, 19
Point No. IV.....	19, 20
CONCLUSION	21

TABLE OF CASES CITED

Cortella v. Salt Lake City, 93 Utah 236, 72 P. 2d, 630.....	10
Genola Town v. Santaquin City, 96 Utah 88, 80 P. 2d, 930.....	16
Moyle v. Salt Lake City, 50 Utah 357, 167 P. 660.....	11

STATUTES

Section 100-1-10	10
Section 100-1-11	10

IN THE SUPREME COURT of the STATE OF UTAH

SALT LAKE CITY, a municipal corporation,

Plaintiff and Respondent,

— vs. —

PAUL McFARLAND and MRS.

PAUL McFARLAND,

Defendants and Appellants.

Civil No. 7870

BRIEF OF PLAINTIFF AND RESPONDENT

STATEMENT OF FACTS

In our opinion the Statement of Facts contained in Appellants' Brief so far fails to state the facts disclosed by the record that we are impelled to state the facts anew.

The action was brought by the City to recover the sum of \$184.31, owing to the City as of January 3, 1950 for water furnished by the City to the Defendants at their home at 4880 Highland Circle in Salt Lake County at Defendants' instance and request.

The evidence shows without any dispute that on or about May 27, 1947 defendant, Mrs. Paul McFarland, at the direction of and being sent to do so by her husband,

Paul McFarland, (R. 49) applied to E. R. Berrett, office manager of plaintiff's water works department, (R. 13) at his office, 112 City & County Building, Salt Lake City, (R. 15) for water service. (R. 14) At that time she signed the regular printed application for water service which the City requires to be signed by persons desiring water service. (R. 18) This original application is in evidence as Exhibit "A." By the terms thereof the applicant agrees to "Be responsible for and pay all bills for all water furnished to the premises in accordance with City ordinances." The application indicates that the bills were to be sent to 1630 South Main Street, but on July 7, 1949, a change was made to send the bills to 4880 Highland Circle, (R. 19) the home of defendants (R. 47) and the place to which the water was to be delivered under the terms of the application, as shown on Exhibit "A."

On the same date, May 27, 1947, an invoice, Exhibit "B," was made out by plaintiff for the cost of installing the service and meter at 4880 Highland Circle in the sum of \$60.00. (R. 19, 20) This sum was paid by defendant, Paul McFarland, and water has been furnished continuously since that time through this service connection. See Exhibit "B" and testimony of Mr. McFarland. (R. 49)

The plaintiff introduced in evidence, two sheets, as Exhibit "C," being a record of the monthly meter readings at the water service at defendants' residence, commencing with November 1, 1947, and ending June 1, 1950. (R. 21) The sheets are read from bottom to top.

The readings are made by the meter reader each month and placed on the sheets by him. These figures show the meter readings each month by cubic feet and the number of cubic feet consumed is arrived at by subtracting the reading one month from the reading the next month. The penciled figures in the right-hand column were taken from the original card record Exhibit "D" (R. 24), and show the amount of the charge for the water delivered. (R. 22, 23) Of the charges shown on Exhibit "C" defendants paid the following: \$4.77 June 1, 1948 bill, \$8.46 July 2, 1948 bill, and \$16.47 August 2, 1948 bill, a total of \$29.69. The charges made each month for the water delivered are shown on the original record, Exhibit "D," which shows these payments and the balance owing as of January 3, 1950 of \$184.31, the total charges to that date having been \$214.00. (R. 26) Bills for the various monthly charges were sent out regularly. Exhibits "E" and "F" (R. 27, 28) are copies of the City's ordinances in effect covering the period of these billings and show that bills are to be rendered monthly as determined by the Superintendent of water works.

It will be noticed that charges were not made for all of the readings on Exhibit "C." In other words, defendants were not charged for all of the water delivered. They were given a free allowance of 2,000 cubic feet per month from October 1st to April 1st and 3600 cubic feet per month from April 1st to October 1st, which credit or allowance was explained to Mrs. McFarland at the time she signed the application for water service, Exhibit

“A.” These cubic feet, when reduced to gallons, amounted to 500 gallons per day from October 1st to April 1st and 900 gallons per day from April 1st to October 1st. It was also explained to her that before a water service could be granted, she must own stock in the Green Ditch Water Company, (R. 15) and the allowance was based on each full acre share of stock. Any water in excess of the monthly allowance would be charged for at regular City rates. (R. 16) Defendants had one acre share of culinary water stock in the Green Ditch Water Company, as shown by a list of stockholders furnished the City by said Company. (R. 17)

The basis and reason for this allowance is the Exchange Agreement entered into, under date of December 15, 1919, between the beneficial owners of the water of the Green Ditch and Salt Lake City, in evidence as Exhibit “H.” By the terms of this agreement, the owners of the water decreed to the Green Ditch from Big Cottonwood Creek conveyed their rights thereto to Salt Lake City, reserving to themselves from October 1st to April 1st, 500 gallons per day for each acre of land owned by each such party, and 900 gallons per day per each acre from April 1st to October 1st. These amounts of water were to be delivered free to the respective owners through water mains to be built and maintained by the City. Any water delivered in excess of these amounts was to be paid for at the regular City rates.

In addition to the culinary water to be delivered in a water main system, the City agreed to furnish irrigation

water at points available to the water users in amounts specified for the months of April to October inclusive. The agreement stipulates there are 573 shares held by the stockholders entitled to the culinary water and 573 acres of land covered by the Green Ditch.

Defendants were not parties to the agreement, but they derived their title from Franklin (Frank) D. Brinton, who signed the agreement. The chain of defendants' title is shown by Exhibit "G," an abstract of title. Entry No. 4 shows the deed to Frank D. Brinton to 11.66 acres. After entering into the agreement with Salt Lake City, Exhibit "H," he conveyed by deed one acre share of culinary water to Ruben Newman. See entry No. 7. Thereafter he executed several mortgages, two in 1928 and one in 1930, covering real property which includes defendants' present property, and including 13½ acres irrigating and 2½ acres culinary water rights in the Green Ditch Water Company. See entries 13, 15 and 17, exhibit "G."

By executor's deed, entry No. 27, his property was conveyed to Claud Hinnen and wife, together with water rights appurtenant. While the Hinnens owned the property they mortgaged it to Enos Jacklin and included 4½ shares (irrigation only) of Green Ditch Water Company. See entry No. 32, exhibit "G." The deed from the Hinnens to William Jacklin and wife, in 1935, also conveyed 4½ shares (irrigation only) Green Ditch Irrigation Company. See entry No. 33. The Jacklins deeded to Robert L. Meier and wife conveying 3 or 3½ shares

of Green Ditch Irrigation water stock and one share Green Ditch culinary water stock. See entry No. 40. This deed covers the same real property now owned by defendants. The Meiers conveyed to Robert B. Pace and wife and included 3 shares of Green Ditch Irrigation Water Stock and 1 share Green Ditch culinary water stock, entry No. 42, and the Paces conveyed the same land and water stock to defendants in 1945, entry No. 43. The foregoing entries are the only ones which cover the transfer of water stock in the chain of title from Frank D. Brinton to defendants as shown by defendants' abstract of title.

Farron Cutler, secretary of the Green Ditch Water Company, testified that "the records of the company show Paul McFarland has one 'full share' of stock, which has culinary and irrigation rights. He purchased that from R. B. Pace and Mary Pace, who obtained it from Robert L. Meier, who obtained it from W. N. Jacklin and he purchased it from Beneficial Life Insurance Company." This stock came from the George C. Smith estate (R. 85) which is the same property as the Wasatch Farms Company property. (R. 86) The Wasatch Farms Company was a signatory to the Exchange Agreement through the Beneficial Life Insurance Company. See pages 8 and 10 of exhibit "H."

It thus appears that this one "full share" of stock did not come through Franklin D. Brinton, but was purchased by William N. Jacklin from another source. This harmonizes with the abstract entry No. 33, showing the

conveyance of the land by Claud Hinnen and wife to William N. Jacklin but conveying no culinary water stock, only $4\frac{1}{2}$ shares of irrigation water. Entry No. 38 shows Jacklin conveyed one share of irrigation water stock to Farron E. Cutler and wife which left $3\frac{1}{2}$ shares of the same kind of stock which was conveyed by the Jacklins to Meier, entry No. 40.

The secretary, Mr. Cutler, further testified "that Mr. McFarland is entitled to $3\frac{1}{2}$ shares of irrigation water only, the stock certificate of which he claims title is now in the name of W. N. Jacklin, but has never been transferred on the books of the Company. That certificate has only one other transfer on it which I can find, and that it came from the Frank Brinton estate." (R. 86, 87) The company recognizes to some extent that McFarland has rights under this $3\frac{1}{2}$ shares of irrigation stock, even though no formal transfer to him has been made on the records of the company. He is assessed for them. (R. 89) Mr. Godfrey, the water master for the Green Ditch, testified he delivered irrigation water to McFarland on the basis of $4\frac{1}{2}$ shares. (R. 99) This would be for the $3\frac{1}{2}$ shares irrigation stock and the one full share which has both culinary and irrigation rights as above described by Mr. Cutler and derived from the Beneficial Life through the Wasatch Farms Company. The Board of Directors, however, has never agreed to make the transfer though requested to do so by McFarland. (R. 91) The Board of Directors decision was that "it wasn't a complete share of stock because a share

of stock is a share having culinary and irrigation rights, which have never been developed."

It thus conclusively appears that for many years, at least from the time the exchange agreement was entered into, as shown by the transfer by Brinton of one share culinary water stock, carrying 500 and 900 gallons daily, as shown by entry No. 7, exhibit "G," the Company and the stockholders have been treating their stock as creating either culinary or irrigation water rights or both such rights. It also appears that the shares were not considered so far appurtenant to the land that they could not be conveyed away to other parties. The one share of culinary water stock now owned by defendants did not come to them with their land but came from a complete stranger to the chain of title to the land. It also appears that defendants' predecessor in interest, Brinton, conveyed away to Ruben Newman one share of culinary water without any conveyance of land therewith, entry No. 7, exhibit "G." The only information furnished plaintiff as to the stock ownership of defendants, either by defendants themselves or by the Company, was that defendants had one share of culinary water stock.

Further, Mr. Cutler testified that "there are stock certificates outstanding which show on them culinary only, but we did not recognize either the culinary or the irrigation stock as being complete shares of stock." This shows that the Company itself has been issuing stock certificates calling only for culinary water.

As we understand defendants' position, their only defense to this action is that their right to use water is based upon the number of acres of land they own, and since the records show they own 2.88 acres of land, they would be entitled to free culinary water upon the basis of owning 2.88 shares, rather than one, and so would not owe the City anything.

STATEMENT OF POINTS

POINT I.

MERE OWNERSHIP OF A STATED ACREAGE OF LAND IS NOT PROOF OF THE NATURE AND EXTENT OF WATER RIGHTS OF THE OWNER OF LAND.

POINT II.

THE MERE FACT THAT THE EXCHANGE AGREEMENT PROVIDES FOR ACRE SHARES DOES NOT SHOW DEFENDANTS ARE ENTITLED TO CULINARY WATER ON THE BASIS OF 2.88 ACRES.

POINT III.

THE SHARE HOLDERS OF THE GREEN DITCH HAD THE RIGHT TO MAKE THE EXCHANGE AGREEMENT AND TO CONVEY THEIR WATER RIGHTS TO THE CITY, RESERVING CULINARY WATER IN CERTAIN QUANTITIES.

POINT IV.

UNDER THE ORDINANCES AND THE EXCHANGE AGREEMENT, THE CITY MAY MAKE MONTHLY BILLINGS.

ARGUMENT

POINT I.

MERE OWNERSHIP OF A STATED ACREAGE OF LAND IS NOT PROOF OF THE NATURE AND EXTENT OF WATER RIGHTS OF THE OWNER OF LAND.

Under the provisions of Section 100-1-10, U.C.A. 1943, as amended 1945 Laws, page 263, water rights may be transferred by deed in the same manner as real estate. Section 100-1-11 provides that a water right may be sold and conveyed separate from the land. In the case of *Cortella vs. Salt Lake City*, 93 Utah 236, 72 P. 2d, 630, the court says:

“It would not be sufficient to allege present ownership of a tract of land to which water had been appurtenant at some time in the past in order to show present ownership of such water right. By the terms of Section 100-1-11, RS 1933, an appurtenant water right may be sold and conveyed separate from the land. * * * To state a cause of action on the one hand, and findings of fact sufficient to sustain a judgment on the other hand, we think it should appear that the rights acquired by the original ownership under the exchange agreement had not been sold or otherwise transferred separate from the land or transferred from the land here involved to some other land, whether within or without the said 547 acre tract.”

That case involved an exchange agreement between Salt Lake City and the owners of water of Parleys Creek,

whose combined lands covered 547 acres. It was held that the rights of the water owners under the exchange agreement could be transferred or sold. The case of *Moyle vs. Salt Lake City*, 50 Utah 357, 167 P. 660, was cited as authority, that case holding that the holders of the exchange right could transfer the water to be supplied by the City under the agreement to lands five (5) miles to the south and outside the acreage on which Parley's Creek water had been beneficially used. The evidence, heretofore referred to, shows that the defendants' predecessors in interest to the land conveyed some of the water rights owned by them and had conveyed separately culinary water rights as well as irrigation water rights. Under these conditions, and the law above referred to, the only water rights shown to be owned by defendants was the one full acre which called for both culinary and irrigation water. There is no evidence whatever that defendants, when they acquired the land, acquired any water rights other than the 3 or $3\frac{1}{2}$ shares of irrigation water and the one share of culinary water.

POINT II.

THE MERE FACT THAT THE EXCHANGE AGREEMENT PROVIDES FOR ACRE SHARES DOES NOT SHOW DEFENDANTS ARE ENTITLED TO CULINARY WATER ON THE BASIS OF 2.88 ACRES.

The evidence shows that defendants owned just one full acre share of water right. In addition they owned

3½ shares of irrigation water. The exchange agreement provided for 573 acre shares of culinary water. The agreement did not provide that these acre shares should forever remain attached to particular acreages or that a conveyance of an acre of ground would forever include a conveyance of one share of water. There is nothing in the contract to prevent an owner of five acres from using all his culinary water right on two acres and selling the other three acres without culinary rights. *Moyle vs. Salt Lake City*, and *Cortella vs. Salt Lake City* supra. This would not involve a rewriting of the contract or violation of the contract in any manner, as counsel contend. If counsel were right then no land owner could hold more shares than he had acres, and yet defendants assert, page 13 of their Brief, that they own five acres of stock but own only three acres of land. If defendants could acquire a greater number of shares in stock than they had acres of land, any other stock owner could do the same. It is apparent, therefore, that defendants' argument that because they had three acres of land, they ipso facto had three, or five, shares of culinary water stock is wholly fallacious.

Furthermore, the trial court's decision does not amount to amending the Articles of Incorporation. The water to which the owners of the shares of stock were entitled, stated in the Articles of Incorporation as being 1/2280 part of the water decreed to the Green Ditch for each share, was, under the exchange agreement, conveyed by the share holders to Salt Lake City. This

conveyance covered all water rights, culinary and irrigation. The shareholders merely reserved to themselves, and successors, the right to take from the City's water mains free of charge 500 and 900 gallons per day per acres. The Green Ditch Company thereupon ceased having any responsibility to distribute culinary water. It still continued to distribute the irrigation water. So far as the company is concerned, therefore, it merely permitted delivery of the canyon water to the City, which water was represented by the shares of stock outstanding. This arrangement did not constitute an amendment of the Articles of Incorporation. The shareholders who thus became entitled to get water from the City under the exchange agreement could divide such water into whatever classes they desired without in the least having the effect of amending or violating the Articles of Incorporation. The trial court correctly stated the proposition as follows:

“Such reserve water right was transferable by the owners thereof. The stockholders of the Green Ditch thus by their own accord, lawfully divided the water rights they had theretofore owned into two classes, irrigation water 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 owners.”

If what the stockholders had been doing for the past twenty years, with the full acquiescence of the company in recognizing and issuing stock in harmony therewith, constituted an unlawful amendment of the Articles of Incorporation, defendants have their recourse against the stockholders so doing and against the company. Certainly they cannot try out such issue in this action without the proper parties. And where would they stand if such an issue were here involved? The very stock they own, by the undisputed evidence, is divided into two classes, culinary water stock and irrigation water stock, one share of the one and $3\frac{1}{2}$ shares of the other. Upon what basis can defendants compel a fusion of these two classes? The Green Ditch Board of Directors refused to concede that defendants have $4\frac{1}{2}$ or 5 full shares of stock, each carrying both culinary and irrigation water. Certainly the City in this action cannot be compelled to recognize an ownership that the company itself refuses to recognize and that in fact does not exist. When defendants acquired $3\frac{1}{2}$ shares of irrigation stock only that was all they acquired however much it may be argued that the stockholders who sold them to defendants had no right to deliver such a class of stock.

Defendants have asserted, contrary to the evidence and findings of the trial court, that they own two shares of culinary stock. In our statement of facts we have shown, by the testimony of the secretary of the Green Ditch Company, the defendants' stock ownership. This

shows that he owns one share of culinary stock which also carries irrigation rights and $3\frac{1}{2}$ shares of irrigation water stock. Mr. McFarland testified that his abstract of title shows the chain of his water and also the title to his property. When asked if he had one share of culinary water stock, he answered: "That's the question. I purchased one share separately from the water I was entitled to when I purchased the property," and that share was purchased from Mr. Pace from whom he purchased the land. (R. 50) Later on cross-examination, he stated that in addition to the shares mentioned in the deed, he purchased one share from Mr. Pace that had been purchased by Mr. Pace from an insurance company. (R. 57) He further testified that he got his certificate for either one share or for quarterly shares from Mr. Pace and that was when he purchased the land and that was the only certificate he got. (R. 59, 60) This clearly is the same certificate testified to by Mr. Cutler, the company secretary, which share he traced back to the Wasatch Farms Company and Beneficial Life Insurance Company and is the only share of culinary water carried on the records of the company in defendants' name. He testified Pace got it from Meier, Meier from Jacklin and Jacklin from Beneficial Life Insurance Company. That share is likewise traced in the abstract back to Jacklin. This undoubtedly was the same certificate that Mrs. McFarland exhibited to Mr. Berrett, the water department office manager, when she came in to apply for a water service. (R. 37) The

trial court found that defendants owned one share of culinary water stock. That certainly is in harmony with the evidence.

POINT III.

THE SHARE HOLDERS OF THE GREEN DITCH HAD THE RIGHT TO MAKE THE EXCHANGE AGREEMENT AND TO CONVEY THEIR WATER RIGHTS TO THE CITY, RESERVING CULINARY WATER IN CERTAIN QUANTITIES.

The exchange agreement, exhibit "H", was entered into by the stockholders of the Green Ditch and not by the Green Ditch Company itself. Under Article No. 7 of the Articles of Incorporation, quoted at page 22 of defendants' brief, each share of stock "shall represent a water right equal to $1/2280$ part of the water decreed to the Green Ditch in the Morse decree." It is further provided that the company could not "sell any water or water rights for or on behalf of the corporation without an affirmative vote of all the issued and outstanding capital stock." This clearly indicates that while the company holds the bare legal title to the water rights under the Morse decree, the beneficial ownership is in the stockholders as found by the trial court. In other words, the corporation was a mutual irrigation company.

In *Genola Town vs. Santaquin City*, 96 Utah 88, 80 P. 2d 930, Genola entered into an exchange agreement with Santaquin City, under the terms of which Genola transferred sixty shares of stock it held in Summit Creek Irrigation and Canal Company. Santaquin

was to receive the water to which these sixty shares were entitled, and Genola was to receive 100 gallons per minute continuous flow of water from Santaquin water system. There was some question as to whether the irrigation company could be compelled to deliver a continuous flow to Santaquin under the sixty shares or whether the City would have to take its turn along with the other stockholders. The court says:

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

A stockholder could lease or sell the water to which he is entitled under his stockholding and still retain ownership of the stock itself. He can enter into an agreement to permit the city to perpetually use the water he is entitled to for such consideration and under such conditions as he sees fit. By so doing title to the water delivered to the City vests, upon such delivery, in the City. When the water is turned into the City’s Big Cottonwood conduit and there commingled with the

City's water, there has been a transfer of title and the City can then sell back to the stockholders the water so acquired. Defendants' position that the City could not recover because it did not have title to the water sold to defendants is clearly erroneous. The company delivers the water to the stockholders and the stockholder delivers it to the City. This does not require any exchange agreement with the company.

Contrary to counsel's assertion, the record does show that defendants' predecessors in interest, both of the land and of the full share culinary stock, were parties to the agreement. The land came down from Franklin (Frank) D. Brinton. See entry No. 8 abstract, exhibit "G", and page 9, exhibit "H". The one share culinary stock, as already shown, came from the Wasatch Farms Company. That company signed the exchange agreement, exhibit "H", (see page 9), and again by Beneficial Life Insurance Company on behalf of Wasatch Farms Company. (See page 10) The agreement, page 8, provided: "This contract shall be binding upon the parties hereto, their successors and assigns."

During the trial counsel for defendants demanded to know whether Salt Lake City took the position that exhibit "H" constituted a binding contract between the City and defendants. (R. 63) Counsel for the City stated plainly that that was the City's position. When counsel for the City asked defendants' counsel if defendants recognize the agreement as binding upon them, defendants' counsel refused to state one way or the other. (R. 65)

At the conclusion of the trial, defendants' counsel still refused to state their position, stating they did not know what the effect of exhibit "H" is.

It seems too clear for argument that if defendants were not bound by exhibit "H" then they have no right to any water from Salt Lake City free of charge and they are liable for all of the water delivered to them under the application, exhibit "A". If the Green Ditch delivered defendants' water to the City without authority from defendants, then they have recourse against the company and had they received their water from the company it would have come down in an open ditch and not through the City's water main system. If defendants want to take the position that they were not parties to and have no privity with the exchange agreement, let them so state. Then the City can decide whether to continue delivery of water under defendants' existing application for water service at county rates and not City rates, or cease furnishing water altogether. Until defendants do that, they must know they are receiving a credit for free water under the agreement, exhibit "H", and are bound to pay for the water used in excess of the free water.

POINT IV.

UNDER THE ORDINANCES AND THE EXCHANGE AGREEMENT, THE CITY MAY MAKE MONTHLY BILLINGS.

The exchange agreement, exhibit "H", provides, page No. 6, as follows:

“Any water owner, his successors or assigns, shall have the right to use the water 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.”

From the very terms of the provision it agrees that the excess water is Salt Lake City's water and is to be delivered under the same rules and regulations as apply to residents of Salt Lake City. So far as the time of billing for water delivered is concerned the rules and regulations of Salt Lake City are contained in the ordinances which are in evidence as exhibits “E” and “F”, both of which provide as follows:

“Bills for water used through meters shall be rendered monthly, or quarterly; the superintendent of water works to determine from time to time when monthly or quarterly meter readings shall be made and bills rendered.”

Defendants have been billed on a monthly basis from the beginning. They paid the first three monthly bills. The contract calls for a certain gallonage per day, but there is no requirement that daily readings be made. The contract does contain the provision above quoted and the ordinances above referred to constitute such rules and regulations. Any uncertainty in the matter

has been settled by the parties under the past thirty years, during which time monthly bills have been rendered. Under the terms of exhibit "A" defendants agreed to "pay all bills for water supplied to premises in accordance with City ordinances."

CONCLUSION

The defendants signed a written application for water service for water to be delivered through the City's water main system. They agreed to pay for that water in accordance with the City ordinances. Water was in fact delivered to them under this application during the time covered by the complaint. Instead of charging for all water so delivered, the City gave defendants a credit allowance under the exchange agreement. If defendants are not entitled to such credit allowance, they are not being required to pay as much as they really owe. If they are entitled to the credit allowance the judgment, without dispute, is for the correct amount. We respectfully submit that the trial court was correct in its judgment and that the same should be affirmed.

Respectfully submitted,

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 INDEX

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