

1960

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

Utah Supreme Court

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Phillip V. Christenson; Joseph Novak; Christenson, Novak, Paulson & Taylor; Attorneys for Plaintiff and Respondent;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

GUNNISON - FAYETTE CANAL  
COMPANY, a corporation,

*Plaintiff and Respondent,*

vs.

HOWARD ROBERTS and F.  
DWIGHT MALMGREN,

*Defendants and Appellants.*

APR 14 1960

Supreme Court, Utah

Case No. 9081

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BRIEF OF RESPONDENT  
GUNNISON-FAYETTE CANAL COMPANY,  
A CORPORATION

---

Phillip V. Christenson

Joseph Novak

for CHRISTENSON, NOVAK,  
PAULSON & TAYLOR

*Attorneys for Plaintiff and  
Respondent,*

Gunnison-Fayette Canal  
Company

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IN THE SUPREME COURT  
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GUNNISON - FAYETTE CANAL  
COMPANY, a corporation,  
*Plaintiff and Respondent,*

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HOWARD ROBERTS and F.  
DWIGHT MALMGREN,  
*Defendants and Appellants.*

Case No. 9081

---

BRIEF OF RESPONDENT  
GUNNISON-FAYETTE CANAL COMPANY,  
A CORPORATION

---

STATEMENT OF CASE

This action was commenced to recover from defendant (appellant) Howard Roberts, the sum of \$161.74 and from defendant (appellant) F. Dwight Malmgren, the sum of \$14.60 as the balance due for their proportionate share of the cost of maintaining, operating and controlling the Gunnison-Fayette Canal during the year 1956. (R. 1, 2). The complaint as originally filed also set forth a second claim alleging that plaintiff (respondent) was informed and believed that defendants claimed the right to convey their private water (.7 sec. ft. of an original 1.4 sec. ft. right) through said canal for a yearly

charge of \$17.50 (\$35.00 for the original 1.4 sec. ft. right) by reason of a claimed agreement, which plaintiff alleged had never been made, but if made, was made while defendant Howard Roberts was an officer of the plaintiff corporation, for his personal benefit and against the interests of plaintiff and in violation of defendant Howard Roberts' fiduciary relationship to plaintiff and its stockholders. (R. 3, 4). In addition thereto, the original complaint set forth a third claim alleging that plaintiff's corporate minute book contained a minute entry which had been altered and as altered does not correctly state the action taken by the Board of Directors of plaintiff with respect thereto. A prayer was made asking the Court to set aside such minute entry. (R. 5, 6).

Defendants filed their respective pleading in the form of a motion and answer moving to dismiss each claim, and setting forth a general denial of all of the material allegations of the complaint. (R. 8). Defendants alleged by way of an affirmative defense to the complaint that plaintiff entered into an agreement with defendant Howard Roberts on February 28, 1931, whereby defendant Roberts was permitted to carry his 1.4 sec. ft. of water through said canal for the sum of \$35.00 per year and as consideration therefor defendant Howard Roberts granted a ten percent interest in his water right in favor of the owners of the Sevier Bridge Reservoir. (R. 8, 9). Defendants further alleged estoppel as an affirmative defense and admitted that there had been added to the minute entry above referred to, the words "and to be

permanent from year to year," but defendants alleged that said minute entry as so modified was approved by the stockholders of plaintiff corporation. (R. 9, 10).

On the morning of the first day of the trial, defendants were permitted to file an amended responsive pleading, entitled "Amended Motion and Answer," (R. 63) wherein defendants made the same motions to dismiss as set forth above and the same affirmative defenses of a claimed contract and estoppel. In addition thereto, defendants set forth the affirmative defenses of laches and the statute of limitations. Defendants alleged that the minute entry was originally written by defendant Roberts' first wife and was removed with ink eradicator, and was rewritten by defendant Roberts' first wife at defendant Roberts' direction, prior to the next ensuing board meeting, and that the said minute entry as rewritten truly reflected the action of the directors of such meeting, and that the minute entry was approved by the directors and stockholders of plaintiff corporation. (R. 12, 13, 14).

The trial of this cause was conducted intermittently on June 25, July 16 and September 8, 1958. (See record of minute entries). On the second day of trial (July 16, 1958, the trial Court permitted plaintiff to amend its complaint by striking therefrom the original second claim in its entirety (R. 16, 218), and further permitted plaintiff to file a reply to defendants amended motion and answer (R. 225), whereby plaintiff denied that the claimed agreement had been made and alleged that if such claimed agreement had been made, it was made

while defendant Roberts was an officer of the plaintiff corporation, and was void as being in violation of defendant Roberts' fiduciary relationship to the plaintiff corporation and its stockholders. In addition thereto, plaintiff alleged that any claimed agreement was void under the statute of frauds. (R. 21, 22).

Due to the manner in which the pleadings were amended and the extensive arguments which were made by counsel, the issues were clouded and became overly complicated. In view of the foregoing, and at the risk of being repetitious, we believe it advisable to summarize the above by restating the issues as framed by the amended pleadings.

Plaintiff sued defendants for contribution of their pro-rata share of the cost and expenses of maintaining, operating and controlling the Gunnison-Fayette Canal during the year 1956, pursuant to Section 73-1-9, Utah Code Annotated, 1953. By way of an affirmative defense thereto, defendants alleged that the rights of the parties were governed by an agreement claimed to have been made on February 28, 1931. By way of reply, plaintiff denied that such an agreement had been made and alleged that if an agreement was found to exist, that the same was made for the personal benefit of defendant Roberts against the interest of the plaintiff at a time when he was an officer of plaintiff corporation in violation of his fiduciary relationship, and further that such defense was barred by the statutes of frauds. Plaintiff further sought to have a particular part of a minute entry appearing in its corporate minute book relating to this



matter set aside for the reason that it does not truly state the action taken by the Board of Directors of plaintiff corporation at such meeting.

Defendants further allege that all claims of plaintiff were barred by laches, estoppel and the statute of frauds.

The trial Court found all of the issues in favor of the plaintiff and against the defendants and accordingly made and entered its findings of fact and conclusions of law (R. 29-38, incl.). Thereupon, the trial Court entered its judgment in favor of plaintiff and against the defendants in the amounts prayed for in the complaint, and in setting aside that portion of the minute entry appearing in the minute book of plaintiff upon which defendants based their alleged contract (R. 39, 40). Thereafter defendants filed their notice of appeal. (R. 42).

## STATEMENT OF FACTS

The statement of facts set forth in appellant's brief is conspicuous by its lack of facts and its careful selection of facts which are contrary to the findings of the trial Court. In view thereof, we think it not only advisable but necessary to present the following statement of facts.

The Gunnison-Fayette Canal diverts water from the Sevier River at the old Robins-Kearns Dam, situated approximately 11½ miles northwesterly from Axtel, Utah, and conveys the water so diverted in a general northerly direction to the east of, and paralleling the Sevier River for approximately 15 miles where said canal terminates

in the Sevier Bridge Reservoir. (Fdg. 2, R. 29, Pl. Exh. 1). Respondent (plaintiff below) owns, operates and maintains the Gunnison-Fayette Canal and distributes the water conveyed thereby to its stockholders under water rights owned by respondent, and in addition thereto, respondent distributes water from said canal to individuals, including appellants (defendants below), under private water rights owned by such individuals (Fdg. 3, R. 30). All of the water rights under which water is conveyed by the means of the Gunnison-Fayette Canal were adjudicated in the District Court of Millard County on November 30, 1936, in an action entitled Richland Irrigation Company, a corporation, Plaintiff vs. Westview Irrigation Company, a corporation, et al, Defendants, being Civil No. 843, commonly known and referred to as the "Cox Decree" (Fdg. 4, R. 30).

Appellants are the owners of the right to the use of 0.7 sec. ft. of water, less 10% thereof for storage privileges, under a class "AA" right as provided in the "Cox Decree" and as between them appellant Malmgren is entitled to 20 acre feet of water annually (less 10 percent for storage privileges) and appellant Roberts is entitled to the remainder thereof (Fdg. 5, R. 30). Appellant Roberts is also the owner of  $\frac{1}{3}$  sec. ft. of class "A" water right for use during the period March 1 to October 15, inclusive. Both appellants own stock in the respondent corporation and by reason thereof are entitled to their pro-rata share of the waters of respondent corporation. However, there is no issue with respect to payment for the operation and maintenance costs for

the conveyance of the water to which appellant Roberts is entitled under his class "A" water right nor with respect to payment of assessments levied against the stock owned by appellants in respondent corporation. Appellant Roberts has paid his pro-rata share of the operation and maintenance costs of the Gunnison-Fayette Canal for the delivery of the water to him under his class "A" right, and has paid his assessments for the delivery of his water under his stock ownership in respondent corporation, and no claim was made or is made herein against appellant Roberts therefor. Likewise, appellant Malmgren has paid his assessments for the delivery of his water under his stock ownership in the respondent corporation, and no claim was made or is made herein against said appellant therefor. In addition thereto, neither does any controversy exist with respect to the contributions by the other individuals who receive water through the Gunnison-Fayette Canal under their private rights since each of such individuals have always paid their pro-rata share of the operation and maintenance costs of the canal. It is only that water which is conveyed by and distributed from the Gunnison-Fayette Canal to appellants Roberts and Malmgren, under their class "AA" water right by respondent for which contribution is sought for appellants proportionate share of the cost of maintaining, operating and controlling the Gunnison-Fayette Canal during the year 1956.

The water to which appellants are entitled under the class "AA" right is diverted from the Sevier River at the old Robins-Kearns Dam into the Gunnison-Fayette

Canal and is conveyed thereby a distance of approximately 5 miles to appellant Malmgrens' turnout, and approximately 6½ miles to appellant Roberts' turnout, at which respective turnouts said water is distributed from the canal by respondent corporation and is delivered to appellants for their use. (Fdg. 6, R. 30).

During the year 1956, there was delivered to the appellant Roberts, 177.74 acre ft. of water and to appellant Malmgren, 15.66 acre ft. of water under their class "AA" water right. (Fdg. 8, R. 31). The foregoing quantities of water were diverted from the Sevier River by means of the old Robins-Kearns Dam into the Gunnison-Fayette Canal, conveyed thereby, distributed therefrom and delivered into the respective turnouts of appellants by respondent corporation and its employees for the use and benefit of appellants. (Fdg. 8, R. 31). Respondent paid for the entire cost of operation and maintenance of the Gunnison-Fayette Canal and for the expenses of administration and distribution of the water therefrom for the year 1956, and the amount of such cost and expenses was \$1.00 per acre ft. of water delivered to each user. (Fdg. 9, R. 31).

The trial Court found that the fair proportionate share of the cost of operation and maintenance of the Gunnison-Fayette Canal and the expenses of administration and distribution of the 177.74 acre ft. of water delivered to appellant Roberts under his class "AA" water right for the year 1956 was \$177.74, and that the fair proportionate share of the cost of operation and maintenance of the Gunnison-Fayette Canal and the

expenses of administration and distribution of the 15.66 acre feet of water delivered to appellant Malmgren under his class "AA" water right for the year 1956 was \$15.66. (Fdg. 10, R. 31). Appellant Roberts paid respondent only the sum of \$16.00 and the trial Court found that there remains unpaid and due from appellant Roberts the sum of \$161.74 (Fdg. 11, R. 31, 32). Appellant Malmgren paid respondent only the sum of \$1.50 and the trial Court found that there remains unpaid and due from appellant Malmgren the sum of \$14.16. (Fdg. 12, R. 32). The trial Court awarded judgment to respondent against appellants in the foregoing respective amounts. (R. 39).

Appellant Howard Roberts was Secretary, Director and Watermaster of respondent corporation continuously from approximately the year 1928 until 1956, during which time he generally managed the affairs of respondent corporation, kept the minutes of the directors and stockholders meetings, sent notices of assessment, collected assessments, and supervised the operation and maintenance of the Gunnison-Fayette Canal and the distribution of water therefrom. (Fdg. 13, R. 32). On February 19, 1931, appellant Roberts and respondent were two of many parties which signed a stipulation in the then pending general adjudication proceedings which chrystalized into the "Cox Decree." Under the terms of the foregoing stipulation, as confirmed by the "Cox Decree", appellant Roberts agreed to convey to the owners of the Sevier Bridge Reservoir 10 percent of his 1.4 sec. ft. of class "AA" water right in consideration of storage privileges in the Sevier Bridge Reservoir as

an exchange user, and respondent likewise agreed to convey 3 percent of all of its water rights for the same storage privileges. (Fdg. 14, R. 32, 33). The foregoing stipulation was offered in evidence by appellants and received with the understanding that counsel for appellants would furnish the trial Court a copy thereof for the record. (R. 399). However, a copy of the stipulation does not appear in the record.

The Trial Court found that the agreement by appellant Roberts to convey 10% of his class "AA" water right to the owners of the Sevier Bridge Reservoir and the reasons therefor were entirely independent from and were in no way connected with the agreement by respondent to likewise convey 3 percent of its water rights, and that the reasons why respondent acquired the storage privileges for relinquishing 3 percent of its rights did not result from any promise, act or consideration given by appellant Roberts, except such acts as he might have performed as an officer of respondent corporation. (Fdg. 14, R. 32, 33). The foregoing stipulation was filed on February 21, 1931, and the provisions thereof were confirmed by the Cox Decree on November 30, 1936. (Fdg. 14, R. 33, 397, 399).

Appellant Roberts has used the storage privilege granted to him under the provisions of the Cox Decree during the entire period from 1931 to 1956, inclusive, and such storage privilege was necessary to the distribution and use of the water under his class "AA" water right, and he has been benefited by such storage privilege and his exercise thereof in the same manner and to

the same extent as other users with like privileges. (Fdg. 14, R. 33).

On February 28, 1931, being nine days after appellant Roberts signed the foregoing stipulation, a Board of Directors Meeting of respondent corporation was held, at which time appellant Roberts was Secretary, Director and Watermaster of respondent corporation. (Fdg. 15, R. 33). A loose oral arrangement was worked out at the foregoing meeting whereby appellant Roberts was to be permitted to convey his waters under his class "AA" water right through the Gunnison-Fayette Canal on a temporary basis, upon condition that appellant Roberts relinquish to the respondent corporation 10 percent of his water conveyed through the canal, plus the sum of \$35.00 for each year that the water was so conveyed. (Fdg 15, R. 34). A minute entry covering the foregoing arrangement was made in the minute book of respondent corporation by appellant Roberts as Secretary. However, such minute entry was subsequently altered and changed by and under the direction of appellant Roberts during the period between 1936 and 1952 while acting as secretary of the respondent corporation without authorization or ratification by respondent corporation or its stockholders. (Fdg. 15, R. 34, Fdg. 19, R. 36).

The trial Court found that during the entire period from 1931 to 1956, inclusive, while appellant Roberts was the managing agent of respondent corporation, he did not at any time relinquish 10 percent of the water accruing to his class "AA" water right to respondent corporation and during such period he did not make a full

disclosure of this fact to respondent corporation, but instead he concealed the same. (Fdg. 17, R. 35, Fdg. 20, R. 36). In view of the foregoing, the trial Court further found that the delay of respondent corporation until 1957 to commence this action was not unreasonable nor constituted laches or an estoppel (Fdg. 20, R. 36, 37), nor were respondents claims barred by the statute of limitations. (Fdg. 21, R. 37).

The trial Court expressly found that no contract either written, oral, constructive or implied was made in fact or in law between appellant Roberts and respondent corporation for the conveyance and distribution of the waters under his class "AA" water right by means of the Gunnison-Fayette Canal. (Fdg. 18, R. 35).

All of the foregoing facts were found by the trial Court and are supported by the evidence. The record is replete with conflicting evidence as to practically every material issue. The trial Court chose to believe the evidence offered by the respondent and refused to believe the evidence offered by the appellants. On this appeal, the record should be viewed in this light.

It was stipulated that portions of the decree of the Fifth Judicial District Court in the case of *Richland Irrigation Company vs. Westview Irrigation Company*, being Civil No. 843 and commonly referred to as the "Cox Decree," dated November 30, 1936, may be included in the record of this case. (R. 397). The specific provisions which were to be included were those commencing with the last paragraph on page 194 of the published volume and continuing over to and including the first



paragraph on page 202 thereof. (R. 397). Counsel for appellants was supposed to have made photostatic copies of these pages and filed the same with the clerk as a part of this record. (R. 399). However, the photostatic copies thereof do not appear in the record. In view of the foregoing, respondent has included in its brief an Appendix setting forth those portions of the "Cox Decree" above referred to, which it believes are material to the issues of this case. The foregoing provisions will be referred to in the argument which follows.

## STATEMENT OF POINTS

### POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO SUSTAIN APPELLANTS' MOTIONS TO DISMISS RESPONDENT'S COMPLAINT.

### POINT II

APPELLANTS' OBLIGATION TO PAY RESPONDENT FOR APPELLANTS' PROPORTIONATE SHARE OF THE EXPENSES OF OPERATING, MAINTAINING AND CONTROLLING THE GUNNISON-FAYETTE CANAL IS IMPOSED BY SECTION 73-1-9, U.C.A., 1953.

### POINT III

RESPONDENT MADE NO CONTRACT, EITHER WRITTEN OR ORAL, WITH APPELLANT HOWARD ROBERTS, TO CONVEY AND DISTRIBUTE TO APPELLANTS THE WATER TO WHICH THEY ARE ENTITLED UNDER THEIR CLASS "AA" WATER RIGHT FOR A FIXED ANNUAL SUM.

### POINT IV

THE CLAIMED CONTRACT WOULD BE VOID AND UNENFORCEABLE UNDER THE STATUTE OF FRAUDS SINCE THE CLAIMED CONTRACT IS NOT IN WRITING,

AND THERE IS NO WRITTEN MEMORANDUM THEREOF SIGNED BY THE PLAINTIFF CORPORATION.

#### POINT V

THE CLAIMED CONTRACT WOULD BE VOID AND UNENFORCEABLE AS BEING MADE WHILE APPELLANT HOWARD ROBERTS WAS A DIRECTOR, SECRETARY AND AN OFFICER OF THE RESPONDENT CORPORATION, FOR HIS PERSONAL BENEFIT AND AGAINST THE INTERESTS OF THE RESPONDENT CORPORATION IN VIOLATION OF HIS FIDUCIARY RELATION TO THE RESPONDENT CORPORATION AND ITS STOCKHOLDERS.

#### POINT VI

APPELLANTS HOWARD ROBERTS AND DWIGHT MALMGREN, ARE LIABLE TO RESPONDENT FOR THEIR PROPORTIONATE SHARE OF THE OPERATION AND MAINTENANCE EXPENSES OF THE GUNNISON-FAYETTE CANAL.

#### POINT VII

THE TRIAL COURT DID NOT ERR IN ITS FINDINGS THAT APPELLANT ROBERTS OWES RESPONDENT THE SUM OF \$161.74, AND THAT APPELLANT MALMGREN OWES RESPONDENT THE SUM OF \$14.16, FOR THEIR RESPECTIVE BALANCES OF THEIR PROPORTIONATE SHARES OF THE EXPENSES OF OPERATING AND MAINTAINING THE GUNNISON-FAYETTE CANAL DURING THE YEAR 1956.

#### POINT VIII

THE EVIDENCE ESTABLISHES THAT THE LAST PARAGRAPH OF THE MINUTE ENTRY OF FEBRUARY 28, 1931, APPEARING IN RESPONDENT'S CORPORATE MINUTE BOOK WAS ALTERED BY AND UNDER THE DIRECTION OF APPELLANT ROBERTS AND DOES NOT

TRULY REFLECT THE ACTION OF THE BOARD OF DIRECTORS AT THAT MEETING.

## POINT IX

RESPONDENT'S CLAIMS ARE NOT BARRED BY LACHES OR ESTOPPEL.

## ARGUMENT

### POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO SUSTAIN APPELLANTS' MOTIONS TO DISMISS RESPONDENT'S COMPLAINT.

In answer to respondents' complaint, appellants filed their responsive pleading in the form of a motion and answer whereby appellants moved to dismiss each claim separately for the reason that the same did not state a cause of action. (R. 8). Yet at no time did appellants call their motions up for hearing either before trial, during the trial, or at the conclusion of the trial. On the morning of the first day of trial, appellants filed an Amended Motion and Answer and made the same motions to dismiss. (R. 12). Yet at no time during the trial nor at the conclusion of the trial did appellants request the trial Court to rule on their amended motions.

At the conclusion of respondent's case, appellants did move to dismiss the complaint on the grounds that there had not been sufficient evidence introduced to

make out a cause of action (R. 340), which was denied by the trial Court. (R. 359).

Rule 12 (d), Utah Rules of Civil Procedure, provides that the defense of failure to state a claim upon which relief can be granted shall be heard and determined before trial on application of any party, unless the Court orders that the hearing and determination thereof be deferred until the trial. We submit that appellants were obliged to request a ruling by the trial Court on their motions to dismiss the complaint if they seriously believed that it did not state a cause of action, and failing to so do they should not be heard to complain to the Court.

In their brief, appellants labor over the fact that the complaint used the word "assessment" in referring to appellants obligations for their proportionate share of the operation and maintenance and expenses of the canal. They make no claim that they were misled thereby. They surely were or should have been aware of what respondent's claim was since we argued about it for 23 pages of transcript at the beginning of the first day of trial (R. 55-77, incl.), and for 28 pages of transcript three weeks later on the second day of trial (R. 198-225, incl.), and for 26 pages of transcript two months later on the third day of trial. (R. 257-282, incl.).

On pages 11 and 12 of appellants brief, they assert that the complaint contains a second claim. This is not so. The trial Court granted respondent's motion to amend its complaint by striking therefrom the second claim in its entirety (R. 16, 218, 224, 344, 345). Appellants do

not assign as error the ruling of the trial Court in granting respondent's motion.

As to the third claim, the subject matter of the altered portion of the minute entry speaks for itself. The cause for repudiation alleged is that the minute entry as altered does not state nor show nor reflect what was in truth and in fact the action of the Board of Directors in connection with the matter being considered. (R. 4). In its prayer for relief, respondent asked the Court to determine that any rights which appellants claim through the altered portion of the minute entry to a reduction in the charge for conveying their water through the Gunnison-Fayette Canal is without foundation and that appellants have no such right. (R. 5).

At the trial, appellants offered in evidence the minute book of respondent containing the above minute entry which was received as defendants' Exhibit 6. (R. 179). Under Point II of appellants' brief, they now contend before this Court, as they did below, that the altered portion of the minute entry forms the basis of a contract between the parties. The trial Court found against them on such issue, and they should not now be heard to complain that the third claim raises no issue against them.

We respectfully submit that the trial Court did not err in failing to sustain appellants' motions to dismiss respondent's complaint.

## POINT II

APPELLANTS' OBLIGATION TO PAY RESPONDENT  
FOR APPELLANTS' PROPORTIONATE SHARE OF THE

EXPENSES OF OPERATING, MAINTAINING AND CONTROLLING THE GUNNISON-FAYETTE CANAL IS IMPOSED BY SECTION 73-1-9, U.C.A., 1953.

Appellants boldly and repeatedly assume from the opening paragraph of their brief throughout its entire context that a contract had been entered into on February 28, 1931, between appellants and respondent under the terms of which respondent is forever obligated to convey and to distribute to appellants the water to which they are entitled under their class "AA" right for a fixed annual sum, irrespective of what their pro-rata share of the expenses might otherwise be, and predicate practically their entire argument upon such fallacious assumption. This they do in spite of the express finding by the trial Court that no contract, either written, oral, constructive or implied, was made in fact or in law between appellant Roberts and the respondent corporation for the conveyance and distribution of the waters under appellant's class "AA" water right. (Fig. 18, R. 35).

Section 73-1-9, U.C.A., 1953, provides as follows:

"When two or more persons are associated in the use of any dam, canal, reservoir, ditch, lateral, flume or other means for conserving or conveying water for the irrigation of land or for other purposes, each of them shall be liable to the other for the reasonable expenses of maintaining, operating and controlling the same, in proportion to the share in the use or ownership of the water to which he is entitled."

Under the specific wording of the statute, the liability imposed is independent from ownership of the canal itself or of rights-of-way therein since the obligation is

one for operation and maintenance expense of the canal. The Gunnison-Fayette Canal is operated, maintained and controlled by the respondent corporation and the appellants do not contend otherwise. Under Point VIII of appellants' brief, they argue that the trial Court erred in finding that respondent corporation is the owner of the canal. Under the foregoing Section, ownership of the canal is immaterial and for purposes of argument under this point we need not concern ourselves therewith.

The law is well settled that in absence of a contract defining the rights and obligations of joint users of a canal the foregoing statute controls. *West Union Canal Co. vs. Thornley*, 64 Utah 77, 228 P. 199. *Perry Irrigation Company vs. Thomas*, 74 Utah 193, 278 P. 535. *Hodges Irrigation Company vs. Swan Creek Canal Company*, 111 Utah 405, 181 P. 2d. 217. *Peterson vs. Sevier Valley Canal Company*, 107 Utah 45, 151 P. 2d. 477. In the *West Union Canal Company* case, *Supra*, this Court held that since the trial Court found that an agreement had been entered into between plaintiff and the predecessors of defendant, the rights and obligations of the parties are determined thereby, and that the statute (now Section 73-1-9, U.C.A., 1953) was not intended to abrogate or disturb the rights of parties in an irrigation canal founded upon a valid and existing contract, and therefore was not controlling under the facts of that case. In the *Perry Irrigation Company* case, *Supra*, this Court held that liability for a proportionate share of the operation and maintenance costs was imposed by the

foregoing statute and that the trial Court rightly refused to admit a claimed agreement for the reason that neither of the defendants, nor their predecessors in interest were parties to such agreement. In the *Hodges Irrigation Company* case, Supra, this Court held that defendants' obligation to pay the expenses of maintaining the canal was measured by a valid contract, and held that Section 73-1-9, U.C.A., 1953, did not apply. In the *Peterson* case, Supra, on page 479 of the Pacific Reporter, this Court pointed out that if the parties agree on the amount to be paid for the use, or on the basis for determination of the amount such contract controls. If, however the parties cannot agree on a price to be paid for the use, the ditch owner can close the ditch against the other parties water until he gets his price.

In view of the foregoing cases, it is clear in the instant case, that unless a valid contract between the parties was made, their rights and obligations for the maintenance and control of the Gunnison-Fayette Canal are determined by Section 73-1-9, U.C.A., 1953, and defendants are obligated to pay their proportionate share of such expenses based upon the share in the use thereof or ownership of water conveyed thereby. Appellants were unable to show such a valid contract as will be hereinafter demonstrated, and the trial Court expressly found that no valid contract was made. (Edg. 18, R. 35). Therefore, under the cases cited above appellants' obligations to respondent are determined by Section 73-1-9, U.C.A., 1953.



### POINT III

RESPONDENT MADE NO CONTRACT, EITHER WRITTEN OR ORAL, WITH APPELLANT HOWARD ROBERTS, TO CONVEY AND DISTRIBUTE TO APPELLANTS THE WATER TO WHICH THEY ARE ENTITLED UNDER THEIR CLASS "AA" WATER RIGHT FOR A FIXED ANNUAL SUM.

In their responsive pleadings, appellants alleged by way of an affirmative defense that the rights of the parties are governed by an agreement claimed to have been made on February 28, 1931, whereby appellants claim that respondent agreed to permit appellant Roberts to carry his 1.4 sec. ft. of water under his class "AA" water right through the Gunnison-Fayette Canal permanently, for a fixed annual sum of \$35.00 per year. (R. 8, 9, 10, 12, 13, 14). Since the foregoing was set forth as an affirmative defense, appellants had the burden of proving a valid and existing contract. The appellants completely failed in sustaining this burden.

The trial Court expressly found that no contract, either written, oral, constructive or implied, was made in fact or in law between the appellant Howard Roberts and respondent corporation for the conveyance and distribution of the waters under appellants' class "AA" water right. (Fdg. 18, R. 35). Appellants readily admit that no formal written contract was executed by the parties and they made no offer in evidence of such an instrument. Admittedly the only thing in writing relating to the claimed contract is the altered minute entry of February 28, 1931 appearing in the minute book of respondent (Exh. 3, p. 66), and the notes of appellant Roberts (Exh. 6, R. 435). Appellants erroneously assume

throughout their brief an oral contract evidenced by the altered portion of a minute entry, dated February 28, 1931, appearing in the minute book of respondent corporation. The trial Court expressly found that such minute entry did not constitute a note or memorandum signed by respondent corporation and that such minute entry was subsequently altered and changed by and under the direction of appellant Roberts while acting as secretary of respondent corporation without authorization or ratification by respondent corporation or its stockholders. (Fdg. 15, R. 34).

Appellants contended below and argue to this Court that as consideration for such contract, appellant Roberts, while he was secretary of respondent corporation and a committee member appointed to represent the interest of respondent corporation, gave up 10 percent of his own class "AA" water right to the owners of the Sevier Bridge Reservoir in order that the respondent corporation could acquire storage privileges by giving up only 3 percent of its water rights to the owners of the Sevier Bridge Reservoir. The trial Court found that the reasons why appellant Roberts gave up 10 percent of his class "AA" water right were entirely independent from and were in no way connected with the 3 percent of respondent's water rights given up by it, and that the reasons why respondent acquired the storage privileges for relinquishing 3 percent of its water right did not result from any promise, act or consideration given by appellant Roberts, except such acts as he might have performed as an officer of appellant corporation. (Fdg. 14, R. 33).

During the negotiations which finally led to the "Cox Decree", appellant Howard Roberts, who was then secretary, director and watermaster and Archie N. Mel-  
lor, who was then President and director of the Gunnison-Fayette Canal Company, were appointed as a committee to represent the interests of the respondent corporation in the negotiations. Appellant Roberts testified that while acting in that capacity and at some time prior to the Board of Directors Meeting of February 28, 1931, he made an offer to one McBride, who was then the Sevier River Commissioner, whereby Roberts would give up 10 percent of his 1.4 second feet of class "AA" water right to the owners of the Sevier Bridge Reservoir, if such owners would grant the Gunnison-Fayette Canal Company storage privileges in the Sevier Bridge Reservoir for granting to said owners only 3 percent of its water right instead of 10 percent. He further testified that he heard nothing further from McBride, but later learned from the respondent's attorney that the Gunnison-Fayette Canal Company would be permitted storage privileges at 3 percent. (R. 439). This, appellants claim was the consideration given up by Roberts to support the claimed oral contract. Appellants then claim that subsequently at the meeting of the directors of respondent corporation on February 28, 1931, the Board agreed to permit Roberts to convey his class "AA" water through the canal for an annual charge of \$35.00, if he would give up 10 percent of his class "AA" water right to the owners of the Sevier Bridge Reservoir as a part consideration for the respondent corporation obtaining

a storage right in the Sevier Bridge Reservoir, for 3 percent of its rights instead of 10 percent.

A cursory analysis of the foregoing readily reveals that the same is impossible. To begin with, it is a matter of common knowledge that the proposed determination of water rights of the Sevier River prepared by the State Engineer, dated February 21, 1926, was for the most part unacceptable to the parties to the proceedings. This put in motion extensive negotiations between the parties in an effort to arrive at a stipulated decree. Finally, on February 19, 1931, a stipulation was signed settling the rights of the parties as they presently appear in the "Cox Decree". (R. 398). There is no dispute that appellant, Howard Roberts, and the respondent corporation were both parties to the stipulation. (Appellants' Brief, page 28). The foregoing stipulation provided for the storage privileges and respective percentages as set forth in Appendix I of this brief. The stipulation was filed February 21, 1931. (R. 399). The foregoing is most important because it shows that appellant Howard Roberts agreed to give up 10 percent of his class "AA" water right to the owners of the Sevier Bridge Reservoir on February 19, 1931, which was nine days prior to the board meeting of February 28, 1931, at which time he claims the alleged oral contract was made. In other words, appellant Howard Roberts had already given up 10 percent of his class "AA" water right to the owners of the Sevier Bridge Reservoir so it was impossible for him to agree to give up that same 10 percent as consideration for the claimed oral contract nine days later.

In addition to the above appellant Howard Roberts admitted that he acquired the same storage privileges as all of the other users who gave up 10 percent of their water rights and that he has utilized his storage privileges the same as everyone else. (R. 436, 437, 438). He further admitted with some reluctance that the same has been of some benefit to him over the years. (R. 438). The fact of the matter is that he gave up no more than he was required to, the same as did the other users, in order that the stipulation could be consummated. We submit that there is a complete failure of consideration to support the claimed oral contract and the trial Court so found. (Fdg. 14, R. 32, 33).

The real reason why the respondent corporation obtained storage privileges for 3 percent of its rights instead of 10 percent deserves comment. The witness Elgin Mellor gave the best explanation in answer to questions by the trial Court, i.e. because of the ability and extraordinary efforts of its attorney and its president Archie Mellor. (R. 303). It is obvious that appellant Roberts was attempting to claim the credit therefor by distorting and misrepresenting the facts.

The witness Elgin Mellor, who was then a board member and attended the board meeting of February 28, 1931, testified that a very loose arrangement was discussed with respect to conveying appellant Roberts' water in the canal. (R. 291). He steadfastly maintained that the arrangement was for appellant Roberts to pay respondent \$35.00 each year, plus 10 percent of his water. (R. 291, 306, 307, 308, 309). The arrangement

decided upon was to be temporary from year to year. (R. 296, 307, 318). The 10 percent of the appellant Roberts' class "AA" water right was to go directly to the respondent corporation. (R. 291). It was there determined that the value of the 40 acre feet to the respondent corporation when added to the \$35.00 cash, would be nearly comparable to the assessments to its stockholders for an equivalent quantity of water. (R. 298).

The trial Court found that such an arrangement had been worked out on a temporary basis. (Edg. 15, R. 33, 34). The witness Mellor was a director of respondent corporation for 27 years during the which time it was his understanding that appellant Roberts had been relinquishing 10 percent of his class "AA" water to respondent corporation. (R. 283, 313). Mr. Mellor and appellant Roberts were both relieved of their directorships in 1956 when an entire new Board of directors was elected. (R. 303, 304). It was not until June of 1958 that Mr. Mellor was apprised that respondent corporation was not receiving the 10 percent of appellant Roberts class "AA" water, at which time he had a conference about this case with appellants. (R. 292). Mr. Roberts was the watermaster during that period and he handled the water. (R. 313, 314).

It is obvious that appellant Roberts had been imposing on respondent corporation for many years and was able to do so because he was secretary, director and watermaster during all of those years. The evidence is clear that the terms of the claimed contract which appellants contend for were never discussed nor agreed

upon even as a temporary arrangement. No consideration ever passed from appellant Roberts to respondent corporation to support the claimed contract. We submit that the trial Court correctly found that no contract, either written, oral, constructive or implied, was made in fact or in law between Roberts and the respondent corporation for the conveyance and distribution of the waters under appellant Roberts class "AA" water right.

#### POINT IV

THE CLAIMED CONTRACT WOULD BE VOID AND UNENFORCEABLE UNDER THE STATUTE OF FRAUDS SINCE THE CLAIMED CONTRACT IS NOT IN WRITING, AND THERE IS NO WRITTEN MEMORANDUM THEREOF SIGNED BY THE PLAINTIFF CORPORATION.

By way of the claimed contract appellants seek to establish a perpetual easement and right-of-way to convey and have respondent distribute water from the Gunnison- Fayette Canal to appellants under their class "AA" right for a fixed annual amount, irrespective of what their proportionate share of the operation and maintenance costs would otherwise be. Since the foregoing perpetual easement and right-of-way is in the nature of an interest in real property, it is axiomatic that appellants could acquire such interest only by deed. (Section 25-5-1, U.C.A., 1953).

Appellants made no offer in evidence of any deed from respondent nor anyone else to establish a right-of-way through the Gunnison-Fayette Canal. Appellants contend that their right-of-way was confirmed by the "Cox Decree", and is res adjudicata as against respondent. The foregoing argument is clearly without merit

since the "Cox Decree", was a general adjudication of the rights to the use of the waters of the Sevier River and its tributaries among the parties thereto, and did not purport to adjudicate rights-of way in canals or ownership of property. This is self evident from the fact that the "Cox Decree" was entered pursuant to Chapter 67, Laws of Utah, 1919 (now Chapter ~~6~~<sup>4</sup>, Title 73, U.C.A., 1953), being the statutory procedure for adjudicating water rights, and the jurisdiction of the Court was necessarily limited thereto.

It is appellants further claim that they have acquired such interest or right-of-way through an alleged contract. Appellants readily concede that the only written evidence of their claimed contract is the altered portion of the minute entry of February 28, 1931, appearing in respondent's corporate minute book (Exhibit 3), and certain notes appearing in appellant Roberts' notebook. (Exhibit 6). Even assuming that such minute entry and the notes of appellant Roberts truly reflected the action taken by the Board of Directors at that meeting (which in fact is not as was hereinabove demonstrated), still such minute entry and notes do not constitute an enforceable contract. (Section 25-5-3, U.C.A., 1953).

The terms of the claimed contract contended for by appellants would require perpetual performance by respondent corporation. Under the provisions of Section 25-5-4, U.C.A., 1953, such an agreement which by its terms cannot be performed within a year from the making thereof must be in writing.



The self-serving notes are in the handwriting of appellant Roberts, and are claimed to have been made while he was acting as secretary of the respondent corporation. The minute entry was made and was subsequently changed by and under the direction of appellant Roberts while he was acting as Secretary of the respondent corporation. There is no subsequent minute entry to prove by the directors or stockholders of the respondent corporation that the secretary could not make a minute entry then subsequently alter the same for his personal benefit without authorization or ratification and thereby perpetually bind the respondent corporation. This case is clearly distinguishable from the case of *Preis v. Eversharp, Inc.*, 154 Fed. Supp. 98, cited on page 27 of appellants' brief, since there the claimed contract was not for the personal benefit of the secretary, and the secretary was authorized to make the minute entry. It follows without argument that neither the notes of appellant Roberts, nor the altered minute entry constitute a "writing subscribed by the party to be charged therewith", as required by said Sections 25-5-1, 4, U.C.A., 1953.

#### POINT V

THE CLAIMED CONTRACT WOULD BE VOID AND UNENFORCEABLE AS BEING MADE WHILE APPELLANT HOWARD ROBERTS WAS A DIRECTOR, SECRETARY AND AN OFFICER OF THE RESPONDENT CORPORATION, FOR HIS PERSONAL BENEFIT AND AGAINST THE INTERESTS OF THE RESPONDENT CORPORATION IN VIOLATION OF HIS FIDUCIARY RELATION TO THE RESPONDENT CORPORATION AND ITS STOCKHOLDERS.

It is an undisputed fact that on February 28, 1931, at the time of the claimed making of the claimed contract, appellant Howard Roberts was secretary, director

and watermaster of the respondent corporation. He acted in the same capacities from 1928 continuously until the year 1956. There can be but little doubt that the claimed contract, if made, was for the personal benefit and profit of appellant Roberts who was an officer of the corporation, and against the interests of the respondent corporation and its stockholders. Exhibit 13 is a summary showing a comparison between the actual amounts paid by appellants Roberts and Malmgren, and what their proportionate share of the cost of operating and maintaining Gunnison-Fayette Canal was over the past years. The foregoing summary shows that in some years they paid less than 10 percent of their proportionate share.

The law is well settled that a director of a corporation has a fiduciary relation to the corporation and its stockholders. *Glen Allen Mining Company vs. Park Galena Mining Company*, 77 Utah 362, 296 P. 231. *Elggren v. Woolley*, 64 Utah 183, 228 P. 906. *Hansen vs. Granite Holding Co.*, 117 Utah 530, 218 P. 2d. 274. *Noble Mercantile Company vs. Mt. Pleasant E. Co-operative Inst.*, 12 Utah 213, 42 P. 869. *Victor Gold & Silver Mining Company vs. National Bank*, 15 Utah 391, 49 P. 826. *McIntyre vs. Ajax Mining Co.*, 17 Utah 213, 53 P. 1124, 13 Am. Jur., Corporations, Sec. 997, pp. 948, 949. 24 ALR 71.

It is a cardinal principle that a director or an officer of a corporation will not be permitted to make a private profit out of his official position; he must give to the corporation the benefit of any advantage which he has

thereby obtained. 13 Am. Jur., Corporations, Sec. 998, p. 950. *Glen Allen Mining Company v. Park Galena Mining Co.*, Supra.

In the case of *Hansen vs. Granite Holding Company*, Supra, this Court stated on page 280 of the Pacific Reporter as follows:

"But a fiduciary relation exists between the board of directors and the management of the corporation on one hand, and the stockholders on the other, and where the management is interested in any deal with the corporation so that its interests are contrary to that of the corporation, then its actions must be open and above board, and their dealings must be carried on with the utmost fairness and good faith. In such cases, courts of equity will carefully scrutinize the dealings of the management and set aside such transactions on slight grounds."

In the instant case, appellant Roberts, while acting as an officer of the respondent corporation was also a member of a committee whose duty to the corporation was to represent and protect its interests. The minute entry of the board meeting of November 18, 1930, (Exh. 3), specifically demonstrates this since it was resolved that the "... board accept the proposition offered as a compromise subject to the committee getting a better deal if possible. . . ." It was a flagrant breach of appellant Roberts' duty to his corporation to misrepresent that he gave up 10 percent of his right in order that the respondent corporation could get its water stored for 3 percent of its right, if he made such representation as he claims, since the evidence overwhelmingly shows that such was

not the fact and the trial Court so found. The only evidence to support appellant Roberts' claim was his own self-serving testimony, his own self-serving notes, and the altered minute entry of February 28, 1931, which under the evidence was altered at least six years later. Contrary to this was the testimony of Elgin Mellor, who unequivocally testified that appellant Roberts represented to the board that he would give 10 percent of his right to the Gunnison-Fayette Canal Company. The trial Court correctly chose to believe the witness Mellor and found right down the line against appellant Roberts.

Appellant Roberts by reason of his position imposed upon his corporation for his personal benefit, and was able to get away with it until a new board was elected in 1956, which had the courage and sense of responsibility to put an end to it. Under the authorities cited above, appellant Roberts had the burden of showing a good faith transaction, and he completely failed in sustaining that burden because in fact it was in extreme bad faith. The evidence shows in dollars and cents the amount he has wrongfully failed to pay to the respondent corporation over the past years, under the guise of a nonexistent and void contract. We submit that to permit these acts to be further imposed upon the respondent corporation, would be a gross miscarriage of justice.

#### POINT VI

APPELLANTS HOWARD ROBERTS AND DWIGHT MALMGREN, ARE LIABLE TO RESPONDENT FOR THEIR PROPORTIONATE SHARE OF THE OPERATION AND

## MAINTENANCE EXPENSES OF THE GUNNISON-FAYETTE CANAL.

Appellants argue under Point VI of their brief that in any event they are not liable for more than their proportionate share of the operation and maintenance costs for only that portion of the canal which is used to convey their water. With this assertion we cannot agree. Section 73-1-9, U.C.A., 1953, defines the basis upon which the proportionate share is to be determined as being "... in proportion to the share in the use or ownership of the water to which he is entitled." Nothing in the foregoing section limits the proportionate share to only that portion of the canal used to convey the water. The statute bases the proportion upon the use or ownership of the water and not upon the length of the canal used. If the Legislature had intended otherwise, the statute would specifically so provide. So long as the basis used by the trial Court in fixing that amount is fair and reasonable the amount fixed should stand.

In the case of *West Union Canal Company vs. Thornley*, 64 Utah 77, 228 P. 199, the issue was raised as to whether defendants were obligated to pay their pro-rata share of 7 miles of the canal or only 1½ miles of the canal actually used by them. The trial Court found that an agreement had been entered into between plaintiff and the predecessors of defendant, whereby defendant's predecessors were to pay their respective pro-rata shares of the expense of controlling and maintaining the canal for only the 1½ miles. However, a fair inference from the holding of that case is that if

the rights of the parties had not been determined by contract, the defendants would have been liable for their pro-rata share of operating and maintaining the seven miles of canal from Carter's Point to Utah Lake, even though their water was conveyed through only  $1\frac{1}{2}$  miles of the canal.

In the case of *Utah Power and Light Company vs. Richmond Irrigation Company*, 115 Utah 352, 204 P. 2d. 818, an action was brought by the State Engineer against the Paradise Irrigation and Reservoir Company, and others to collect certain assessments to defray the expenses of administering the distribution of water in the Little Bear River System. Since the Paradise Company normally required less service from the water commissioner than that rendered to other users, it claimed that it should not be assessed on the same basis with the other users, and in fact it should be excluded from the river system entirely and fight its own battles should any arise. This Court rejected their contention and held that the assessments should be levied against them on the same basis as that used to determine the levy imposed upon the other users. On page 824 of the Pacific Reporter it is stated as follows:

“While the relative position of certain of the users requires closer supervision in comparison with that required of others, even the Paradise Company, in its comparatively remote position on the stream, is not so isolated as to render the services of a water commissioner unnecessary. The knowledge that a commissioner patrols the area may in and of itself reduce the possibility of strangers or junior appropriators interfering

with the rights of the Paradise Company. Re-stating that mathematical exactness is not necessary for a valid assessment, and that the rule is—there should be a reasonable relationship between the proportion of the cost of distribution to the individual borne and the benefits and services to be received, we think an assessment should be levied against the Paradise Company on the same basis as that used to determine the levy imposed on other users.”

We believe that the principle applied in the foregoing case, applies with equal vigor to the facts of this case. The installation, operation and maintenance of measuring devices along the entire length of the canal, and the cleaning, repairs and maintenance of the entire canal, together with the services of the watermasters employed by respondent corporation and its officers in the administration and distribution of the waters along the entire canal to all users insure appellants that they will receive the water to which they are entitled. Respondent is engaged solely in the diversion, conveyance, distribution, administration and controlling of the waters through the Gunnison-Fayette Canal to its stockholders and to other users under their own rights. The sole means of income to the company to defray the expenses of operation is from assessments against its capital stock, and contributions by joint users of the canal.

The evidence showed that all of the expenditures made by the Company in 1956, were for the operation and maintenance of its canal and for the administration and distribution of waters therefrom. It would be virtu-

ally impossible to determine which of the expenditures made, and how much thereof applies only to the canal from the point of diversion to the turnouts of the appellants since the entire canal system is operated as a unit. Appellants attempt to defeat respondent's claim with the assertion that since respondent is unable to segregate the expenses which are attributable only to the length of the canal which they use, that they should be relieved from liability for their proportionate shares. They make such assertion in spite of the fact that appellant Roberts has leased part of his water up and down the entire canal. (R. 434). Apparently they believe respondent should keep a separate set of books and pro-rate every single item of expense just for their benefit.

All of the stockholders of respondent corporation pay their assessments based upon the expenses of operating and maintaining the entire canal system. Likewise, all of the other joint users pay their pro-rata share of the expenses of operating and maintaining the entire canal system. The services which appellants receive are of equal benefit to them as are those to the other users under the canal and good conscience and fair play dictates that they should pay on the same basis. Appellants cite no authority that it should be otherwise. We submit that under the law and the facts of this case, appellants are and should be obligated to pay for their proportionate shares of the expenses for operating, maintaining and controlling the entire length of the Gunnison-Fayette Canal.



## POINT VII

THE TRIAL COURT DID NOT ERR IN ITS FINDINGS THAT APPELLANT ROBERTS OWES RESPONDENT THE SUM OF \$161.74, AND THAT APPELLANT MALMGREN OWES RESPONDENT THE SUM OF \$14.16, FOR THEIR RESPECTIVE BALANCES OF THEIR PROPORTIONATE SHARES OF THE EXPENSES OF OPERATING AND MAINTAINING THE GUNNISON-FAYETTE CANAL DURING THE YEAR 1956.

The trial Court found that during the year 1956, there was delivered to appellant Roberts, 177.74 acre feet of water and to appellant Malmgren, 15.66 acre feet of water from the Gunnison-Fayette Canal under their class "AA" right. (F'dg. 8, R. 31). The foregoing is supported by the evidence. (R. 123, 150, Exh. 4, back of page 1). Appellants argue under Point IX of their brief that there was no evidence to show how much water was delivered to appellants because such figures are not specifically shown on Exhibits 11 and 13. Yet they offered no evidence to disprove either figure. Our answer is that they should look on pages 73 and 100 of the transcript (R. 123, 150) and on the back of page 1 of Exhibit 4. The foregoing quantities of water were determined from the river commissioner's reports (Exh. 4) of water delivered into the head of the canal minus the shrinkage (loss) in the canal. (R. 116, 146).

Dean Bartholemew, secretary of respondent corporation, testified that during the year of 1956, there was delivered to the stockholders of respondent corporation a total of approximately 1 acre foot of water per share of stock. (R. 124). Of this amount there was 0.54 acre feet per share of irrigation water delivered and the

balance was delivered outside of the irrigation season. (R. 123, 124).

Mr. Bartholomew prepared Exhibit 5, which is an account of the expenditures made by respondent corporation during the year 1956. (R. 116). It contains all of the expenditures for operation, maintenance, administration and improvements for the year 1956. (R. 118). Under Point XVI of appellants' brief, they argue that the trial Court erred in permitting the secretary to copy from the records of the respondent corporation, the expenditures made and introduce such in evidence as proof of such expenditures. Any objection which appellants might have with respect thereto was waived by counsel for appellants on the bottom of page R. 118 and the top of page R. 119, wherein Mr. Burton stated "Judge, without going into the books, I am willing to take the tabulation as representing the various expenditures that the books of this corporation would show." The only objection raised by appellants was that the Exhibit includes many items that would not pertain to the operation and maintenance of a canal. (R. 119).

The expenditures shown on Exhibit 5 were presented to the board of directors of respondent corporation at its regular board meeting in October, 1956. (R. 124). Based upon the foregoing expenditures and the water delivered, it was determined that an assessment of \$1.00 per share be levied against the stock of respondent corporation to cover their share of the expenses of operation and maintenance of the canal and the administration and distribution of the company's water from the canal

for the year 1956. (R. 128). Since the stockholders received approximately 1 acre foot of water per share, it was determined by the directors that the fair contribution by the individual users of the canal should be \$1.00 per acre foot of water delivered from the canal as their proportionate share of the cost of operation and maintenance of the canal and for the administration and distribution of the water therefrom during the year 1956. (R. 128). The amount so determined for appellant Roberts was \$177.74, based upon a delivery of 177.74 acre feet of water, and for appellant Malmgren was \$15.66, based upon a delivery of 15.66 acre feet of water. Appellant Roberts paid \$16.00 and appellant Malmgren paid \$1.50 for a total of \$17.50. They based the foregoing payment on their claim that they were obligated to pay only one-half of the \$35.00 or \$17.50, since together they owned one-half of the original 1.4 sec. ft. of class "AA" water right.

Appellants strenuously argue that the list of expenditures shown on Exhibit 5 include purely corporate expenditures and that their proportionate shares of the expenses found by the trial Court were based in part thereon. Under Point VII of their brief they list 11 items which they claim should not be included. What appellants overlook is that respondent corporation is engaged solely in the business of the distribution of waters from the Gunnison-Fayette Canal to the stockholders and joint users under the canal. The directors administer the distribution of the waters both to respondent corporation's stockholders and to all joint users, including

appellants. Voucher books and check books are used to pay the obligations incurred in the administration and distribution of the waters. Equipment rentals are for cleaning, repairing, maintaining and improving the canal. Measuring devices and locks insure better distribution. The foregoing are a few of the many reasons why the items listed are properly included.

We concede the law to be that an individual joint user of a canal cannot be charged with expenses which are purely corporate in nature. *Perry Irrigation Company vs. Thomas*, 74 Ut. 193, 278 P. 535. The same contention made by appellants herein was raised in the foregoing case. It was urged by the defendants in that case that the charges sought to be collected by plaintiff were in the nature of corporate assessments. This Court held that the defendants point was not well taken since the trial was had and judgment rendered on the theory of holding defendants for their proportionate share of the expenses, excluding strictly corporate items.

In this case, the trial court found that respondent corporation paid for the cost, operation and maintenance of the Gunnison-Fayette Canal and for the expenses of administration and distribution of the waters therefrom for the year 1956, and that such cost and expenses amounted to \$1.00 per acre foot of water delivered. (Fdg. 9, R. 31). The trial Court further found that the fair proportionate share of the cost of operation and maintenance of the Gunnison-Fayette Canal and for the expenses of administration and distribution of the waters delivered to appellant Roberts under his class "AA" water right

for the year 1956 was \$177.74 and to appellant Malmgren under his class "AA" water right for the year 1956 was \$15.66. (Fdg. 10, R. 31). Appellants offered no evidence to show that their fair and proportionate shares should be otherwise. All they do is stand back and criticise the method employed in determining the same. Appellants respective proportionate shares were determined on the same basis as all other users under the canal. We respectfully submit that their respective proportionate shares as found and determined by the trial Court and that basis used in determining the same are fair, reasonable and are supported by the evidence.

#### POINT VIII

THE EVIDENCE ESTABLISHES THAT THE LAST PARAGRAPH OF THE MINUTE ENTRY OF FEBRUARY 28, 1931, APPEARING IN RESPONDENT'S CORPORATE MINUTE BOOK WAS ALTERED BY AND UNDER THE DIRECTION OF APPELLANT ROBERTS AND DOES NOT TRULY REFLECT THE ACTION OF THE BOARD OF DIRECTORS AT THAT MEETING.

It is obvious from a visual inspection that the last paragraph of the minute entry of February 28, 1931, appearing in respondent's corporate minute book (Exhibit 3, page 66) has been altered. In appellants' amended answer, it is alleged that the paragraph was originally written by the first wife of appellant, Roberts was removed with ink eradicator by appellant Roberts and was rewritten by his first wife at his direction prior to the next ensuing board meeting of respondent corporation, and that the same truly reflected the action of the directors at that meeting and was read to and approved by

the directors and stockholders. (R. 14). Yet appellants offered no evidence either by way of a subsequent minute entry or by oral testimony to show that such minute entry was ever read to or approved by either the directors or the stockholders of the respondent corporation.

The admittedly altered minute entry was carefully examined by J. Perry Goddard, a handwriting expert who testified that the altered portion of the minute entry was without question in handwriting different from the handwriting of the first portion of the same minute entry and was different from any other handwriting which appeared in the minute book. (R. 184-187, inc.). Mr. Goddard further testified that without question the altered portion of the minute entry was written by the same person who wrote the letter marked Exhibit 7. (R. 188-190, inc.). The witness Carolyn Jensen identified the handwriting of the letter marked Exhibit 7 to be that of her Aunt Florence, who was also the second wife of appellant Roberts. (R. 227).

Grace Roberts, the first wife of appellants Roberts, passed away on June 18, 1933. (R. 169). He married his second wife Florence in July of 1936. (R. 433). It follows that the altered portion of the minute entry was not made until sometime after July of 1936 when appellant Roberts married his second wife Florence, which was at least five years after the board meeting of February 28, 1931. Yet appellant Roberts was positive that the minute entry was made by either his first wife Grace or his daughter Vera. (R. 170).

Appellant Roberts could not remember what was

erased nor what changes had been made. (R. 431). He testified that the altered portion of the minute entry truly reflected the action taken by the board at that meeting. (R. 180). Yet, he at no time ever obtained the approval of the board of directors of respondent corporation authorizing him to make the alteration or changes. (R. 432).

The witness Elgin Mellor, who was a director, and was present at the board of directors meeting of February 28, 1931, unequivocally testified that the altered portion of the minute entry does not reflect the action taken by the board of directors at that meeting. (R. 290, 291). He testified that the arrangement made at the meeting was that appellant Roberts would give the respondent corporation 10 percent of his class "AA" water right and \$35.00 per year for permission to convey his water through the canal. (R. 291). The arrangement decided upon was to be temporary from year to year. (R. 296, 307, 318). The 10 percent of the appellant Roberts' class "AA" water right was to go directly to the respondent corporation. (R. 291).

The trial Court found that at some time subsequent to the year 1936 and prior to the year 1952 a new paragraph was written in place of the original last paragraph of the minute entry by Florence Roberts the second wife of appellant Howard Roberts, under his direction, and that such paragraph as rewritten does not state nor reflect the action taken by the directors of respondent corporation at the meeting of February 28, 1931, and that said paragraph is void and has no force or

effect. (F'dg. 19, R. 36). We submit that for 25 years appellant Roberts used the altered minute entry to impose upon his corporation and the trial Court properly set the same aside.

#### POINT IX

#### RESPONDENT'S CLAIMS ARE NOT BARRED BY LACHES OR ESTOPPEL.

It is undisputed that during the period 1931 until 1956, inclusive, appellant Roberts was continuously secretary, director and watermaster of the respondent corporation and as such was in fact the managing agent thereof. He kept the books and administered the distribution of water and collected assessments during the entire period. The directors would annually fix the assessment per share of stock and the amounts of contribution for the joint users and left the sending of notices and collection of the monies to appellant Roberts. He administered and distributed the waters from the canal to the various stockholders and joint users and to himself, both under his stock ownership and his class "AA" right without disclosure to his corporation that he was not relinquishing 10 percent of his water to it. As a matter of fact, the witness Elgin Mellor, who was a director for 27 years and watermaster for approximately 12 years on the lower portion of the canal did not learn that respondent corporation was not getting the 10 percent of appellant Roberts' class "AA" water right until shortly before the trial of this action in June of 1958. Respondent's records, including its corporate minute book (Exh. 3) were in appellant Roberts'



possession until the year 1956 when he turned the same over to the new secretary. When the new board of directors was elected in 1956, the officers immediately asserted the claims of the respondent corporation against appellants, and when appellants refused to comply this action was commenced.

Delay in seeking relief prior to the time of acquiring knowledge of a director's breach of trust, or the gaining of such information as reasonably to place the complainant on inquiry does not constitute laches. 10 A.L.R. 378. The defense of laches as a general rule is not available to a director who has by some affirmative act attempted to conceal his violation of trust from the complaining stockholders, provided, relief is sought within a proper time after discovery of the dereliction. 13 Am. Jur., Corporations, Sec. 1022, p. 972, 10 A.L.R. 379, 380. In the case of *Hansen vs. Granite Holding Company*, 117 Utah 530, 218 P. 2nd. 274, this Court held that the stockholders were not estopped from asserting their rights because of the fact that certain original plaintiffs, as to whom the action had been dismissed, had stood by and allowed the president of the corporation to manage the corporation as his own property for more than 25 years.

Under Point V of their brief, appellants argue that 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 stockholders derivative suit, and cite authority in support thereof. However, such authority is limited

to those instances where there has been no concealment of the cause of action. The general rule is that one who wrongfully conceals material facts and thereby prevents discovery of his wrong or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his wrong, until the expiration of the full statutory period from the time when the facts were discovered or should, with reasonable diligence, have been discovered. 34 Am. Jur., Limitation of Actions, Sec. 231, p. 188.

The record is clear that any representations made to appellant Malmgren or his predecessors that a contract existed covering the costs of administration and distribution of the class "AA" water involved herein, were made by appellant Roberts personally and not as an officer of the respondent. Respondent corporation certainly cannot be charged with his misrepresentations. In addition thereto, this case does not involve the repudiation of a contract since a contract was never made.

The trial Court found that during the period from 1931 to 1956, inclusive, appellant Roberts was in fact the managing agent of respondent corporation, and during such period, he concealed material facts from his corporation. (Fdg. 20, R. 36). Appellants had the burden of proving facts which would constitute laches or an estoppel. The trial Court found that the evidence fails to show facts from which a finding could be made that the conduct of respondent corporation and its officers for the delay until 1957 to commence this action was

unreasonable and constituted laches or an estoppel. (Fdg. 20, R. 37). We submit that under the facts of this case, the trial Court did not err in finding and concluding that respondent's claims for relief are not barred by laches or estoppels.

## CONCLUSION

The trial Court found all of the facts in favor of respondent corporation and against appellants. All of the findings are clearly supported by the preponderance of the evidence. The conclusions of law and judgment are supported in all respects by the findings. The trial Court put an end to an imposition which has been placed upon respondent corporation by appellant Roberts for 25 years, which he was able to carry on by reason of his official positions of secretary, director and water-master. To permit a further imposition of these acts would be a gross miscarriage of justice. We respectfully submit that the findings of fact and conclusions of law and judgment should and must be affirmed.

Respectfully submitted,

Phillip V. Christenson  
Joseph Novak  
for CHRISTENSON, NOVAK,  
PAULSON & TAYLOR  
*Attorneys for Plaintiff and  
Respondent,*  
Gunnison-Fayette Canal  
Company

## APPENDIX I

The owners of above rights from A to F, inclusive, the amount of water to which they are severally entitled, subject to the limitations herein provided and the period of time each is entitled to the use of the water and the priority date under the same are as follows:

<i>Class A</i>	<i>Sec. Ft.</i>	<i>Date</i>	<i>Priority</i>
Gunnison-Fayette Canal			
Company .....	16.5	Mar. 1 to Oct. 15	
Ray P. Dyring & W. J.			
Wintch .....	6.0	Mar. 1 to Oct. 15	
J. W. Nielsen, or his			
successor .....	0.8	Mar. 1 to Oct. 15	
Fritsch Loan & Trust Co.,			
or its successor .....	3.2	Mar. 1 to Oct. 15	
Dover Irrigation			
Company .....	45.0	Mar. 1 to Oct. 15	
Dover Irrigation			
Company .....	12.1	Mar. 1 to Oct. 1	
Wellington Irrigation			
Company .....	20.4	Mar. 1 to Oct. 1	
Central Utah Water			
Company .....	12.4	Mar. 1 to Oct. 1	
Samuel McIntyre Inv.			
Company .....	22.0	Mar. 1 to Oct. 1	
Leamington Irrigation			
Company .....	23.6	Mar. 1 to Oct. 1	
Abraham Irrigation			
Company .....	59.0	Mar. 1 to Oct. 1	1874
Deseret Irrigation Co.			
Company .....	74.0	Mar. 1 to Oct. 1	1874
Total .....	295.0		

\* \* \* \* \*

<i>Class B</i>	<i>Sec. Ft.</i>	<i>Date</i>	<i>Priority</i>
Abraham Irrigation Co.....	5.0	Mar. 1 to Oct. 1	1874
Deseret Irrigation Co.....	10.7	Mar. 1 to Oct. 1	1874

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Total .....	15.7	Mar. 1 to Oct. 1	
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<i>Class C</i>	<i>Sec. Ft.</i>	<i>Date</i>	<i>Priority</i>
Central Utah Water Co.....	12.5	Mar. 1 to Oct. 1	

<i>Class D</i>	<i>Sec. Ft.</i>	<i>Date</i>	<i>Priority</i>
Abraham Irrigation Co.....	4285.6	Apr. 1 to July 1	1890
Deseret Irrigation Co.....	5714.4	Apr. 1 to July 1	1890

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Total .....	10000.0		
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<i>Class E</i>	<i>Sec. Ft.</i>	<i>Date</i>	<i>Priority</i>
Central Utah Water Co.....	5.8	Mar. 1 to Oct. 1	

<i>Class F</i>	<i>Sec. Ft.</i>	<i>Date</i>	<i>Priority</i>
West View Irrigation Co.....	28.6	Mar. 1 to Oct. 15	
Gunnison-Fayette Canal Company .....	14.3	Mar. 1 to Oct. 15	
Ray P. Dyring and W. J. Wintch .....	1.0	Mar. 1 to Oct. 15	
Central Utah Water Co.....	4.3	Mar. 1 to Oct. 1	
Abraham Irrigation Co.....	9.0	Mar. 1 to Oct. 1	1890

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Total .....	57.2		
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\* \* \* \* \*

The following rights not being the subject of pro rata division under rights above defined as A, B, C, D, E, and F, and being in their nature miscellaneous and independent and having their sources in springs and other tributaries of the Sevier River are hereby designated as AA rights, and are to be satisfied in full from the waters flowing in the Sevier River as hereinafter stated in lieu of the water directly available from such

## II

sources, and the water which said rights represent is to be used on lands as hereinafter set forth and are limited in season and quantity as follows:

*AA rights:*

1. West View Irrigation Company from Redmond Spring Creek 1.5 second feet to be used from April 1 to October 15 and to be diverted from the Sevier River through the West View Canal for use on lands under its said canal system.

2. Gunnison-Fayette Canal Company, from the yield of San Pitch River below the intersection of the Gunnison-Fayette Canal and San Pitch River, 1.4 second feet, to be used from March 1 to October 15 to be diverted through the Gunnison Fayette Canal and used on lands under its canal system.

3. A. H. Christensen, from Ryan Meadow springs, 1.0 second foot to be used from April 1 to October 15, to be diverted through the Gunnison-Fayette Canal and used to irrigate lands under its canal system.

4. Howard Roberts, from Ryan Meadow springs, 0.7 second foot, and Archie M. Mellor, from Ryan Meadow springs, 0.7 second foot, to be used from April 1 to October 15, to be diverted into the Gunnison-Fayette Canal and used to irrigate lands under its canal system.

5. Central Utah Water Company, from right decreed to L. H. Erickson in the Higgins decree, 3.3 second feet to be used from March 1 to October 1, to be diverted through the Central Utah Water Company Canal and used to irrigate lands under its canal system.

6. Nicholson Seed Farms, from right de-

III

ceded to Elizabeth Roberts, et al, in the Higgins decree, 1.4 second feet to be used from March 1 to October 1, to be diverted through its canals and used to irrigate lands under its canal system. \* \* \* \*

The following named companies and individuals hereinafter called "Exchange Users," shall have the right annually from April 16 to October 10, inclusive, to divert from the river the following percentages of the water yielded by said river for satisfying their respective rights as specified in this paragraph and as follows, to-wit:

<i>Name of Company</i>	<i>Second Class of Feet</i>	<i>Per-centage Water Allowed</i>	
West View Irrigation Co.....	23.7	A	90
West View Irrigation Co.....	1.5	AA	90
West View Irrigation Co.....	1.0	Well Water	90
West View Irrigation Co.....	28.6	F	90
Gunnison-Fayette Canal Co.....	16.5	A	97
Gunnison-Fayette Canal Co.....	1.4	AA	97
Gunnison-Fayette Canal Co.....	14.3	F	97
Ray P. Dyring & W. J. Wintch....	6.0	A	90
Ray P. Dyring & W. J. Wintch....	1.0	F	90
J. W. Nielson or his successors....	2.0	A	90
Fritsch Loan & Trust Co., or its successors in interest.....	3.2	A	90
State of Utah .....	1.0	AA	90
Howard Roberts .....	.7	AA	90
Archie M. Mellor .....	.7	AA	90
Dover Irrigation Company .....	20.1	A	90
* * * * *			

Provided that the said companies and individuals herein referred to as Exchange Users, shall each have the right to divert from the yield of the river below

Vermillion Dam at their respective head gates any amount in second feet and at any time between April 16 and October 10, inclusive, provided that any company's or individual's diversion does not exceed the value of their respective diversion right or rights as above defined in this paragraph measured in total acre feet at any time between April 16 and October 10, inclusive, and provided further that the said companies and individuals may collectively overdraft the amount of water collectively available as stated in this paragraph at the time of the overdraft, but not exceeding in the aggregate 1,000 acre feet at such time, and provided further that all overdrafts shall be paid back from their portion of the yield of the river for satisfying the rights of the companies and parties as above set out in this paragraph on or before October 10 of the year in which said overdraft occurs.

There shall be no drafting on call of any water yielded by said river for satisfying the rights in this paragraph prior to April 16 or after October 10 in each and every year, but the companies and/or individuals owning said right or rights shall have the privilege of using the water yielded by said river for satisfying said right or rights by direct diversion from March 1 to April 15, inclusive, and from October 11 to October 15, inclusive, in each and every year. The right of the said Exchange Users to the use of the water as set forth in this paragraph is not additional to their other rights herein set forth but is a part thereof and this paragraph shall be construed as further defining said right. \* \* \* \* \*

## V



For drafting and/or storage privileges granted to the primary users in the lower zone as herein set forth, the following percentages of the following rights shall be irrevocably decreed to the owners of Sevier Bridge Reservoir to be stored in Sevier Bridge Reservoir or used by direct diversion for the periods of time in each and every year as set forth hereunder and as follows, to-wit:

<i>Name of Company</i>	<i>Second Feet</i>	<i>Class of Water</i>	<i>Period of Storage or Draft</i>	<i>Percent to Be Decreed to Sevier Bridge Res. Owners</i>
West View Irrigat'n Co.....	28.6	F	Apr 16-Oct 10 inc.	10
West View Irrigat'n Co.....	23.7	A	Apr 16-Oct 10 inc.	10
West View Irrigat'n Co.....	1.5	AA	Apr 16-Oct 10 inc.	10
West View Irrigat'n Co.....	1.0	Well Water	Apr 16-Oct 10 inc.	10
Gunnison-Fayette Canal Co.....	16.5	A	Apr 16-Oct 10 inc.	3
Gunnison-Fayette Canal Co.....	1.4	AA	Apr 16-Oct 10 inc.	3
Gunnison-Fayette Canal Co.....	14.3	F	Apr 16-Oct 10 inc.	3
Ray P. Dyring and W. J. Wintch....	6.0	A	Apr 16-Oct 10 inc.	10
Ray P. Dyring and W. J. Wintch....	1.0	F	Apr 16-Oct 10 inc.	10
J. W. Nielson, or his successor.....	2.0	A	Apr 16-Oct 10 inc.	10
Fritch Loan & Trust Co. or its successor .....	3.2	A	Apr 16-Oct 10 inc.	10
State of Utah .....	1.0	A	Apr 16-Oct 10 inc.	10
Howard Roberts .....	.7	AA	Apr 16-Oct 10 inc.	10
Archie M. Mellor .....	.7	AA	Apr 16-Oct 10 inc.	10
Dover Irrigation Co.....	20.1	A	Apr 16-Oct 10 inc.	10
Leamington Irr. Co. ....	23.6	A	Apr 16-Oct 1 inc.	10
Samuel McIntyre Inv. Co. ....	22.0	A	Apr 16-Oct 1 inc.	10
Wellington Irr. Co. ....	20.4	A	Apr 16-Oct 1 inc.	100