

1953

Hilda A. Brimm v. Cache Valley Banking Co. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

L. E. Nelson; Attorney for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *Brimm v. Cache Valley Banking Co.*, No. 7979 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1951

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

HILDA A. BRIMM,
Plaintiff and Respondent

vs.

CACHE VALLEY BANKING CO.
a coroporation, ADMINISTRATOR
OF THE ESTATE OF ANDREW
ANDERSEN, AKA, ANDREW
ANDERSON, Deceased.

Defendant and Appellant

Case No. 7979

APPELLANT'S
BRIEF

Appeal from the District Court of Cache County, Utah

Honorable John L. Sevy, Jr., District Judge

L. E. NELSON,
Attorney for Defendant
and Appellant.

I N D E X

<i>Subject</i>	<i>Page</i>
STATEMENT OF CASE	3
STATEMENT OF FACTS	4
Point No. I. The court erred in finding and holding that the water rights represented by certificate No. 24, for 112 shares of the Capital Stock of the Mendon Central Irrigation Company, a corporation, is appurtenant to the lands described in the findings and decree	8
Point No. II. The court erred in finding and holding, that the water intended to be represented by the said 112 shares of said capital stock, and the water so used upon said lands is one and the same identical water, and that said water was never by any owner thereof either severed or intended to be severed from said lands, or used otherwise than for the irrigation of said lands described in the findings and decree	15
Point No. III. The court erred in finding and holding, that the said water stock certificate never has been and is not now personal property separate and apart from said lands, or even so considered	17
Point No. IV. The court erred in finding and holding that the Mendon Central Irrigation Company, is a mutual company and that the interest in the water was conveyed with the land as an appurtenance	20
Point No. V. The court erred in finding and holding that plaintiff is entitled to an order declaring her to be the owner of the water right represented by the certificates of stock number 24, and that another certificate of stock be issued to plaintiff in lieu thereof for 112 shares of the capital stock of the Mendon Irrigation Company	23
Point No. VI. The court erred in making and entering its finding four (R. 11) since the action therein referred to involved different property and different issues	25
Point No. VII. The court erred in rendering its judgment and decree that the water represented by the 112 shares of capital stock in the Mendon Central Irrigation Company, a corporation, is appurtenant	

to the lands described in said decree, and that plaintiff is the legal and equitable owner of said water—and that the said Mendon Central Irrigation Company, be directed to issue to plaintiff a certificate for 112 shares of stock to replace the certificates issued to Andrew Andersen, deceased, in his lifetime, and the court further erred in rendering its further judgment and decree; that the Cache Valley Banking Company, administrator of the Estate of Andrew Andersen, deceased, nor any of the heirs at law of his estate have no interest, ownership or title in either the water, or Certificate of Stock covering the same, or any part thereof, and that the plaintiff's title thereto is good and valid and is quieted in her, and that the administrator and heirs of the estate of Andrew Andersen, are estopped, enjoined, and restrained from asserting any right, title or interest whatsoever in said water or stock covering same	27-28
ARGUMENT	8

AUTHORITIES CITED:

East River Bottom Water Co. v. Boyce, 128 P 2d. 277	16-20
First National Bank vs. Hastings, 42 Pac. 691	19
George vs. Robison, 23 U. 79; 63 P. 819..9, 11, 12, 18, 23, 29	
Oppenlander vs. Left Hand Ditch Co., 31 Pac. 854	13
Snyder vs. Murdock, 20 U. 419, 59 P. 91	29
51 C. J. 168, Sec. 71	30
51 C. J. 171, Sec. 73	30

STATUTES:

Comp. Laws of Utah, 1917, Title 17	4
Comp. Laws of Utah, 1917, Section 3478	11
Laws of 1943, page 154, Section 100-1-10	14
Laws of 1945, page 263, Section 100-1-10	14
U. C. A., 1953, Section 73-1-10	14
Compiled laws of 1907, Section 316	16
Revised Statutes of Utah, 1933, Sections 100-1-10 and 100-1-11	17, 21
Compiled Laws of Utah, 1917, Section 878	17
Utah Code Annotated, 1943, Section 18-2-33	18
Utah Code Annotated, 1943, Section 100-1-10	18-28
Revised Statutes, 1898, Section 330	19
Constitution, Art. 1, Section 7	30

IN THE SUPREME COURT OF THE STATE OF UTAH

HILDA A. BRIMM,
Plaintiff and Respondent

vs.

CACHE VALLEY BANKING CO.
a corporation, ADMINISTRATOR
OF THE ESTATE OF ANDREW
ANDERSEN, AKA, ANDREW
ANDERSON, Deceased.
Defendant and Appellant

Case No. 7979
APPELLANT'S
BRIEF

STATEMENT OF CASE

This is an Appeal by defendant from a judgment entered in favor of plaintiff by the District Court of Cache County, wherein title to the certificate of stock, No. 24, issued by the Mendon Central Irrigation Company, a corporation, to Andrew Andersen on April 30, 1918, for 112 shares of its Capital Stock, or the water represented thereby is quieted in plaintiff Hilda Brimm. The parties will be referred to as plaintiff and defendant as they were known in the court below. The defendant and appellant insists that the trial court, by the entry of its findings, conclusions and decree, committed reversible error.

STATEMENT OF FACTS

In making this statement of facts, since some of the facts are taken from the Abstract of Title, (Pl. Ex. "A") and some are taken from the Record, the reference to each will be supplied.

Andrew Anderson and his wife Sophia Anderson were early settlers in Mendon, Utah, and on February 1, and on May 1, 1890, he acquired title to the 17.63 acre tract and the 2 acre tract respectively, (Ab. 2, 4) which lands are particularly described in the decree of the court dated January 31, 1953. (R. 12-13). This property was thereafter farmed and operated by Andrew Andersen, until shortly prior to his death which occurred on the 19th day of July, 1922. (R.27). This property together with other adjoining lands in the community of Mendon, were irrigated from waters arising and flowing from certain springs in the mountains west of Mendon, and which will be hereinafter more particularly described.

Early in the year 1918, Andrew Andersen, and the remaining land owners using the water from said springs, organized a corporation, in accordance with the provisions of Title 19, Comp. Laws of Utah, 1917. And in payment for the Capital Stock to be issued to the incorporators, they and their wives, which included Andrew Andersen and his wife Sophia, jointly executed a Deed of Water Rights, (Def. Ex. No. 1) dated March 9, 1918, whereby they jointly sold, assigned, transferred, conveyed and confirmed unto the Mendon Central Irrigation Company, a corporation, all of their right, title and interest of said

incorporators and their wives, in and to the springs of water and the waters arising therefrom which is more particularly described in said deed.

“The spring commonly known as “Central Spring” and situate in the west half of the southwest quarter of section eight; the two springs commonly known as “Gittens Springs” situate in the southeast quarter of section seven; the two unnamed springs situate in the north half of the northeast quarter of section eighteen, in the bottom of a deep hollow extending in a northeasterly and southwesterly direction; the spring commonly known as the “Maple Bench Spring” situate in the central part of the east half of section eighteen; the spring commonly known as the “William Bird Spring” situate in the southeast quarter of the northeast quarter of section eighteen; and all of said springs are situate in township eleven (11) north of range one (1) west of the Salt Lake Meridian in the County of Cache in the State of Utah.” (Def. Ex. 1, page two).

“And the first parties also convey unto the second party and to its successors and assigns forever all of the right, title and interest of the first parties in and to the ditches constructed and used for the diversion and use of the waters of said springs for irrigation purposes by the said first parties. Together with all and singular the tenements and hereditaments and appurtenances thereunto belonging or in any wise appertaining. To have and to hold all and singular the said water rights and ditches together with the appurtenances unto the said second party and to its successors and assigns forever.

In consideration of the execution and delivery of the Deed of Water Rights (Def. Ex. 1) by the incorporators and their wives and, as provided in the articles of incor-

poration (Def. Ex. 2) the Mendon Central Irrigation Company, issued certificates of stock to the incorporators for the number of shares which they were entitled to, commensurate with their respective appurtenance rights, previously owned by them as more particularly described in the deed (Def. Ex. 1). In pursuance thereto, on April 30, 1918, certificate No. 24, for 112 shares of the capital stock of the Mendon Central Irrigation Company, (Def. Ex. 3) was issued to Andrew Andersen, and he signed a receipt therefor as appears from the stub No. 24, (Def. Ex. 3).

On May 24, 1951, petition was filed to probate the estate of Andrew Andersen, deceased, (R. 27). The defendant, Cache Valley Banking Company, was appointed as administrator on July 2, 1951, and thereafter on July 10, the administrator filed an inventory listing as property of said estate, 112 shares of the capital stock of the Mendon Central Irrigation Company, a corporation, 100 shares as class one and appraised at \$2,000.00, and 12 shares as Class two, appraised at \$150.00 (R. 27).

Over defendants objection plaintiff testified that she worked on the farm consisting of the land described in paragraph three of plaintiff's complaint (R. 32). That she was then about 14 or 15 years of age. The land was irrigated from water that "came from a canal of the Mendon Central Irrigation Company" (R. 32). She saw her grandfather Andrew Andersen, irrigate this property. After his death which occurred on July 19, 1922, her uncle L. M. Andersen irrigated this land with this water. (R. 33). The heirs of L. M. Andersen deceased, and Andrew Andersen, deceased, are identical. (R. 41).

Mr. Sorenson, secretary of Mendon Central Irrigation Company, was called as witness (R. 42). He had held office five years — and had custody of the books and records of said Company. He produced the Severance Deed which was identified as Def's. Ex. No. 1. It contained the names of the incorporators and their wives. It was offered and received in evidence (R. 44). An original carbon copy of the Articles of Incorporation was marked Def's. Ex. No. 2. It was received in lieu of the original articles (R. 44).

The original stock book was produced and the stub to certificate No. 24, was read unto the record. "For 112 shares issued to Andrew Anderson, dated April 30, 1918." "Received by Andrew Andersen." The secretary testified that Andrew Andersen's estate is the owner of the stock so far as the Irrigation Company is concerned. (R. 45). It is necessary to have an order to transfer the stock (R. 44). The stock is clear, it is not obligated. All assessments are paid (R. 45).

The stock book of the Mendon Central Irrigation Company, (Def's. Ex. 3) was received in evidence (R. 45) and particularly the stub to certificate No. 24, for 112 shares issued to Andrew Andersen, dated April 30, 1918. At bottom of stub recites, "received this certificate," signed "Andrew Andersen" was all offered and received in evidence without objection. This offer is identified as Ex. No. 4. (R. 45). The signature on the stub is in Andrew Andersen's hand writing. So far as the corporation records are concerned, Andrew Andersen appears to be the record owner. (R. 47). There are other stubs in Ex. No. 3 the

original stock certificate book, where the original certificate itself has not been attached to the stub. (R. 48). The witness further stated that when the certificate has been attached to stub it indicated that the stock has been transferred.

ARGUMENT

Point No. 1. *The court erred in finding and holding that the water rights represented by certificate No. 24, for 112 shares of the Capital Stock of the Mendon Central Irrigation Company, a corporation, is appurtenant to the lands described in the findings and decree.*

It is respectfully submitted that in making such a finding and arriving at such conclusion the trial court entirely ignored and refused to apply certain statutory provisions, as well as the decisions of this court, to the undisputed evidence in this case. The evidence is without dispute that Andrew Andersen, and other early settlers in Mendon, appropriated and used upon their lands the waters flowing from certain springs situated in the mountains westerly from Mendon, and by means of a canal and ditches conveyed the waters therefrom to their respective lands.

In the winter of 1917-18, these water users, including Andrew Andersen, formed a corporation. The articles of incorporation was dated February 6th, 1918. (Def's. Ex. No. 2). The incorporators subscribed for stock as provided in Article seven, which provides, That the number of shares, and the amount, kind and class of the capital stock of this corporation actually subscribed by each party

to this agreement, are set opposite his name in this article numbered seven; and the names and places of residence of the incorporators of this corporation, are as in this article set out, as follows, to-wit, "On pages three of the articles of incorporation the names of the incorporators are listed together with their place of residence, and the amount of stock subscribed by each incorporator, and it appears from page three that Andrew Andersen, subscribed for 12 shares of class two stock, and from page five that he subscribed for 100 shares of class four stock.

That in payment for said stock we quote from said Deed of Water Rights, (Def's. Ex. 1) applicable provisions:

"Whereas the organization of the second party was fully completed in the month of February, A. D. 1918, and a certificate of incorporation thereof was duly issued on the thirteenth day of February, A. D. 1918, by the Secretary of State of the State of Utah, to the second party;—

"Now therefore the first parties for and in consideration of the capital stock of the second party to be issued to the said first parties as in the said articles of incorporation set forth, and for the purpose of complying with the requirements of section 316 of the Compiled Laws of Utah of 1907, relating to the payment of capital stock in a corporation by conveying property to such corporation by deed actually executed and delivered, do by these ppresents, sell, assign, transfer, convey and confirm unto the said second party and to its successors and assigns forever, all of the right, title and interest of the said first parties and each of them in and to the springs of water and the waters arising in and flowing therefrom as described in said articles of incorporation."

“Together with all and singular the tenements and hereditaments and appurtenances thereunto belonging or in any wise appertaining. xxx. To have and to hold all and singular the said water rights and ditches together with the appurtenances unto the said second party and to its successors and assigns forever.”

Thus it will be seen that by the said deed of Water Rights, (Def's. Ex. 1) Andrew Andersen, and his wife Sophia, conveyed, assigned and transferred to the newly organized corporation all of their right, title and interest in and to the water which they had prior thereto used upon the land described in the findings and decree. Thus the appurtenance rights which they previously had in the water, springs and diversion works was assigned, transferred and conveyed to the Mendon Central Irrigation Company, and as consideration therefor, Andrew Andersen, received a certificate of stock for 112 shares of the capital stock in the newly organized corporation.

Hence a water right that had theretofore been appurtenant to the land, was upon the execution and delivery of (Def's. Ex. 1) the Deed for Water Rights, legally severed from the land, and thereafter the water right represented by the certificate of stock, (Def's. Ex. 4) entitled the owner of the certificate to use the water right on the land theretofore used, or it could be used, in whole or in part upon other lands. (George v. Robison et, al., 23 Utah 79, 63 P. 819).

Now as against the foregoing evidence, what proof has plaintiff produced to show that she is the owner of this water right? Absolutely none. The fact that plain-

tiff is the record holder of title to land upon which this water could or has been used is entirely immaterial. Legally, this water can be used upon any lands within this irrigation system. (George v. Robison, 28 Utah 79, 63 P. 819).

It is very significant that the deed dated January 25, 1924, from Sophia Andersen to L. M. Andersen, conveying to him the land described in the findings and decree (Ab. of title, page 15, Plaintiff's Ex. A) does not mention a water right. At the time this deed was executed, the Mendon Central Irrigation Company was incorporated, and Section 3478, Laws of Utah, 1917, then in force and effect, contained the following provision:

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

The fact that no water right was mentioned indicates that the grantor and grantee, widow and son respectively of Andrew Andersen, deceased, no doubt knew that the title to this water right could not be transferred by deed. The legal ownership in the water right was then vested in the estate of Andrew Andersen, deceased, he having died on the 19th day of July, 1922. Thus L. M. Andersen acquired title to the land only.

Reference has heretofore been made to the case of George vs. Robison et. al., 23 Utah 79, 63 Pac. 819. The facts in that case are very similar to the facts in the case at bar. The plaintiff, George, brought suit to recover

damages for breach of warranty, claiming that the water used upon the land was appurtenant thereto. When he purchased the land from Robison the water used thereon was represented by shares of stock in the Corn Crook Irrigation Company, a corporation, and said stock was owned by a third party. The trial court held that the water was appurtenant to the land and awarded judgment to the plaintiff for damages and costs. The defendants appealed, contending that the water, was owned by the Corn Creek Irrigation Company, a corporation, and was not appurtenant to the land purchased by the plaintiff.

This Court reversed the decision rendered by the trial court and in the course of the opinion, Mr. Justice Barch said:

“From such evidence it appears that the water which was used for some years prior to and since the execution of the deed, and over which this controversy arose, was obtained from the Corn Creek Irrigation Company, a corporation, organized in April, 1887, which company had distributed the water from Corn Creek, a stream flowing through Kanosh, among its stockholders; that the plaintiff was aware that the company was incorporated, xxx, that, to obtain water for irrigation, it was always necessary for a person to be a stockholder; that each share of stock entitled the owner thereof to water sufficient to irrigate one acre.”
 . xxxx Under such arrangements as are here disclosed by the testimony *the water cannot be regarded as a part of the land, and is not appurtenant to it.* (Italics supplied).

The decision of this Court in *George v. Robison et. al.* supra, is supported by the Supreme Court of Colorado, which had occasion to decide this question in *Oppenlander*

vs. Left Hand Ditch Company, 31 Pac. 854. The facts are similar to the facts in the case at bar, and, in holding that water rights represented by shares of stock in a corporation, may be legally transferred only by assignment of the certificate and issuance of a new certificate or certificates to the transferee and noted on the books of the corporation, said:

“In the next place, Baun’s rights to water from Left-Hand ditch were dependent upon, and evidenced by his two shares of stock. These he could legally transfer only by assignment on the books of the corporation. *While Baun caused the land to be conveyed to his wife and children, he did not convey the stock, nor does it appear that he entered into any contract or received any consideration for the conveyance of the stock.* On the contrary, he retained the stock, and continued to act as a stockholder of the company, in his own name. It is true, Baun used the stock as a means of procuring water for the benefit of the land which had been conveyed to his children, but he continued to occupy the land for his own benefit, while he pledged the stock as collateral security, and thereby lost it. *With the loss of the stock, he lost all title to the water rights dependent thereon; so that neither he, nor his grantees of the land, can have any water rights by means of such stock.*” (Italics supplied).

It will thus be seen from the decision of this Court in *George vs. Robison*, supra, and from the decision of the Supreme Court of Colorado, that a water right represented by shares of stock in a corporation, is an absolute separate and independent property, the title to which must be transferred by assignment of the certificate of title, and surrendered to the corporation issuing the same, and a new certificate or certificates issued to the transferee.

If there could be any doubt whether a water right represented by shares of stock in a corporation, is appurtenant to the land upon which it is used, such doubt was removed by the Legislature when it amended Section 100-1-10, U.C.A. 1943, Session laws 1943, page 154, to provide, "Water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, *in which case water shall not be deemed to be appurtenant to the land.*" (Italics supplied).

The foregoing Section was amended in other respects by the 1945 Session Laws, page 263, but the foregoing amendment with respect to water rights was retained. And in the 1953 Code, Section 73-1-10, contains the identical language of the 1943 amendment. viz. — "Water rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, *in which case water shall not be deemed to be appurtenant to the land.*" (Italics supplied).

Hence it is definitely settled by statute that water represented by shares of stock in a corporation, is not appurtenant to the land upon which it may be used. The incorporated irrigation companies no doubt promoted the enactment of the foregoing amendment in order to remove any doubt concerning the ownership of water rights represented by shares of stock in an incorporated company. And the foregoing statute as amended was in force and effect when plaintiff acquired the lands from Catharine Gibbons, on January 25, 1949.

Point No. 11. *The court erred in finding and holding, that the water intended to be and represented by the said 112 shares of said capital stock, and the water so used upon said lands is one and the same identical water, and that said water was never by any owner thereof either severed or intended to be severed from said lands, or used otherwise than for the irrigation of said lands described in the findings and decree.*

The principal question raised by the above finding relates to whether the water used on the lands prior to the incorporation of the company, was at the time of said incorporation, severed from the lands described in the findings and decree. It is submitted that the language found in Deed to Water Rights, (Defendant's Ex. 1) is very explicit, with respect to the incorporators and their wives conveying to the corporation their appurtenance rights in the waters, ditches and diversion works, as the following language will disclose:

"That Whereas the first parties excepting those described as wives, are the incorporators of the second party, and in the articles of incorporation the incorporators agreed to convey unto the second party as soon as the incorporation thereof should be completed, all of the right, title and interest of the incorporators in and to those certain springs and the waters arising in and flowing from same as described in the articles of incorporation of the second party on file and on record in the office of the County Clerk of the County of Cache, in the State of Utah, as and for full payment for the capital stock of the incorporators subscribed by them respectively as in said articles of incorporation set forth: and, — (Italics supplied).

Whereas the organization of the second party was fully completed in the month of February, A. D. 1918, *and a certificate of incorporation thereof was duly issued on the thirteenth day of February, A. D. 1918, by the Secretary of the State of Utah, to the second party: — (Italics supplied).*

Now therefore the first parties *for and in consideration of the capital stock of the second party to be issued to the said first parties as in the said articles of incorporation set forth, and for the purpose of complying with the requirements of section 316 of the Compiled Laws of Utah of 1907 relating to the payment of capital stock in a corporation by conveying property to such corporation by deed actually executed and delivered, do by these presents sell, assign, transfer, convey and confirm unto the said second party and interest of the said first parties and each of them, in and to the springs of water and the waters arising in and flowing therefrom as described in the said articles of incorporation.*" (Italics supplied).

The import of the execution and delivery of the Deed of Water Rights, (Defendant's Ex. 1) in the case at bar whereby the incorporators and their wives, expressly conveyed and transferred their appurtenance rights in the water to the corporation, in consideration for which the incorporators received certificates for a stated number of shares of stock, is pointed to in the case of East River Bottom Water Company vs. Boyce et, al., 128 P. 2d. 277, where this court held that because the incorporators had not conveyed their ownership in the water to the corporation, they retained the title to the water and it was therefore appurtenant to the land. In so holding it is stated that:

“The corporation was a loose sort of a mutual agreement for the unified management and distribution of the water to the owners. *The limited and restrictive words for the purpose of “control, management and distribution” is not a conveyance separating a water right appurtenant to land from the land and does not vest the title or right of use in the corporation within the provisions of Revised Statutes of Utah, 1933, Section 100-1-10 and Section 100-1-11. The company has power or authority only to manage, control and distribute the water. The water right was never severed from the land and is still appurtenant thereto. Italics supplied).*

It will thus be seen that the controlling facts in the case at bar are vastly different from the facts in the case of the East River Bottom Water Company vs. Boyce, *supra*. There is no showing in that case that a deed similar to defendant’s exhibit 1, was ever executed.

Point No. 111. *The court erred in finding and holding that the said water stock certificate never has been and is not now personal property separate and apart from said lands, or even so considered.*

By this finding it is conceded by plaintiff and respondent that the water right is represented by a certificate of stock in a corporation. But the court nevertheless found and held that said stock never has been and is not personal property separate and apart from said lands described in the findings and decree. It is respectfully submitted that this finding is made in the very teeth of the Statute. Section 878, Compiled Laws of Utah, 1917, which was in effect when the Mendon Central Irrigation Company, was incorporated, provides that —

“Stock shall be deemed personal property, and the delivery of a stock certificate of a corporation together with a written transfer of the same, signed by the owner to a bona fide purchaser or pledgee for value, shall be deemed a sufficient transfer of title.” (Italics supplied).

And, at the time of the trial and the entry of judgment in this action, the following statute Section 18-2-33, 1943, was in full force and effect and provides that —

“Stock shall be deemed personal property. For the purpose of voting and of receiving dividends and of levying and collecting assessments and for other purposes wherein the corporation is otherwise interested the stockholder of record as shown by its books shall be treated and considered as the holder in fact, and the transferee shall have no rights or claims as against the corporation until transfer thereof is made upon the books of the corporation or a new certificate is issued to him.” (Italics supplied).

Can there be any doubt about the stock in question belonging to Andrew Anderson's estate, when the provisions of the above statute are applied to the uncontradicted evidence in this case? It appears that the trial court has for some unaccountable reason refused to apply the provisions of the Section 18-2-33, 1943, and Section 100-1-10, U. C. A., 1943, to the settled facts in this case.

The facts in the case of *George vs. Robison et. al.*, 23 Utah 79, 63 Pac. 819, are very similar to the facts in the case at bar. The plaintiff brought action to recover damages for breach of warranty, claiming that the water used upon the land which he purchased was appurtenant there-

to. At the time said conveyance was made the water used upon the land was represented by shares of stock in the Corn Creek Irrigation Company, a corporation, which water right was owned by a third party. The trial court held that the water right was appurtenant to the land and awarded judgment to the plaintiff for damages and costs. The defendants appealed to this court, contending that the water, being owned by the Corn Creek Irrigation Company, was not appurtenant to the land. This court reversed the trial court and in the course of the opinion stated:

“The stock of such a corporation is mere personal property, and may be sold and transferred independent of any land; and the sale carries with it the right to use the water on any land or for any purpose the new owner may choose. The stock is merely the evidence of the holder’s title to a certain amount of water. That it is personal is settled in this state by statute. Section 330, Rev. St. 1898. It is not a corporeal, but an incorporeal, species of property, and has nothing which gives it the character of reality.”

In the opinion of this court in *George vs. Robison et. al.*, supra, an early Colorado decision, in the *First National Bank vs. Hastings*, 42 Pac. 691, is cited with approval. The Colorado Court had under consideration a case where the contending parties claimed the ownership in certain water rights represented by shares of stock in an incorporated company. In the course of the opinion the Colorado court stated that:

“Water rights belonging to land and stock in a ditch corporation are two essentially different kinds of property. A real-estate owner may have the right to

water for the purpose of irrigating his land without owning any ditch stock, and a stockholder in a ditch company may be without right to water for irrigation or without land to irrigate. *Water rights for irrigation are regarded as real property, and shares of stock in a corporation are personal property.* The deed conveyed all rights in water pertaining to the land described for the purpose of its irrigation, *but it no more conveyed the grantors water stock than it conveyed his horses.*" (Italics supplied).

Point No. IV. *The court erred in finding and holding that the Mendon Central Irrigation Company, is a mutual company and that the interest in the water was conveyed with the land as an appurtenance.*

The foregoing finding and conclusion no doubt has its genesis from the language used by this court in its opinion rendered in the case of East River Bottom Water Company, vs. Boyce, 128 P. 2d. 277. No where in the opinion in that case does it appear that the incorporators executed a conveyance of their appurtenance rights in the water to the corporation. In defining the nature of the corporation, and holding that the appurtenance right in the water used upon the land was never severed therefrom we quote from the opinion of this court:

"The corporation was a loose sort of a mutual agreement for the unified management and distribution of the water to the owners. The limited and restrictive words for the purpose of *control, management and distribution*, is not a conveyance separating a water right appurtenant to the land from the land and does not vest the title or right of use in the corporation within the provisions of Revised Statutes of Utah

1933, Section 100-1-10 and Section 100-1-11. *The company has power or authority only to manage, control and distribute the water.* The water right was never severed from the land and is still appurtenant thereto. (Italics supplied).

In contrast to the failure of the incorporators and their wives to convey their appurtenance right in and to the waters in the East River Bottom Water Company, as shown in the above quote, it will be of interest to observe the explicit provisions found in Deed of water Rights, (Def. Ex. 1) which was executed by the incorporators and their wives and delivered to the officers of the Mendon Central Irrigation Company, and produced by the secretary and was offered and received in evidence, and among other things said deed provides:

Now therefore the first parties *for and in consideration of the capital stock of the second party to be issued to the said first parties as in said articles of incorporation set forth*, and for the purpose of complying with the requirements of section 316 of the Compiled Laws of Utah of 1907, *relating to the payment of Capital stock in a corporation by conveying property to such corporation by deed actually executed and delivered, do by these presents, sell, assign, transfer, convey and confirm unto the said second party and to its successors and assigns forever*, all of the right, title and interest of the said first parties and each of them *in and to the springs of water and the waters arising in and flowing therefrom as described in said articles of incorporation.*" (Italics supplied).

"Together with all and singular the *tenements and hereditaments and appurtenances* thereunto *belong-*

ing or in any wise appertaining. To have and to hold all and singular the said water rights and ditches together with the appurtenances unto the said second party and to its successors and assigns forever. (Italics supplied).

And in consideration for the execution and delivery of said Deed of Water Rights, (Def.'s. Ex. 1) by the incorporators and their wives, the Mendon Central Irrigation Company on April 30, 1918, issued fifty-one certificates of stock and on May 2, 1918, issued certificate No. 52 to the incorporators. And from an examination of the original stock certificates book Def's. Ex. No. 3, it appears that some of the original certificates were surrendered to the secretary of the corporation, and new certificates were issued in lieu thereof to the purchasers or transferees of said stock, and it further appears from said exhibit that it covers a period of time from April 30, 1918, to August 20, 1936, when certificate No. 99, was issued to the Utah Mortgage Loan Corporation; and that of the 99 certificates issued during the aforesaid period of time, it appears that 47 of said certificates are outstanding, including the certificate No. 24, issued to Andrew Andersen, deceased, on the 30th day of April, 1918.

It is respectfully submitted that if the judgment of the trial court is permitted to stand, then the water rights represented by the remaining 98 certificates issued in said certificate book (Def's. Ex. No. 3) is invalid, as well as the certificates issued subsequently to August 20, 1936. And moreover, it would render invalid and ineffective the certificates of every other incorporated irrigation Company.

Point V. *The court erred in finding and holding that plaintiff is entitled to an order declaring her to be the owner of the water right represented by the certificates of stock number 24, and that another certificate of stock be issued to plaintiff in lieu thereof for 112 shares of the capital stock of the Mendon Central Irrigation Company.*

It is respectfully submitted that by the foregoing finding and conclusion, it is definitely conceded by the court that the water right represented by the certificate of stock number 24, is not appurtenant to plaintiff's property, but is a distinct and separate property. It has been held by this court that a water right represented by shares of stock in a corporation, is not appurtenant to any particular land under the irrigation system, but may be used on any land under the system. *George vs. Robison* 28 Utah 79; 63 P. 819.

And, it definitely appears from plaintiff's testimony that the water used upon her land came from the canal of the Mendon Central Irrigation Company. This water, as well as the canal, is owned and controlled by an incorporated company.

This was exactly the situation present in the case of *George vs. Robison*, 63 Pac. 819, as stated by Mr. Justice Barch on page 820.

"In fact the fair result of the plaintiff's own testimony is to the effect that the water of Corn Creek, of which that in dispute formed a part, is and was owned and controlled by a corporation; that each share of its capital stock represented sufficient water to irrigate one acre; and that stockholders only were entitled to

water for the purposes of irrigation. There is nothing to show that any share of stock represented water for any particular acre of land. So far as appears from the proof, each stockholder had the right to use the water to which he was entitled on any land he saw fit. Under such arrangements as are here disclosed by the testimony, the water cannot be regarded as a part of the land, and is not appurtenant to it."

It is difficult to perceive how the judgment rendered by the trial court can stand, when plaintiff predicated her action on the theory that the water appurtenant to the land, as alleged in paragraph three of her complaint, and found in paragraph three of the courts findings, and paragraph one of the courts conclusions, and in the decree the following order is made: "It is Ordered, Adjudged and Decreed that the water represented by the 112 shares of stock in the Mendon Central Irrigation Company is appurtenant to the following described lands — (land described) — and that plaintiff is the legal and equitable owner of said water and entitled to the use thereof."

And, moreover, it is alleged in paragraph two of plaintiff's complaint; and found in paragraph two of the courts findings of fact, "That defendant has caused to be inventoried and appraised as assets belonging to the estate of said deceased (Andrew Andersen) the following property: 112 shares of the capital stock of the Mendon Central Irrigation, a corporation, 12 shares of which is known as Class two appraised at \$150.00, and 100 shares of class four appraised at \$2000.00." It will thus be seen from plaintiff's complaint as well as the findings of the court, that the property involved in this litigation belongs to the estate of Andrew Andersen, deceased.

It appears from the abstract of Title (Plaintiff's Ex. A) that subsequently to the death of Andrew Andersen, deceased, the said lands have been owned successively by his wife Sophia Andersen, and by his son L. M. Andersen, and by his daughter Catharine Gibbons. L. M. Andersen acquired the property from his Mother Sophia Andersen, by deed dated January 25, 1924, (Ab. of title page 15), and Catharine Gibbons acquired an 8/9th undivided interest and John C. Andersen, a 1/9th undivided interest, in the property from the estate of L. M. Andersen, deceased, as appears from the decree of distribution in said estate, dated May 24, 1948. (Ab. of title pages 21-25 inclusive). And, plaintiff's uncle, John C. Andersen, and wife Sena, conveyed his 1/9th undivided interest in said land to the plaintiff on June 22, 1949, (Ab. of title, page 29).

It will thus be seen that the lands now belonging to plaintiff were owned by her grand-mother, Sophia Andersen, uncles L. M. Andersen and John C. Andersen, and aunt, Catharine Gibbons, since the death of Andrew Andersen, and until plaintiff acquired title thereto on January 25, 1949. And undoubtedly, since the title and possession of the property was in the wife and children of Andrew Andersen, deceased, the remaining heirs did not petition the court to probate the said water right. Of course, any one of said heirs could have filed a petition at any time after the demise of Andrew Andersen, but, as is well known to the Bench and Bar, probate proceedings are occasionally postponed for various reasons and for various periods of time, after the demise of the owner.

Point No. VI. *The court erred in making and entering its finding four (R. 11) since the action therein referred to involved different property and different issues.*

During the trial plaintiff's counsel attempted to offer in evidence the opinion of this Court in the case of Gibbons vs. Brimm, 230 P. 2nd. 983, but an objection thereto was sustained by the court. (R. 39). During the discussion between the court and counsel before the court ruled on the objection, plaintiff's counsel conceded that his offer was based upon the theory that the water right represented by certificate No. 24, was appurtenant to plaintiff's land. However, the court at that time apparently did not agree with counsel's contention that a water right represented by shares of stock in a corporation, was appurtenant to the land upon which it had been used, or, that it was appurtenant to any land under the irrigation system. But, notwithstanding the ruling of the court at the time of trial, about 14 months later when judgment was rendered, paragraph four of plaintiff's complaint was included in the findings of the court.

The court also erred in its finding No. 4 — that plaintiff's ownership in the land was burdened with a lien thereon for the support and keep of Catharine Gibbons. This only proves how far plaintiff has gone in this case, in her attempt to appropriate the property belonging to her grandfather's estate.

It must be cenceded that the only property involved in that case, was the land described in the decree herein, Plaintiff acquired only such property as Mrs. Gibbons owned, and that, was an 8/9th undivided interest in said property. The remaining 1/9th interest was conveyed to plaintiff by her uncle John C. Andersen. And, that property descended to them from the estate of their brother

L. M. Andersen, deceased. (Ab. of title, 25, 26, 27). L. M. Andersen acquired this land from his mother, Sophia Andersen by deeds, appearing on pages 14 and 15 of the abstract of title. (Pl's. Ex. A.). These deeds were dated November 22, 1922, and January 25, 1924 and were both filed for record June 21, 1933. A water right was not mentioned in either deed.

The fact that a water right was not mentioned in either deed, may be due to the fact that both mother and son knew that a short time prior thereto the water right had been sold, conveyed, and assigned to the recently incorporated Irrigation Company, by the Deed of Water Rights, (Def's. Ex. 1) and that in consideration therefor the said company had issued to Andrew Andersen, a Stock Certificate No. 24, for 112 shares of water right in the company.

Point No. VII. *The court erred in rendering its judgment and decree that the water represented by the 112 shares of capital stock in the Mendon Central Irrigation Company, a corporation, is appurtenant to the lands described in said decree, and that plaintiff is the legal and equitable owner of said water — and that the said Mendon Central Irrigation Company, be directed to issue to plaintiff a certificate for 112 shares of stock to replace the certificate issued to Andrew Andersen, deceased, in his lifetime, and the court further erred in rendering its further judgment and decree; that the Cache Valley Banking Company, administrator of the Estate of Andrew Andersen, deceased, nor any of the heirs at law of his estate have no interest, ownership or title in either the water, or Certificate of Stock covering the same, or any part thereof, and that the*

plaintiff's title thereto is good and valid and is quieted in her, and that the administrator and heirs of the estate of Andrew Andersen, are estopped, enjoined, and restrained from asserting any right, title or interest whatsoever in said water or stock covering same.

It is respectfully submitted that the judgment and decree entered by the trial court in this case is contrary to the statutes of this state and the decisions of this court. The judgment concedes that the water right decreed to plaintiff is represented by shares of stock in the Mendon Central Irrigation Company. And the uncontradicted evidence discloses that this stock stands in the name of Andrew Andersen, deceased, upon the records of the Mendon Central Irrigation Company; and it is so alleged in paragraphs one and two of plaintiff's complaint, and so found in paragraphs one and two of the courts findings. (R. 1, 9).

There is no allegation or finding that plaintiff purchased this stock. Her sole claim thereto, as alleged in her complaint is, that the water represented by said stock certificate issued by the Mendon Central Irrigation Company, to Andrew Andersen, deceased, is appurtenant to the land. But section 100-1-10, U. C. A. 1943, as amended by Session Laws 1945, page 263, provides in part — "Water rights shall be transferred by deed substantially the same as real estate, *except when they are represented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land.*" (Italics supplied).

Thus it will be seen that the trial court entirely ignored the plain provisions of the statutes, as well as the

decisions of this court in the cases of Snyder vs. Murdock, 20 Utah 419, 59 Pac. 91, and George vs Robison 23 Utah 79, 63 Pac. 819, wherein this court held that water stock, being personal property, is not appurtenant to any particular lands under the system.

And moreover, there is no pleading, evidence or finding that plaintiff acquired title to said stock in any legal manner. Plaintiff merely alleges and testified (R. 36) and, the court found, that plaintiff and her predecessors in interest were permitted to use water coming from the canal of the Mendon Central Irrigation Company, to irrigate the lands described in the complaint. There is no allegation, or proof that plaintiff or her predecessors purchased this water stock from Andrew Anderson, during his lifetime, or from his estate after his demise. In fact, plaintiff testified that the water right covered by the certificate of stock No. 24, was the water used to irrigate the land. (R.36). But she did not testify that she or her predecessors in interest had purchased the stock represented by certificate No. 24. Thus, the only testimony in the record is to the effect, that a majority of the heirs of the estate of Andrew Andersen, deceased, permitted certain of the other heirs to use the water, consisting of their mother Sophia Andersen, brother L. M. Andersen, and sister Catharine Gibbons.

This was a permissive use, and such a use will not ripen into a title. It is a matter of common knowledge that some estates, consisting of real and personal property, such as land and water stock, are not probated for many years after the decedent's demise.

The water in question belong to the estate of Andrew Andersen, deceased. He left nine heirs, including the plaintiff. According to the judgment of the trial court, the remaining eight heirs would have their 8/9th interest in the property taken from them without compensation. This amounts to confiscation of private property and is forbidden by the constitution. (Art. 1 Sec. 7). And moreover, the water right must be sold in pursuance to probate sale, in order that the purchaser may receive a legal transfer of the stock. The plaintiff will be afforded an opportunity to purchase this property, or as much thereof as she deems necessary in a legal manner, as provided by the probate code.

The rule is well settled that in order for plaintiff to prevail in an action to quiet title to property, such action may be maintained only by a person having title to, the property in controversy. 51 C. J. 168, Sec. 71. And in an action to quiet title the general rule is that plaintiff must succeed on the strength of his own title and not on the weakness of his adversary's. 51 C. J. 171, Section 73.

This case is no doubt one without a single precedent, and the judgment entered in this action is likewise without precedent. If this judgment were permitted to stand, an heir could appropriate property of an estate, on the pretext that he was the last of some of the heirs who had been permitted to use the property.

Defendant and appellant respectively submits that the paramount question presented upon this appeal is whether the lower court had the right to hold under the evidence

in this case that plaintiff was the exclusive owner of the water right represented by the certificate of stock issued to Andrew Andersen during his life time, and which has not been transferred in any legal manner, but which according to the undisputed evidence in this case, appears upon the records of the Mendon Central Irrigation Company, to be the property of the estate of Andrew Andersen, deceased. (R. 45).

The defendant and appellant respectfully submits to this Honorable Court that the findings, conclusions, and judgment of the lower court be reversed, and set aside and held for naught, and for such other and further order as deemed proper by this Court, which will enable defendant and appellant to probate said estate, and that distribution be made to the heirs thereof, and for costs on this appeal.

Respectfully submitted,

L. E. NELSON,
Attorney for Defendant
and Appellant.