

1960

# Gunnison-Fayette Canal Company v. Howard Roberts and F. Dwight Malmgren : Brief of Defendants and Appellants

Utah Supreme Court

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McKay and Burton; Attorneys for Defendants and Appellants;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

GUNNISON-FAYETTE CANAL  
COMPANY,

*Plaintiff and Respondent,*

—vs.—

HOWARD ROBERTS and F.  
DWIGHT MALMGREN,

*Defendants and Appellants.*

FILED

1 - 1980

Supreme Court, Utah

Case No. 9081

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## BRIEF OF DEFENDANTS AND APPELLANTS

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McKAY AND BURTON

Attorneys for Howard Roberts  
and F. Dwight Malmgren

Defendants and Appellants

Salt Lake City, Utah

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## BRIEF OF DEFENDANTS AND APPELLANTS

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### STATEMENT OF FACTS

From 1931 to and including 1956, defendants, as owners of a .7 c.f.s. water-right, have been paying to plaintiff their pro rata part of a \$35.00 charge, pursuant to contract made in 1931, for transporting 1.4 c.f.s. of water for a distance of six miles from the Sevier River to the point where the defendant Roberts' water was delivered to him, and a distance of about four miles to the point where defendant Malmgren's water was delivered to him.

At the conclusion of the year 1956 the plaintiff corporation attempted to abandon the agreement and in-

stead of accepting the \$35.00 charge, *assessed* a charge of \$177.74 against Howard Roberts and \$15.66 against defendant F. Dwight Malmgren.

Though the defendants used not to exceed the first one-third of a fifteen mile canal, the plaintiff has sought not only to set aside an agreement, practice and construction of twenty-five years, providing for an annual charge of \$35.00 for the use of the portion of the canal, but now seeks to charge defendants by way of an assessment for not only the maintenance of the entire canal, but to require defendants to pay the administrative and corporate costs of the plaintiff corporation.

Gunnison-Fayette Canal diverts from the Sevier River at a point between the towns of Axtel and Centerfield and extends to the north past the communities of Gunnison and Fayette, terminating at a point to the north of the town of Fayette and east of the Sevier Bridge Reservoir.

In the early land boom days of the Sevier River there was a development known as "Kearns and Robbins" and a diversion from the Sevier River to that land was made through what was known as the "Kearns and Robbins Canal," which canal now represents the approximate first four or five miles of the present Gunnison-Fayette Canal. In connection with subsequent acquisition of water rights from the Sevier River, the Gunnison-Fayette Canal Company by deed became a part owner in the Kearns-Robbins Canal and used the same to carry the water-rights acquired from the Sevier River to the Fayette Canal. The Fayette Canal had theretofore carried only waters from the San Pitch River. This proceed-

ing is only concerned with the Kearns-Robbins section of what is presently commonly known as the "Gunnison-Fayette Canal."

The general adjudication on the Sevier River which resulted in what is commonly known as the "Cox Decree" was initiated in about 1916, and by 1926, State Engineer Bacon had prepared his proposed determination of water-rights and there were then ensuing a number of hearings as well as trials to settle the respective water-rights to be determined and adjudicated for the entire Sevier River. The time with which we are particularly concerned in these negotiations was the year 1931, at which time defendant Howard Roberts owned 1.4 second feet of water designated as an "AA Right." This right came to Howard Roberts from his father, the original source having been known as Ryan Springs, tributary to the Sevier River. This water-right had been used by defendant Roberts on his land under the Dover Canal and had been transferred at various times under temporary permit from the State Engineer for use on lands of the defendant Roberts under the Kearns-Robbins Canal. There were other people in the year 1931 who were owners in and using the Kearns-Robbins Canal to divert their waters, such as the Dyring family, the Wintch and Nielsen families.

In about the year 1931 the Board of Directors of the Gunnison-Fayette Company consisted of Archie M. Mellor, W. J. Gribble, Elgin Mellor, Elijah James and Howard Roberts (T. 234). Archie M. Mellor was president, Howard Roberts was secretary and Elgin Mellor was treasurer. At a directors' meeting in 1930 a com-



mittee consisting of Archie Mellor and Howard Roberts were appointed to meet with the lower Sevier River users and to effect an agreement and, if necessary, to accept a deduction of ten per cent of their water-rights for a storage privilege in the Sevier Bridge Reservoir, but leaving it to the officers to make the best negotiations possible.

At a meeting of the directors of plaintiff corporation at the Roberts home in February, 1931, the report of this committee was presented, pursuant to which a discussion was had concerning the agreement that could be arrived at whereby the charge to Gunnison-Fayette for storage of its waters in Sevier Bridge Reservoir would be reduced from ten per cent to three per cent, providing the Roberts water be joined in the stipulation to take a discount of ten per cent from the 1.4 c.f.s. to the credit of the Sevier Bridge Reservoir. The Roberts 1.4 c.f.s. AA Right was a constant flow right which was not subject to pro rating at any time, irrespective of the flow of the Sevier River. Roberts had no need for storage and the matter concerned was an arrangement pursuant to which he would suffer a ten per cent discount of his water-right by bringing the water into the Gunnison-Fayette Canal, providing there was an agreement as to the charge that would be made for the use of the portion of the canal required to get the waters to his land.

Elgin Mellor, the treasurer and director, was called as a witness by the plaintiff, and he characterized the substance of what was said at the meeting as follows (T. 241):

"A. Well, I don't know who said it. It was either Mr. Mellor, Archie Mellor, or Mr. Roberts suggested that they put their water in the canal. And we talked over different terms and finally they agreed on them, we agreed on ten per cent of their water and \$35 a year."

At Pages 255 and 256 of the transcript Mr. Mellor characterized the meeting of February, 1931, as follows:

"Q. Going back to this meeting of 1931, Mr. Mellor, at that meeting you were negotiating a contract, the arrangement under which Howard Roberts would put that 1.4 AA right into the Gunnison-Fayette Canal, weren't you?

A. I think so.

Q. And so that contract was to involve his right to put the water into the canal, as well as what arrangements would be made for a charge for the use of the canal?

A. That is right.

\* \* \*

Q. And for the privilege of running his water in the canal he wanted to know what the term would be?

A. That is right.

Q. And did you arrive at terms that were agreeable in that meeting to both the corporation and to Mr. Roberts?

A. I think so.

Q. Now one of those terms had to do with the payment of \$35 each year, didn't they?

A. Well, that was part of it."

Again at Pages 258 and 259 of the transcript:

"Q. Now, let's go back to this. The \$35 was to be the cash charge that would be made so long as Roberts kept this water in the canal?

A. Yes.

Q. It wouldn't be \$40 or \$50 or any other figure. It was going to be \$35 as a cash assessment?

A. Yes.

Q. Is that correct?

A. Yes. In cash.

Q. All right. Now you claim that in addition to \$35 cash your company was to get ten per cent of whatever this 1.4 would have produced?

A. Right."

The minutes of the company concerned with this meeting and the contract negotiated between the plaintiff corporation and defendant Roberts read as follows (Defendants' Exhibit 3):

"Motion by W. J. Gribble and seconded by Elijah James. That the board accept the proposition of Howard Roberts to let him run his 1-4/10 s.f. of water less 10% of the same, in the Fayette Canal permanently for the sum of \$35.00 per year. That the 10% is to go to the Sevier Bridge Reservoir for the credit of the Fayette Canal Company as agreed by Howard Roberts as part consideration for the Canal Company getting storage rights in said reservoir for 3% of the Fayette Canal Company water instead of 10%."

As evidenced by defendants' motion and answer to the complaint, it is admitted that the above quoted paragraph from the minutes, originally written by the first wife of Howard Roberts, was removed with ink eradiator and rewritten. The plaintiff introduced evidence that the handwriting on the portion re-written was that of Howard Roberts' second wife. However, such re-

writing, if made by the second wife, would have had to have been made prior to 1941 (T.354), at which time there was a separation when the second wife moved to California.

The original notation made at the meeting by Howard Roberts, and from which the minutes were written into the official minute book of the company, is defendants' Exhibit 6. Such original notation contains all of the significant wording concerned with the minutes and supports the fact that whatever occurred in the re-writing of the minutes, the re-written portion directly reflects the action taken, as evidenced by the original notes.

## POINTS RELIED UPON

### POINT NO. I

THE COURT ERRED IN FAILING TO SUSTAIN DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT AS A WHOLE AND AS TO EACH COUNT SEPARATELY.

### POINT NO. II

THE RIGHTS AND OBLIGATIONS OF THE PARTIES CONCERNING THE PORTION OF THE CANAL JOINTLY USED RESTING IN CONTRACT, AND THAT CONTRACT HAVING BEEN RECOGNIZED AND ACTED UPON BY THE PARTIES FOR OVER 25 YEARS, THE CONTRACT GOVERNS, AND SECTION 73-1-9, U.C.A., 1933, DOES NOT ABROGATE OR DISTURB RIGHTS OF THE PARTIES FOUNDED UPON SUCH CONTRACT.

### POINT NO. III

THE DELAY AND LACHES OF THE PLAINTIFF CORPORATION IN BRINGING THIS ACTION OVER 25 YEARS AFTER THE ACTUAL NOTICE BY DIRECTORS AND STOCKHOLDERS OF ALL FACTS AND CIRCUMSTANCES

CONSTITUTING THE CLAIMED ACTS OF MISCONDUCT OR IMPOSITION, COMBINED WITH THE INTERVENTION OF RIGHTS OF INNOCENT THIRD PERSONS WHO ACQUIRED WATER RIGHTS IN RELIANCE ON SAID CONTRACT, ESTOPS AND DEPRIVES THE PLAINTIFF CORPORATION FROM CHALLENGING OR SETTING ASIDE THE CONTRACT.

POINT NO. IV

THE PLAINTIFF CORPORATION CANNOT RETAIN THE BENEFITS OR FRUITS OF ITS CONTRACT AND ASSERT AS A DEFENSE THERETO PURPORTED ACTS OF MISCONDUCT OF ITS OFFICERS.

POINT NO. V

DIRECTORS OF A CORPORATION ARE NOT SUCH EXPRESS TRUSTEES AS WILL PREVENT THE OPERATION OF THE STATUTE OF LIMITATIONS AGAINST THE CORPORATION IN AN ACTION BY THE CORPORATION OR IN A STOCKHOLDER'S DERIVATIVE SUIT.

POINT NO. VI

A CO-USER OF A CANAL IS RESPONSIBLE ONLY FOR A PROPORTIONATE COST OF MAINTENANCE, OPERATION AND CONTROL OF THAT PORTION OF THE CANAL WHICH IS IN FACT JOINTLY USED.

POINT NO. VII

A CORPORATE CO-USER AND CO-OWNER OF A CANAL CANNOT REQUIRE ANOTHER CO-USER TO CONTRIBUTE TO THE PAYMENT OF CORPORATION SALARIES, COSTS OF CORPORATE MEETINGS, STATIONERY, CHECKS, COSTS OF BORROWING MONEYS FOR PURELY CORPORATE PURPOSES AS A PART OF CHARGES FOR MAINTENANCE, OPERATION AND CONTROL OF A JOINT CANAL.

POINT NO. VIII

FINDING OF FACT NO. 3 IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE OR LAW, AS

PLAINTIFF IS NOT THE SOLE OWNER OF THE CANAL AS SHOWN BY DEEDS IN EVIDENCE DISCLOSING THAT DEFENDANTS AND OTHERS ARE CO-OWNERS OF THE CANAL.

#### POINT NO. IX

FINDING OF FACT NO. 8 IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE OR LAW, AS THERE WAS NO COMPETENT EVIDENCE OR LEGAL BASIS UPON WHICH "REASONABLE EXPENSE" FOR WHICH DEFENDANTS WOULD BE LIABLE COULD BE DETERMINED; PARTICULARLY WAS THERE NO EVIDENCE TO SHOW THE TOTAL ACRE FEET OF WATER DIVERTED INTO THE CANAL OR DIVERTED AND DELIVERED TO THE DEFENDANTS, BUT IT AFFIRMATIVELY APPEARS THAT THE PLAINTIFF CORPORATION TOOK WATERS OF DEFENDANTS AND FAILED TO CREDIT OR PAY DEFENDANTS FOR THE WATERS SO TAKEN.

#### POINT NO. X

FINDING OF FACT NO. 9 IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE OR LAW AS THERE WAS NO EVIDENCE INTRODUCED SHOWING THE ACTUAL COSTS OF OPERATING, MAINTAINING AND CONTROLLING THE PORTION OF THE CANAL JOINTLY USED, NOR WAS ANY BASIS PROVIDED BY WHICH THE COURT COULD ALLOCATE ANY OF THE EXPENSES TO THE PORTION OF THE CANAL JOINTLY USED, AND THE FINDING IS BASED PURELY ON CONJECTURE.

#### POINT NO. XI

FINDING OF FACT NO. 10 IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE OR LAW, AS THE EVIDENCE SHOWED THE PLAINTIFF RESTED ITS CASE ON A MOTION PASSED BY ITS BOARD OF DIRECTORS ISSUING A CHARGE AGAINST DEFENDANTS UNSUPPORTED BY FACTS OR EVIDENCE ESTABLISHING A BASIS IN ACCORDANCE WITH LAW UPON WHICH ANY CHARGE COULD BE MADE.

#### POINT NO. XII

FINDINGS OF FACTS NOS. 13, 14, 16, 17 and 18 ARE CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE OR LAW FOR THE REASON THAT THESE FINDINGS PURPORT TO ESTABLISH A BASIS FOR SETTING ASIDE A CONTRACT BY THE PLAINTIFF AND DEFENDANT ROBERTS WHICH HAD BEEN HONORED AND RECOGNIZED FOR A PERIOD OF OVER 25 YEARS AND SUCH FINDINGS ARE CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE AND DO NOT IN LAW CONSTITUTE A BASIS UPON WHICH ANY RELIEF COULD BE AFFORDED.

#### POINT NO. XIII

FINDING OF FACT NO. 15 IS CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE OR LAW FOR THE REASON THAT A COURT WILL NOT REWRITE OR DETERMINE VOID THE MINUTES OF A CORPORATION IN THIS TYPE OF AN ACTION WHERE NO OFFICER OF THE CORPORATION IS INVOLVED AND WHERE THE CORPORATION HAS NOT TAKEN ANY ACTION ITSELF TO CORRECT SAID MINUTES, AND IN A CIRCUMSTANCE SUCH AS IN THIS CASE PRESENTED WHERE THE MINUTES EVIDENCE THE ACTION OF A CORPORATION, AND THE CORPORATION HAS NOT ATTEMPTED TO ESTABLISH WHAT ACTION IF ANY TO THE CONTRARY WAS TAKEN.

#### POINT NO. XIV

FINDING OF FACT NO. 20 IS CONTRARY TO LAW AND NOT SUPPORTED BY THE EVIDENCE AS THERE IS NO EVIDENCE THAT DEFENDANT HOWARD ROBERTS CONCEALED ANY MATERIAL FACT, AND THE EVIDENCE CLEARLY SHOWS THAT ALL STOCKHOLDERS, DIRECTORS AND OFFICERS WERE FOR OVER 25 YEARS ADVISED OF ALL OF THE FACTS OF WHICH COMPLAINT IS MADE BY PLAINTIFF.

#### POINT NO. XV

THAT THE CONCLUSIONS OF LAW AND JUDGMENT ARE CONTRARY TO LAW AND NOT SUPPORTED BY THE FINDINGS.

## POINT NO. XVI

THE COURT ERRED IN PERMITTING THE SECRETARY TO COPY FROM SOME RECORD EVERY EXPENDITURE OF PLAINTIFF CORPORATION AND INTRODUCE SUCH IN EVIDENCE AS PROOF OF EXPENDITURES MADE ON A PORTION OF A CANAL JOINTLY USED AS BASIS FOR DEFENDANT'S LIABILITY AS A JOINT USER. (Tr. 71)

## ARGUMENT

### POINT NO. I

THE COURT ERRED IN FAILING TO SUSTAIN DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT AS A WHOLE AND AS TO EACH COUNT SEPARATELY.

The complaint of the plaintiff is divided in three claims. In the first claim the plaintiff sets up that it owns and operates the Gunnison-Fayette Canal; that the defendants are stockholders in the plaintiff corporation and have separate rights from the Sevier River; that defendants use the Gunnison-Fayette Canal as a means of conveying water to their land to which they are entitled by virtue of their stock ownership in the plaintiff corporation and the water which they use under their own separate rights. The significant paragraph of the first claim is that "Howard Roberts owes the plaintiff the sum of \$161.74 for the balance of a water assessment legally assessed by plaintiff against defendants during the year 1956, as his share of the operation and maintenance costs of the canal system for conveying the said waters to his land."

The second claim contains a recital that the defendant Howard Robert claims that while he was a director



and officer of the plaintiff company, Roberts entered into an agreement with the company whereby he would be able to convey water under his own rights through the canal for a yearly charge of \$35.00. That such an agreement, if any there is, is void and unenforceable and was made against the best interest of the corporation and was made while Roberts was a trustee and officer of the corporation and was for the personal benefit of Roberts and against the interests of the corporation, and was made in violation of a duty of Roberts towards the corporation. That the present officers have now repudiated the alleged agreement and that it is null and void; that Malngren, as a successor from various persons to a portion of the original Roberts right should likewise be determined to have no right under such agreement.

The third claim states that there is a certain minute entry in the books of the Canal Company and that there has been an apparent erasure, and the minute entry does not state or show or reflect in truth and fact the actions of the Board of Directors in connection with the matter, and that the action has been repudiated and is now repudiated and should by the Court be declared to be of no force and effect.

As its first defense defendant and appellant directed motions to dismiss the complaint as a whole and as to each of the claims as though separately by each defendant.

As appears at page 24 of the transcript, defendant Howard Roberts had various water-rights in the Sevier River which he would use or lease to others. In addition, he had his rights as a stockholder to water of the Gunni-

son-Fayette Canal Company. Such other rights would be (a) for one-third of a second foot, which was known as the Nielson Class "A" right, and (b) the right of defendants Roberts and Malmgren having a combined value of .7 c.f.s. of AA water. Each such right would produce a different acre foot and consequently a different pro rata obligation, if there be any obligation shown.

Under the provisions of the Cox Decree the AA water-rights did not prorate (T. 231). It was a firm right which was to be taken from the waters of the Sevier River, irrespective of the amount of water flowing in that river, and did not have to be prorated with any other person. The Class "A" right had to be prorated. The amount of water which the Gunnison-Fayette Canal Company itself would receive and distribute per share would vary with the amount of the flow of the Sevier River and in accordance with the various types of rights which the Canal Company had which would produce a different volume of water from year to year, depending upon the flow of the Sevier River. The significance of this recital is to indicate that each of the rights referred to above would produce a different volume of water. In other words, under one right the defendant Roberts would receive a full water right which would not be diminished or prorated with any other use. That would be his "AA Right." His A right would not produce necessarily a third of the second foot but would have to take its prorated position with the other A rights using the canal.

Does the first claim, then, state a cause of action? Mr. Novak, counsel for plaintiff Irrigation Company,

states his action is under Section 73-1-9 for contribution from a co-user of the canal. To state a cause of action under such section it is submitted that the complaint must allege:

- (1) That defendant used water through the canal during a specified time.
- (2) The amount of water defendant used and the total amount of water used by all others through the canal for the same time.
- (3) Allege the amount that had been expended by plaintiff and others that used the canal for the period concerned, and describe such expense as *reasonable* and the nature of the same, and that such was for maintenance and operation and reasonably required, and what was the character and nature of the work and expense.

Plaintiff alleges that it legally assessed defendant \$161.74 during the year 1956 as his share of operation and maintenance costs of the canal system *for conveying the said waters to his lands.*

The words "said waters" can only refer to the waters theretofore described which the complaint states are waters received "as a stockholder" and "waters they use under their separate rights."

Plaintiff can assess its stock but it cannot assess a co-user.

Certainly without this complaint alleging that plaintiff spent money, or did work on the canal, it cannot be

said that this complaint states any basis in law showing an obligation of defendant to pay plaintiff any sum.

Plaintiff's counsel states that the stock assessment was paid by defendant and there is no issue over any obligation of defendant as a stockholder.

Because of the absolute lack of competent or any evidence showing sums spent on the portion of the canal jointly used, the plaintiff cannot now seek to amend its complaint, and it is submitted the motion to dismiss should be sustained.

Plaintiff had its Second Cause of Action dismissed ('T. 168-174). Though the District Court evidently had trouble determining who was plaintiff and what the motion to dismiss might effect, it is submitted that any issue to dismiss might effect, it is submitted that this claim was dismissed. (See minutes of June 25, 1958)

Certainly the third claim raises no issue against defendants. The third claim is merely a recital of a portion of corporate minutes, with a statement that there is no erasure and that though admittedly there was action taken by the Board, the minutes do not reflect the action taken; that the action is repudiated. No cause for repudiation is alleged; no allegation as to who made any alteration; no allegation as to what the action was; no allegation that the corporation seeks to correct the minutes.

It is clear that no cause for relief is stated against either defendant, but more important no cause, no complaint is made at all.

The action should be now and should have been dismissed both on the pleadings and in accordance with defendants' motion to dismiss made at the conclusion of plaintiff's case (T. 321).

## POINT NO. II

THE RIGHTS AND OBLIGATIONS OF THE PARTIES CONCERNING THE PORTION OF THE CANAL JOINTLY USED RESTING IN CONTRACT, AND THAT CONTRACT HAVING BEEN RECOGNIZED AND ACTED UPON BY THE PARTIES FOR OVER 25 YEARS, THE CONTRACT GOVERNS, AND SECTION 73-1-9, U.C.A., 1933, DOES NOT ABROGATE OR DISTURB RIGHTS OF THE PARTIES FOUNDED UPON SUCH CONTRACT.

In *West Union Canal Company v. Thornley*, 228 P. 199, 64 Utah 77 this court states :

"The rights and obligations of the parties are therefore determined by contract; and that contract, as found by the court, has been recognized and acted upon by the parties for many years. Section 13 of chapter 67, [73-1-9 U.C.A., 1953] *supra*, was not intended to abrogate or disturb the rights of parties in an irrigation canal founded upon a valid and existing contract and is therefore not controlling, under the facts of this case."

There was a contract negotiated between Howard Roberts and the plaintiff corporation by the means of which he was given the privilege of diverting his 1.4 cubic feet per second of water from the Sevier River through the first six miles of a canal jointly owned by the plaintiff corporation and others.

At pages 346, 347 and 348 of the transcript the defendant Roberts stated :

"A. Prior to that and when that water was established for that land we had an individual ditch that went from the Sevier River and across Sanpitch and down through all them farms to our country. It was before the Fayette Canal Company was built. And later years we abandoned that ditch. We traded part of the right to the Gunnison-Fayette Canal Company. I sold part of it to Delta and I transferred, transferred this water in to the Dover Canal Company and then used it in the Dover Canal.

Q. So then the recognized place of use prior to the entry of the Cox Decree or prior to the negotiations leading to the Cox Decree, the place of use for this water was under the Dover Canal, the one and four-tenths, before the Cox Decree?

A. Yes.

Q. Then did you enter into some negotiations, Mr. Roberts—

A. Well—

Q. —for the transfer of the one and four-tenths into the Gunnison-Fayette Canal?

A. When it come up and we had to put a point of diversion for the use of this water, I had more land under the Fayette Canal Company than I did in Dover. And I had more water right in Dover than I had there. And I wanted to, would sooner used it down the Fayette Canal. And I asked the board if they would be interested in letting the water go down the Fayette Canal. And they was they was. So then I wanted to know how it was going in and the terms it could go in on. I told them if they didn't want it in there I could use it in Dover, but I would sooner have it over here. And they felt like, at that time, the more water they got in the canal and to help keep shrinkage up and expenses that they would let it in.

Q. —did you have a meeting with the board of directors of the Gunnison-Fayette Canal Company which was concerned with the transfer of the one and four-tenths in to that canal in connection with the arrangements for storage in Sevier Bridge encompassing this entire field?

A. Yes.

Q. When did that meeting take place?

A. Well, the first meeting I think was along in November, if I remember right. It was early. Of '30. It would be 1930. And then we finally had another meeting in February, or, yes, February, 1931, when they decided—"

At page 355 the action of that meeting of the Board of Directors of February 28, 1931, stated by Mr. Roberts as follows:

"Q. Now has there been anything added to Exhibit 6 or Exhibit 3 that was not actually acted upon by that board in 1931 at the directors meeting?

A. No, sir.

Q. And these minutes correctly reflect the action of the board at that time?

A. Yes.

Q. As they are now?

A. Yes, sir."

At pages 363, 364, 365, and 366 of the transcript:

"Q. (By Mr. Burton) Was there a conversation between you and this, the officers of the Gunnison-Fayette Canal Company relative to the conditions upon which you could take your waters through the Gunnison-Fayette Canal?

A. Well, all the board.

A. Yes.

Q. When did that take place?

A. That night in the meeting, and previous before.

Q. All right. And who was present in these conversations?

Q. Now that is Arch?

A. Arch M. Mellor; W. J. Gibble; Elijah J. James, and Elgin Mellor and myself.

\* \* \*

A. Well, I told them I would like to use my waters in the Fayette Canal and have it put in there permanent. And they talked about, I told them I wanted to know what they was going to charge me to put it in, because if they didn't want it in there, it wasn't going to be a benefit, I would leave it in the Dover Canal where I had had it. And they talked it over among themselves and the set down and they figured as to the expenses of the canal, and left off what the canal company owed. The owed some money for water they purchased. They had bought eleven hundred shares of water, which amounted to \$11,000, of the Central Utah Water Company. And when they figured it all up and all, they arrived at a \$35 assessment to run that water in the canal. And I told them that we, I did, that it looked like that we could store that water and get the canal company's water stored for three per cent if I would give them ten per cent of my water for storage of the Gunnison-Fayette Canal Company.

At that time it was brought up as to the, I would get a benefit from that ten per cent. I said individually if I could get that water through the canal and all I would just as soon use it daily as have it stored, which I would.



Q. Now was anything said relative to the duration or how long this \$35 was to apply?

A. Well, it was to put in there permanent.

Q. At \$35 a year?

A. At \$35 a year. And I took no part in setting that price.

Q. You mentioned that Gunnison-Fayette, pardon me, was anything said by any of the other persons present?

A. Well, only that they sit and figured it out and said they thought it was a fair assessment and accepted it in there, and made a motion to the effect that they would take in that way.

Q. And thereafter did you and every since that time have you run your one and four-tenths second feet through the canal?

A. Yes, sir.

Q. And how much did you pay each and every year from 1931 for that one and four-tenths?

A. Well, one and four-tenths. Arch paid half and I paid half, which was seventeen and a half that I paid and he paid seventeen and a half, that part of it."

The plaintiff corporation called as its witness Elgin Mellor who was one of the directors at the said meeting of the directors on February 28, 1931. At pages 255 and 256 states the following:

"Q. Going back to this meeting in 1931, Mr. Mellor, at that meeting you were negotiating the contract, the arrangement under which Howard Roberts would put that 1.4 AA right in to the Gunnison-Fayette canal, weren't you?

A. I think so.

Q. And so that contract was to involve his right to put the water in to the canal, as well as what arrangements would be made for a charge for the use of the canal?

A. That is right.

\* \* \*

Q. And for the privilege of running his water in the canal he wanted to know what the terms would be?

A. That is right.

Q. And did you arrive at terms that were agreeable in that meeting to both the corporation and to Mr. Roberts?

A. I think so.

Q. Now one of those terms had to do with the payment of \$35 each year, didn't they?

A. Well, that was part of it.

\* \* \*

Q. Now that was \$35 in cash, wasn't it?

A. I suppose it was cash."

At pages 258, 259 and 260 of the transcript appears the following:

"Q. Now let's go back to this. The \$35 was to be the cash charge that would be made so long as Roberts kept this water in the canal?

A. Yes.

Q. It wouldn't be \$40 or \$50 or any other figure. It was going to be \$35 as a cash assessment?

A. Yes.

Q. Is that correct?

A. Yes. In cash.

Q. Now you say there was a question raised constantly in directors meetings concerning this matter, this contract of Roberts?

A. There was.

Q. Did it come up in very many directors meetings?

A. Several.

Q. Now you say several. Tell me about what number in your recollections?

A. Oh, on an average of once a year.

Q. And who raised the question?

A. Oh, one of the directors.

Q. Did you ever raise the question?

A. Yes.

Q. What did you say when you raised the question?

A. I told them there was a complaint; that they didn't, the stock didn't think they was paying enough assessment.

Q. All right. Then was there any answer given on that?

A. Yes, sir. There was.

Q. Who answered it?

A. Well, Mr. Roberts sometimes, and Mr. Mellor sometimes, said, well, you are getting ten per cent and that amounts to so many acre feet and you are getting \$35, and that is worth so much in dollars and cents an acre foot, and it values pretty close to a fair assessment.

Q. Now, then, as far as your understanding of this contract would be concerned, taking the year 1956, Gunnison-Fayette Canal Company would have taken ten per cent of whatever water

Roberts and his assigns would have been entitled to, plus \$35?

A. That is my understanding.

Q. That is what you would say the arrangement was?

A. That is what we were doing when I was in there."

Pages 269 and 270 of witness Elgin Mellor's testimony proved the following:

"Q. Now then the majority on the board of directors at that time, consisting of yourself and Elijah James and Gribble, were without any interest whatsoever in this 1.4?

A. That is right.

\* \* \*

Q. Now going back to this meeting of February of 1931, at that meeting Mr. Mellor, do you remember that you and Elijah James set this \$35 charge?

A. No. I can't remember. We may have done, but I couldn't remember. I wouldn't say I did or didn't. That is too far back for me to remember.

\* \* \*

Q. All right. There would be Gribble, you and James that would set that amount?

A. I think so. I think after they showed us how much this water meant to us, how much we were going to get out of it, additional water in the canal, besides the 10%, I think we did. It looked like a good deal at that time.

At page 271:

"Q. All right. If the three of you set the \$35, tell me how you figured \$35?

A. I don't recall that. I don't know what we suggested or whether they suggested that they would give that. I rather think they suggested giving that to us and we accepted it."

At page 272 the witness Mellor said:

"Q. Now, when you say it should have been a benefit, how would that—

A. Well, additional water. The more water you get in the canal you should have less shrinkage and get more water in there if you keep the canal clean.

Q. Now was that discussed, the fact it would be a benefit to the company by having additional water in the canal?

A. Oh, I think it was brought up. Yes."

At page 273 Mellor states:

"Q. I am just pointing out there is a three-months difference only in time. Actually you knew that Roberts putting his water in the canal and the three per cent for Fayette and that arrangement was all tied together simultaneously?

A. Yes."

Mellor proceeded then to describe his activities as a water master and the manner in which the assessments of the company were computed in establishing the fact that at the end of a calendar year the company tabulates its expenses for that year and then proceeds to determine the amount of water that was distributed and pro-rate the expenses establishing the fact that the assessment is made for in effect the distribution made the previous year. Then at pages 276 and 277 of the transcript Mellor states:

"Q. So there had to be a different basis for figuring the upper end then than the assessment

for the shares in the company?

A. Well, they was on a different water right and it was figured so far, Dyreng and Wintel and them, so far they paid on the canal and so much expense they had, and it had to be figured different.

Q. So the practice then was to take Dyreng's costs, the costs of the canal up to the Dyreng diversion, and then figure out how much water he got and make an assessment accordingly?

A. That is right for Dyreng.

Q. The same would be for Roberts—

A. No.

Q. —on his—

A. No.

Q.—water?

A. No. It wasn't for Roberts.

Q. How would it be handled for Roberts?

A. Well, Roberts on his second foot of water was so much, definitely so much, a year.

Q. I see. So there is no necessity then of attempting to determine costs. Roberts would be \$35 and that was it.

A. Well, that is the way we did it."

Concerning the 10% of his rights which Mr. Roberts had given up for the benefit of the canal company at page 277 appears the following from Mr. Mellor's testimony:

"Q. You have testified concerning the conversation that you had with Mr. Roberts in the summer of this year?

A. I did.

Q. And I will ask you if in that conversation Mr. Roberts didn't tell you that you got your

three per cent by his giving up his ten per cent to the Sevier Bridge?

A. He did."

The reluctance of the admissions of Mr. Mellor concerning the arrangements with Roberts best appears at pages 278 and 279 in the following questions and answers:

"Q. And you knew that was done under the claim of a contract with the company?

A. Well, I don't think there is any contract. It was just an agreement we let them put them in. They talked like maybe year from year they might take it out. So it was just a year to year proposition.

Q. But it was pursuant to an agreement with the company, wasn't it?

A. Well, as long as it was agreeable.

Q. Now I will ask you in that connection if you didn't make the following reply or statement at Page 14 of your deposition.

A. They wanted to know what arrangement they could make to put the water in the canal and what it would cost them to do it. And that was discussed back and forth. And the understanding we finally agreed on, my knowledge of thinking and the way I have always seen it was that we get 10% and \$35. And they was telling, they told us what a good deal they got for us on account of getting our stored for 3%. But I never did hear it that that was the way they got it was by giving 10% of their water.

Q. Did you make that statement?

A. Yes, sir.

• • •

Q. Now there was no doubt in this under-

standing or agreement, as you call it, with Roberts and Archie Mellor that so long as they wanted to keep the water in the canal that it was going to be in accordance with this agreement or understanding that you had at this directors meeting?

A. Well, so long as we was agreeable and they were agreeable, wanted to keep it and it was agreeable with us, that was understood from year to year. Every time it was brought up there was a little argument over it. They threatened to take it out; sell it somewhere else. Said we didn't want it they would take it somewhere else, if we didn't think it was a benefit to us.

Q. And I take it that your company determined that they wanted it then?

A. Well, we did, yes. We went along with it. We figured under those conditions we would go along. We wasn't totally satisfied with it, but we did it anyway."

There is no doubt the evidence conclusively shows that a director's meeting was held, and that the contract was negotiated between the plaintiff and the defendant Roberts. As stated in *Preis v. Eversharp, Inc.*, 154 Fed. Supplement, 98 at page 101 where a contract was being challenged as not being within the provisions of the statute of fraud the court states:

"The minutes of the meeting of August 23, 1954, signed by the Secretary of the defendant, are clear and unequivocal, and the agreement constituted thereby does not come within the Statute of Frauds . . . In the case of *Argus Co. v. Mayor, etc., of City of Albany*, 55 N.Y. 495, at page 501, similar to the case at bar, the New York Court of Appeals said, '\* \* \* and the minutes of the days doings of the body, being signed by the clerk thereof, there is a subscription of the note of



memorandum made by the party, by its agent duly authorized. This is a satisfactory compliance with the statute. It meets the purpose and intention of the law, by providing an enduring and unchanging evidence of the agreement; and it meets its letter, for there is some note or memorandum of it in writing subscribed by the party to be charged thereby, the subscription made by an authorized agent.' "

In addition there is in evidence in this case the written stipulation entered into between the plaintiff and the defendant and other parties in the proceedings ending in the Cox Decree and by which this very result was achieved, the stipulation and the Cox Decree providing that the defendant Roberts would have the Gunnison-Fayette Canal as the point of diversion and would there receive this water.

There is further in evidence now the testimony produced by plaintiffs own witness and director Elgin Mellor in which the very fact there was an agreement or an arrangement made for Roberts to put his water into the canal and the details of it set forth including the \$35 annual fee all sufficiently and adequately point out the fact that there was a contract which had been honored and accepted for 25 years covering the basis upon which Roberts put his water in the canal and the amount that he would be charged therefor, this contract having been so established. Under the principle enunciated at the beginning of this point, that contract governs the charge of \$35 for the year involved. Certainly that must be true because there had been no effort made to change the arrangement between the parties until after the year 1956. Certainly the plaintiff cannot change the basis

of the assessment at the end of the fiscal year. This company cannot wait until the end of the calendar year concerned and then attempt to set up a different charge. If Plaintiff had a right to modify the contract price of \$35.00, they could do that only as to an ensuing year but not as to a year where the waters had been delivered under the basis of \$35 that had been established in all previous years.

### POINT NO. III

THE DELAY AND LACHES OF THE PLAINTIFF CORPORATION IN BRINGING THIS ACTION OVER 25 YEARS AFTER THE ACTUAL NOTICE BY DIRECTORS AND STOCKHOLDERS OF ALL FACTS AND CIRCUMSTANCES CONSTITUTING THE CLAIMED ACTS OF MISCONDUCT OR IMPOSITION, COMBINED WITH THE INTERVENTION OF RIGHTS OF INNOCENT THIRD PERSONS WHO ACQUIRED WATER RIGHTS IN RELIANCE ON SAID CONTRACT, ESTOPS AND DEPRIVES THE PLAINTIFF CORPORATION FROM CHALLENGING OR SETTING ASIDE THE CONTRACT.

The lower court attempted to state that there was only one way in which a contract could be entered into and that was by a resolution passed and the written contract entered into. At page 240 the court states:

“And want to avoid the contract or what Mr. Burton calls a contract. Personally, I don't think a contract can be made in that way.”

“If they are going to enter in to the contract it has to be someplace besides on the minutes; a resolution passed and a contract entered into.”

The court further says:

“It pertains to rights, conveyance of rights, in real estate as far as I can see.”

Then plaintiff's counsel says:

"We don't even if it were the action of the board of directors without the alterations . . ."

It is obvious that both the lower court and counsel for the plaintiff are in error when they attempt to determine this case on the basis that the contract could not have been entered into in a meeting between Roberts and Arch Mellor and the other directors of the corporation. It is fundamental law that such a contract could have been negotiated and was negotiated.

As heretofore pointed out, Plaintiff's witness Elgin Mellor was a director back in 1931 at the time the contract was negotiated. At pages 259 and 260 of the transcript he states:

"Q. Now you say there was a question raised constantly in directors meetings concerning this matter, this contract of Roberts?

A. There was.

Q. Did it come up in very many directors meetings?

A. Several.

Q. Now you say several. Tell me about what number in your recollection?

A. Oh, on an average of once a year.

Q. And who raised the question?

A. Oh, one of the directors.

Q. Did you ever raise the question?

A. Yes.

Q. Which—

A. Several times.

Q. Which meeting?

A. I couldn't tell you which meeting. There was several meetings. I don't recall it.

Q. What did you say when you raised the question?

A. I told them there was a complaint; that they didn't, the stock didn't think they was paying enough assessment.

Q. All right. Then was there any answer given on that?

A. Yes, sir. There was.

Q. Who answered it?

A. Well, Mr. Roberts sometimes, and Mr. Mellor sometimes, said, well, you are getting ten per cent and that amounts to so many acre feet and you are getting \$35, and that is worth so much in dollars and cents an acre foot, and it values pretty close to a fair assessment."

From the foregoing it is obvious that the directors and the stockholders were well aware of the arrangement, the contract, the details of the Cox Degree and the practice pursuant to which Roberts and Mellor had been for over a period of twenty-five years using and paying for their water which they brought through the canal. It is submitted that any attempt at this time to set up any claim of fraud, duress, imposition or otherwise, if this court should for any reason hold that such an issue was before the lower court, that the doctrine of estoppel applies and the Plaintiff corporation cannot now attempt to set up such a defense.

This is particularly important for the reason that as appears in this record, third persons have now entered the picture and have bought in reliance upon this contract. The defendant Malmgren purchased his shares from his father. His father in turn purchased the 20 acre interest in the Roberts' rights from Gribble.

Gribble had purchased the 20 acre right from Roberts, and in these transactions Gribble and the company officers represented to Malmgren, Sr. and Malmgren, Jr. that this particular water right carried an obligation of its pro rata share of \$35 per year and not otherwise. The witness Jensen who purchased a part of the Mellor interest is in the same position.

#### POINT NO. IV

THE PLAINTIFF CORPORATION CANNOT RETAIN THE BENEFITS OR FRUITS OF ITS CONTRACT AND ASSERT AS A DEFENSE THERETO PURPORTED ACTS OF MISCONDUCT OF ITS OFFICERS.

As heretofore pointed out the defendant Roberts with Arch Mellor, at the instance of the plaintiff corporation, entered into a negotiation which resulted in the stipulation on which all of these rights were finally determined in the Cox Decree. Roberts had no need for any storage privilege because he was entitled to his 1.4 cubic feet as an AA right without prorating with anyone. As appeared by the statement of counsel for the plaintiff in this case, this is a constant flow right, does not vary, and Roberts is always entitled to and should have received his one and four-tenths. He couldn't receive any more than this, nor could anyone for any reason legally prevent him from receiving exactly that amount. He at no time under any of these arrangements was able to get more nor a larger flow at any time than the one and four-tenths. Being in that situation he was in a perfect position to be the key figure to secure for the plaintiff corporation, which he did, the right to have a storage privilege in the Sevier Bridge Reservoir and to secure the 1,000 acre feet, advanced cost figures

the Cox Decree gives to the corporation, in exchange for the defendant Roberts agreeing to let these waters be taken down with all other waters into the Sevier River Bridge at a discount to him of 10% and without any corresponding benefit of any kind whatsoever to Roberts. Roberts is a shareholder in the plaintiff company who would be interested in seeing that the company water rights were improved; certainly, however, not to his detriment as an individual owner of one and four-tenths.

We have the situation, therefore, where Roberts, as a member of the negotiating committee and with the full understanding of the plaintiff corporation, agreed to sacrifice 10 per cent of his water right to enable the plaintiff to not only effect this stipulation, but to be able to have storage privilege at only a 3% loss of its water rights. Certainly there is a full and complete benefit to the plaintiff corporation not only in the fact that it improved its water right to have the one and four-tenths cubic feet per second in the canal as far as shrinkage is concerned, but the benefit that it achieved in having the privilege of storage at such a smaller rate than was available to any other of the water users involved in that stipulation. The principal has been well stated in the case of *Baker vs. Glenwood Mining Company*, 82 Utah 100, 21 P.(2d) 889:

“Where a corporation has received the benefit of a contract and while it still retains the truth thereof it will be estopped from urging as a defense that the contract was ultra vires to the corporation or that the corporate officers were without authority with respect thereto.”

Having obtained the benefit of a very advantageous position this plaintiff corporation surely will not be able to take the equitable position to state now that the contract was unauthorized because of a position which Mr. Roberts held, or for any other reason while the plaintiff company retains the benefit of the contract made in its behalf by Howard Roberts and his giving up 10 per cent of his water rights.

#### POINT NO. V

DIRECTORS OF A CORPORATION ARE NOT SUCH EXPRESS TRUSTEES AS WILL PREVENT THE OPERATION OF THE STATUTE OF LIMITATIONS AGAINST THE CORPORATION IN AN ACTION BY THE CORPORATION OR IN A STOCKHOLDER'S DERIVATIVE SUIT.

In the annotation appearing at 123 A.L.R., 346 it states:

"Directors of a corporation are not such express trustees as will prevent the operation of the statute of limitations in their favor in a stockholders derivative suit."

In the case of *Runswick v. Floor*, 208 P.(2d) 948 the following rules are announced by this court:

"So long as corporate officers act clearly and in good faith they are not precluded from dealing or contracting with the corporation merely because they are its officers."

Citing *McIntyre v. Ajax Mining Company*, 28 Utah 162, 77 P. 613:

"There is no sound principle of law or equity which prohibits one or more of the directors of a corporation from entering into contracts and dealings with the corporation, provided they act in good faith, and provided there is a quorum

of directors on the other side of contract, so that the vote of the interested director is not necessary to the adoption of the measure; and even in the latter case the contract is good in law."

Neither by pleading nor by any evidence has the plaintiff in this case shown any act of imposition or unfairness on the part of the defendant Roberts or of the now deceased president Arch Mellor. They have shown that there was a meeting; that there was a full disclosure, that the facts were well considered; that from their own witness Mellor, who was one of the directors, they produced the fact that it appeared to be a just and reasonable arrangement at the time it was entered into; that it has been known at all times by the directors and the stockholders; and there has been no basis of over-reaching, or fraud or imposition of any type by pleading or by evidence introduced in this case. Plaintiff has sought to rest a claim of a right to repudiate the contract for the sole purpose and reason that Roberts was a director at the time it was made. The authority indicated is adequate to establish the fact that such a contention has no validity.

#### POINT NO. VI

A CO-USER OF A CANAL IS RESPONSIBLE ONLY FOR A PROPORTIONATE COST OF MAINTENANCE, OPERATION AND CONTROL OF THAT PORTION OF THE CANAL WHICH IS IN FACT JOINTLY USED.

#### POINT NO. VII

A CORPORATE CO-USER AND CO-OWNER OF A CANAL CANNOT REQUIRE ANOTHER CO-USER TO CONTRIBUTE TO THE PAYMENT OF CORPORATION SALARIES, COSTS OF CORPORATE MEETINGS, STATIONERY, CHECKS, COSTS OF BORROWING MONEYS FOR PURELY



CORPORATE PURPOSES AS A PART OF CHARGES FOR  
MAINTENANCE, OPERATION AND CONTROL OF A JOINT  
CANAL.

What is now known as the Gunnison-Fayette Canal consists of a canal 15 miles long, and the evidence shows that defendant Roberts' diversion occurs at a point in the canal 6 miles from its diversion from the Sevier River. The defendant Malmgren's point of diversion is at a point 4 miles from the head of the canal. The plaintiff's position has been that both Malmgren and defendant Roberts are required to pay the total expense of the corporation and in addition every expense that the corporation incurs for the full length of the canal.

Counsel for the plaintiff at page 71 of the transcript states plaintiff's position as follows

"... it is our position and our contention that the defendants are obligated for their pro rata share of the operation and maintenance of the whole canal, because operation, distribution on the lower end of the canal insures their getting their water where they get it. Secondly, the witness testified that each one of these expenditures made were expenses of operation, maintenance and administration of the canal."

To further show the confused situation that was presented to the District Court, counsel, at page 78 of the transcript, was interrogating the Secretary of the company, and we have the following answers to his questions:

"Q. (By Mr. Novak) What did the Board do at that particular meeting, Mr. Bartholomew?

A. One of the things we did at this particular meeting was decide on the assessment that should be levied for the year 1956.

Q. What determination was made?

A. We determined that in order to pay off our expenditures and some of the improvements that we were planning that it was necessary to have a \$1 assessment per share.

Q. What determination was made with respect to the Class AA water?

A. Inasmuch as each share received about one acre foot of water during the year, we felt that the Double A water should be assessed \$1 per acre foot of water delivered to the owners of it.

Q. Was that the action that was taken by the Board at that meeting?

A. That was the action."

We have the very confused situation, therefore, that not only was plaintiff's counsel contending that every expense of the corporation, every expense for the full fifteen miles of the canal was included in the charge to defendants, but we had him also presenting the basis of the assessment not on expenditures and acre feet delivered, but on a projection of future improvement and action that the corporation wanted to take which they then assessed against the defendant Roberts as a joint user of the first 6 miles because it appeared that each shareholder per share received about the same amount as the defendant Roberts.

It is submitted that in this evidence you cannot find a basis either accurate or inaccurate or conceivable

upon which the court could have determined was given as the action by this corporation in making it successful. You couldn't tell whether they tried to equalize a matter between shareholders and Roberts or whether they made an assessment on acre feet and expenditures. Counsel for the plaintiff himself didn't know.

What is most discouraging is the attitude of the court itself for all of the effort that was made to try and find out what the basis for making the assessment was when the court, as appears at page 103 of its transcript, says:

“I didn't think it was important, so I wasn't even listening to it much. Just in one ear.”

These are the items which defendants are to share as purported joint users of the canal and to which exception is taken:

(a) A bond for the treasurer of the corporation for handling the corporation money. (Tr. 80) This is the bond which enables him to qualify as treasurer for the company under the company rules and regulations.

(b) Voucher book. This is the book that is used by the secretary in making out a request for the treasurer, who then makes out the check for the payment of the various items.

(c) Rental expenses of a ward house for holding the annual meeting of the stockholders of Gunnison-Fayette Canal Company. (Tr. 80) This is the annual meeting for the electing of officers including company business.

(d) D-7 Cat work. As appears at page 81 of the transcript, this was cat work for all sections of the canal.

(e) Rental of a room for holding a director's meeting of the corporation. (Tr. 82)

(f) Legal fees in filing a protest for and in behalf of the plaintiff corporation against a well application by a man by the name of Hansen. (Tr. 82)

(g) The check book for the corporation for the Gunnison Valley Bank, used in paying its corporate obligations. (Tr. 82)

(h) At page 83 of the transcript is an item of \$203.73 for interest on a note at the Gunnison Valley Bank borrowed by the company for the purchase of water.

(i) Advertising in the Gunnison Valley News. (Tr. 84)

(j) Locks on the diversions from the canal for the entire system of the canal as appears at page 83 of the transcript. The secretary estimated there were 60 diversions from the canal, 20 above the Robert's diversion and 40 below the Robert's diversion to the end of the canal.

(k) An item of \$233.59 paid to the Utah State Engineer by Gunnison-Fayette Canal Company, an assessment to the River Commissioner which was based solely on the amount of water delivered to Gunnison-Fayette Canal Company. (Tr. 84) In addition to the defendant Roberts had had to pay his share of the River Commissioner's expense on his proportion of the 1.4

c.f.s. Now as a shareholder, and then again as a joint user, he was asked to pay a part of the Engineer's expense to the company.

As appears at page 85 of the transcript, every expenditure of the company for the fiscal year ending in February 1956 was put in on Exhibit 5; and Defendants, as joint users of 6 miles of the canal, were assessed for every expenditure made for the full length of the canal.

There had been no evidence presented upon which there could be allocated a proportion of any of the work for the area of this canal that is jointly used by Roberts. The court could not have segregated any portion out of this conglomeration of expense items. The plaintiff had made no effort to segregate or to indicate to the court what proportion would be allocated to the first 6 miles because, as plaintiff had stated its position, it intended that Roberts had to pay for all of the corporation expenses on the entire system.

The very lack of information of the witness Bartholomew, as secretary of the company as to what the items of expense were, is most vividly portrayed at pages 85 and 86 of the transcript where he was asked:

“Q. Now Laura J. Gore, for interest, what is that for?

A. That is interest on a note that we had with Mrs. Gore for operating, maintenance and improvement.

Q. What was the moneys used for and when was it borrowed?

A. It was used for operating, maintenance and improvements.

Q. You told us that. Now I want to know what operating, maintenance and improvements. Tell me specifically what was done with that money and when and where.

A. Part of the expenses or transactions appear on the page before you that the money was used for.

Q. Now you tell me what the moneys from this Laura J. Gore were used for, will you? If you know. If you don't know tell us so, and it will surely shorten this.

A. They were used for improvements.

Q. Now tell me what improvements?

A. For purchasing partial flumes; for installation of partial flumes; for cleaning of canal and maintaining canal: partly for ditch rider.

Q. When were they moneys borrowed?

A. Sometime between the forepart of April and the forepart of May. Possibly during the month of April.

Q. Of 1956?

A. I will have to retract that statement, Mr. Burton. That interest is on a note that was borrowed by the previous Board and we paid the interest off. I am sorry. I don't know what the money specifically was used for."

At page 86 of the transcript appears a charge for welding. The treasurer's answer to what the welding was he says this:

"A. . . . To tell you which one, I can't do. But it took a number of days and he traveled from one end to another."

At page 87 of the transcript appears a charge for one Bill Nay for a D-7 Cat. The witness said specifically that that cat was used on the lower end of the canal; certainly it had nothing to do with the joint area of the canal used by Roberts. Again at page 87 of the transcript the charge of Delois James and Dale Dorius, was for moss cleaning on the lower end of the canal, and had nothing to do with the area used by Mr. Roberts. At page 88 we have a charge for plaintiff's attorneys; and that was for their services in helping the company get a loan for straightening the canal bank at the lower end, having nothing to do whatsoever with the upper end used by the defendant Roberts. Again at page 88 appears legal expenses of Don Tibbs which had to do with filing a protest on an application made by one Ray P. Dyreng who was appearing and representing the interest of the company and had nothing to do with the interest of the water rights of the defendant Roberts.

#### POINT NO. VIII

FINDING OF FACT NO. 3 IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE OR LAW, AS PLAINTIFF IS NOT THE SOLE OWNER OF THE CANAL AS SHOWN BY DEEDS IN EVIDENCE DISCLOSING THAT DEFENDANTS AND OTHERS ARE CO-OWNERS OF THE CANAL.

In finding No. 3 the Court finds that plaintiff is the sole owner of the canal. Exhibit 9 is a deed clearly indicating that plaintiff is the owner of a  $\frac{1}{2}$  undivided interest in the canal (T. 190). At T. 190 plaintiff's counsel concedes that plaintiff is the owner of not more than an undivided  $\frac{1}{2}$  interest in the canal.

## POINT NO. IX

FINDING OF FACT NO. 8 IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE OR LAW, AS THERE WAS NO COMPETENT EVIDENCE OR LEGAL BASIS UPON WHICH "REASONABLE EXPENSE" FOR WHICH DEFENDANTS WOULD BE LIABLE COULD BE DETERMINED; PARTICULARLY WAS THERE NO EVIDENCE TO SHOW THE TOTAL ACRE FEET OF WATER DIVERTED INTO THE CANAL OR DIVERTED AND DELIVERED TO THE DEFENDANTS, BUT IT AFFIRMATIVELY APPEARS THAT THE PLAINTIFF CORPORATION TOOK WATERS OF THE DEFENDANT AND FAILED TO CREDIT OR PAY DEFENDANTS FOR THE WATERS SO TAKEN.

Factual matter supporting defendant's position appears in detail in the argument under Points VI and VII and is included herein by reference. There is no competent evidence or legal basis for the assessment of a charge against defendants for other than the \$35.00 contract price. The company Secretary was asked if he could prorate the expenses for the maintenance of the canal from the Sevier River to the Roberts turn-out and he replied, "The records were inadequate. I couldn't do so." (T. 298). Both Exhibit 13 and Exhibit 5 are for all corporate and canal expenditures. When asked to show from Exhibit 11 or 13, the amount of water delivered to Roberts or the plaintiff company the company Secretary answered, "It is not there, Sir." (T. 292). At (T. 291) the Secretary further explains that his records are inadequate because there had to be an allowance for shrinkage which further reduced the amount of water which legally would be the basis for determining the obligation of Roberts if the statute



rather than the contract of \$35.00 was to apply.

#### POINT NO. X

FINDING OF FACT NO. 9 IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE OR LAW AS THERE WAS NO EVIDENCE INTRODUCED SHOWING THE ACTUAL COSTS OF OPERATING, MAINTAINING AND CONTROLLING THE PORTION OF THE CANAL JOINTLY USED, NOR WAS ANY BASIS PROVIDED BY WHICH THE COURT COULD ALLOCATE ANY OF THE EXPENSES TO THE PORTION OF THE CANAL JOINTLY USED, AND THE FINDING IS BASED PURELY ON CONJECTURE.

The evidence of plaintiff consisted of placing its secretary on the stand and having him present a list he purportedly took from the books showing every expense the corporation made in 1956.

There is no basis for such evidence from which the Court could determine what expenses were made, if any, on the portion of the canal jointly used, and it would be contrary to law for the Court to assess the proportion of expenses for the entire canal as being a proportion spent on the first six miles of the canal.

#### POINT NO. XI

FINDING OF FACT NO. 10 IS CONTRARY TO AND IS NOT SUPPORTED BY THE EVIDENCE OR LAW, AS THE EVIDENCE SHOWED THE PLAINTIFF RESTED ITS CASE ON A MOTION PASSED BY ITS BOARD OF DIRECTORS ISSUING A CHARGE AGAINST DEFENDANTS UNSUPPORTED BY FACTS OR EVIDENCE ESTABLISHING A BASIS IN ACCORDANCE WITH LAW UPON WHICH ANY CHARGE COULD BE MADE.

At Page 96 of the transcript plaintiff's secretary states that at a meeting of the Board of Directors in 1957

the Board had taken all of the costs that had been incurred in operating the Company for 1956 and added project costs over a five-year period for the future for improvements that were proposed to be made, and figured that a dollar a year per acre foot for its stockholders and all others using the canal would be a sum which would approach an amount to cover all such items and, based on these facts, had assessed a dollar an acre foot for the use of the canal by defendants.

It is submitted that such a basis for liability of a joint canal user is not in accordance with law and is in violation of the statute should the Court determine that the \$35.00 contract could be abrogated.

#### POINT NO. XII

FINDINGS OF FACTS NOS. 13, 14, 16, 17 and 18 ARE CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE OR LAW FOR THE REASON THAT THESE FINDINGS PURPORT TO ESTABLISH A BASIS FOR SETTING ASIDE A CONTRACT BY THE PLAINTIFF AND DEFENDANT ROBERTS WHICH HAD BEEN HONORED AND RECOGNIZED FOR A PERIOD OF OVER 25 YEARS AND SUCH FINDINGS ARE CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE AND DO NOT IN LAW CONSTITUTE A BASIS UPON WHICH ANY RELIEF COULD BE AFFORDED.

#### POINT NO. XIII

FINDING OF FACT NO. 15 IS CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE OR LAW FOR THE REASON THAT A COURT WILL NOT REWRITE OR DETERMINE VOID THE MINUTES OF A CORPORATION IN THIS TYPE OF AN ACTION WHERE NO OFFICER OF THE CORPORATION IS INVOLVED AND WHERE THE CORPORATION HAS NOT TAKEN ANY ACTION ITSELF TO CORRECT SAID MINUTES, AND IN A CIRCUMSTANCE SUCH

AS IN THIS CASE PRESENTED WHERE THE MINUTES EVIDENCE THE ACTION OF A CORPORATION, AND THE CORPORATION HAS NOT ATTEMPTED TO ESTABLISH WHAT ACTION IF ANY TO THE CONTRARY WAS TAKEN.

POINT NO. XIV

FINDING OF FACT NO. 20 IS CONTRARY TO LAW AND NOT SUPPORTED BY THE EVIDENCE AS THERE IS NO EVIDENCE THAT DEFENDANT HOWARD ROBERTS CONCEALED ANY MATERIAL FACT, AND THE EVIDENCE CLEARLY SHOWS THAT ALL STOCKHOLDERS, DIRECTORS AND OFFICERS WERE FOR OVER 25 YEARS ADVISED OF ALL OF THE FACTS OF WHICH COMPLAINT IS MADE BY PLAINTIFF.

POINT NO. XV

THAT THE CONCLUSIONS OF LAW AND JUDGMENT ARE CONTRARY TO LAW AND NOT SUPPORTED BY THE FINDINGS.

Points XII to XV, inclusive are combined for argument, as they have to do with the Findings, Conclusions and Decree purportedly directed to plaintiff's third claim to support the Findings, Conclusions and Decree that the contract of \$35.00 a year could be repudiated by plaintiff and thereafter plaintiff rely on the statute rather than the contract.

As heretofore pointed out, the District Court stated that a corporation could not make a contract unless it was based on a resolution of its Board of Directors and reduced to writing.

It is submitted that the Court erred in refusing to accept as probative the acts of the parties for twenty-five years in honoring the contract, the stipulation in

the Cox Decree, the minutes of the corporation and the testimony of two surviving directors that there was a directors' meeting of the corporation when the \$35.00 contract was effected in consideration of Roberts giving up ten per cent of his AA water-right so that the Company could receive its storage rights with only a three per cent reduction in its water-right.

#### POINT NO. XVI

THE COURT ERRED IN PERMITTING THE SECRETARY TO COPY FROM SOME RECORD EVERY EXPENDITURE OF PLAINTIFF CORPORATION AND INTRODUCE SUCH IN EVIDENCE AS PROOF OF EXPENDITURES MADE ON A PORTION OF A CANAL JOINTLY USED AS BASIS FOR DEFENDANT'S LIABILITY AS A JOINT USER (Tr. 71)

It is elemental that the secretary of a company of this kind cannot under the book rule take off from the records of the company portions of its records and introduce the same in evidence as proof of expenditures on a joint canal. Proper objections appear in the record and it is clearly an abuse of the shop book rule to have permitted such proof of purported expenditures.

Respectfully submitted,

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