1969

Dean E. Park v. Alta Ditch & Canal Company, a Corporation; Metropolitan Water District of Orem, A Public Corporation, and Orem City, A Municipal Corporation : Brief of Defendants-Respondents - Cross Appellants, Metropolitan Water District of Orem and Orem City

IN THE SUPREME COURT OF THE STATE OF UTAH

DEAN E. PARK,
Plaintiff and Appellant,

vs.

ALTA DITCH AND CANAL COMPANY, a corporation,
Defendant and Respondent,

METROPOLITAN WATER DISTRICT OF OREM, a public corporation; and OREM CITY, a municipal corporation,
Defendants, Respondents and Cross Appellants.

BRIEF OF RESPONDENTS AND CROSS APPELLANTS METROPOLITAN WATER DISTRICT OF OREM AND OREM CITY

An Appeal From The Judgment Of The District Court For [illegible] County
Honorable Joseph [illegible]

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (Continued)

TEXTS

CONSTITUTION, STATUTES AND ORDINANCES

IN THE SUPREME COURT OF THE STATE OF UTAH

DEAN E. PARK,
Plaintiff and Appellant,

vs.

ALTA DITCH AND CANAL COMPANY, a corporation,
Defendant and Respondent,

METROPOLITAN WATER DISTRICT OF OREM, a public corporation; and OREM CITY, a municipal corporation,
Defendants, Respondents and Cross Appellants

Case No. 11,345

STATEMENT OF THE KIND OF CASE

Action by plaintiff-appellant to quiet title to 2/288ths of the waters of Alta Springs and to enjoin all defendants-respondents from denying plaintiff-appellant of the use of that flow and quantity of water directly from the Alta Springs. By way of counter-claim defendant-respondent Alta Ditch And Canal Company sought an adjudication that the Water Exchange and Rental Agreements entered into among respondents covering the waters of the Alta Springs were valid and that plaintiff-appellant has been afforded all rights as a stockholder of defendant-respondent Alta Ditch And Canal Company.

By way of counter-claim defendants-respond-

ents-cross appellants Metropolitan Water District of Orem and Orem City sought an adjudication that

(1) plaintiff has no right to convey any water by means of Orem City's pipeline or its other diversion and conveyance works and facilities;

(2) plaintiff has no right to use or maintain the connection to Orem City's pipeline or to take any water therefrom;

(3) plaintiff has no right to divert water directly from Alta Springs; and

(4) for judgment against plaintiff for the sum of $1,834.45 for the reasonable value of the water received by plaintiff from Orem City's pipeline during the period from November 1, 1962 to October 31, 1967.

DISPOSITION IN LOWER COURT

The trial court

(1) dismissed plaintiff's Amended Complaint with prejudice

and adjudicated that

(2) plaintiff's only right as against defendant Alta Ditch And Canal Company is as the owner of 2 shares of stock of said defendant, and plaintiff has been afforded all rights and privileges thereunder;

(3) the Pipeline and Water Rental Agree-

ments and the Exchange Agreements are valid and in full force and effect and are binding on plaintiff, and that plaintiff is not entitled to divert any water directly from the Alta Springs;

(4) plaintiff has no right to use or maintain the connection to the Orem City's pipeline or to convey water through said pipeline or through said defendant's other diversion works and facilities;

(5) defendant Orem City's counter-claim against plaintiff for the reasonable value of the water delivered by said defendant through its pipeline and used by plaintiff from November 1, 1962 to October 31, 1967 be dismissed with prejudice.

RELIEF SOUGHT ON APPEAL

Defendants-respondents-cross appellants Metropolitan Water District of Orem and Orem City seek to affirm the Findings Of Fact, Conclusions Of Law and Judgment of the trial court as to paragraphs Nos. (1), (2), (3) and (4) above and by way of cross appeal to reverse paragraph No. (5) above, with instructions to enter judgment in favor of Orem City and against plaintiff in the sum of $1,834.45 together with interest thereon.

STATEMENT OF FACTS

These respondents shall follow the same nomenclature in referring to the parties as set forth in

Appellant's Brief, except when these respondents are separately referred to Metropolitan Water District of Orem will be designated "Orem District" and Orem City will be designated by name.

Orem disagrees with appellant's Statement Of Facts because it

> (1) contains essentially only those facts carefully selected to be most favorable to plaintiff, who lost below, and thereby violates the time-honored rule that the facts on this appeal must be construed in the light most favorable to defendants, who won below; and
>
> (2) contains facts which are contrary to the express findings of the trial court supported by the evidence, without attacking those findings.

And so Orem makes the following Statement Of Facts as found by the trial court and as supported by the evidence, being directed primarily to the issues between appellant and Orem.

The Alta Springs emerge from the ledges high on the north wall of Provo Canyon, approximately 3 miles above its mouth, at an elevation of some 640 feet above the canyon floor (Exh. 29, Tr. 202). The original appropriators of the Alta Springs conveyed the waters therefrom by means of a high line canal through and around the ledges and thence steeply down a mountain side ravine to the Orem Bench into a ditch which coursed in a general northwesterly

direction along the easterly edge of their lands at the base of the foothills (Exhs. 28, 29, 30). Appellant's property is situated on an intermediate bench approximately 150 feet higher in elevation than where the Alta Ditch passes below his property (Tr. 54).

The early appropriators of the Alta Springs organized the old Alta Ditch And Canal Company as a corporation under Utah law on May 20, 1893 for a term of fifty (50) years (Fdg. 2, R. 87; Exh. 26). The old charter expired on May 20, 1943, at which time there were 288 shares of stock issued and outstanding, of which Orem City owned 100 1/6th shares (Fdg. 3, R. 88).

Excluding Orem City, *all* of the remaining stockholders of the old Alta Company, owning 187 5/6ths shares, re-incorporated into the new Alta Company and *all* of them (except Orem City) executed the new Articles of Incorporation, including Verena C. Crandall, the predecessor in interest of plaintiff (Fdg. 4, R. 88; Fdg. 7, R. 89; Exh. 3). Orem City refused to join the *new* Alta Company, which touched off disputes over their respective rights in the distribution of water and the litigation encompassed in Civil No. 15,460 ensued (Fdg. 5, R. 88; Exh. 3). The end result of the litigation awarded Orem City 100 1/6th / 288ths (34.82%) of the waters of Alta Springs in its own right and to take the whole stream at the Orem headhouse on turns with all of the other shareholders of the *new* Alta Company (Fdg. 5, R.

88, 89; Exh. 3, Order Approving Amendments To Decree).

On November 4, 1945, being approximately one year prior to the incorporation of the *new* Alta Company, Verena C. Crandall acquired 2 shares of stock in the *old* Alta Company (Fdg. 7, R. 88). In November of 1946 Verena C. Crandall subscribed to the Articles of Incorporation of the *new* Alta Company and thereby conveyed to the *new* Alta Company all of her right, title and interest in the 2 shares of stock and assets of the *old* Alta Company in exchange for 2 shares of stock in the *new* Alta Company (Fdg. 7, R. 88; Exh. 7). On May 5, 1947 Verena C. Crandall transferred her 2 shares of stock in the *new* Alta Company to one Robert Calder, and in 1949 appellant acquired those 2 shares of stock from Calder. However, the transfer was not made on the books of the *new* Alta Company until March 7, 1951, when Certificate No. 224 for 2 shares was issued to appellant (Fdg. 7, R. 88; Exh. 13, Tr. 91). Appellant's predecessors used the water represented by said 2 shares of stock for irrigation purposes below the Alta Ditch (Exh. 28, Tr. 198, 199).

On February 18, 1947 appellant and his wife entered into an agreement with Orem City to purchase 5.03 acres of land comprising a part of appellant's subject property (Exhs. 27, 28, Tr. 219). The agreement specifically provided that the conveyance of the land was made only on condition that no water rights, either in pipeline extensions, culinary water

use or irrigation water, shall be granted. Beginning on August 30, 1948 appellant and the Orem City Council engaged in a series of discussions pertaining to the furnishing of water to appellant's property (Exh. 12 — Minutes of Orem City Council). Those Minutes make it abundantly clear that no mutual understanding was ever reached between appellant and Orem City respecting the furnishing of water to appellant from Orem City's 14 inch pipeline. Appellant readily admits that no written agreement was ever executed by the parties respecting the furnishing of water to appellant from Orem City's 14 inch pipeline (Tr. 57), and the trial court so found (Fdg. 10, R. 91).

During the year 1949 Orem City constructed a 14 inch diameter pipeline from its headhouse down the mountain side some 4,445 feet to one of its equalization and distribution steel tank reservoirs (Tr. 15, 18), together with other water diversion and conveyance works and facilities as an integral and necessary part of its water works system whereby the waters to which Orem City is entitled from the Alta Springs are diverted and conveyed by Orem City for distribution and beneficial use by its inhabitants and persons outside of its corporate limits (Fdg. 9, R. 90; Exh. 28, 29). Sometime during the fall of 1949 appellant connected into the bottom of said 14 inch pipeline at a point immediately above the steel tank reservoir (Fdg. 9, R. 90). L. V. Beckman, then Orem City Engineer, designed the connection and super-

vised the construction, which was made with the understanding that appellant would pay for the water (Tr. 42). Appellant paid the contractor for making the connection (Tr. 12) and shortly thereafter constructed a 4 inch pipeline from the connection to his premises (Fdg. 9, R. 90). From 1949 to 1958 the Alta Springs water was divided between Orem City and Alta on a turns basis (Tr. 34). Whenever it was Orem City's turn appellant used some water through the connection, the quantity of which is unknown, for the watering of some lawn, a few trees and some horses (Tr. 34, 35, 141). From 1949 to 1957 appellant leased the water represented by 1 3/4ths shares of his 2 shares of stock to Howard Ferguson and Richard Anderson, both of whom were stockholders of Alta (Tr. 143). The leased water was used by them from the Alta Ditch on turns (Tr. 143, 144).

On March 19, 1956 Orem and Alta entered into a "Pipeline And Water Rental Agreement" (Exh. 4) which essentially accomplished two things:

> (1) It provided for the joint construction of a pipeline approximately 18,400 feet long from the Orem headhouse to the Alta Springs, with Orem to pay 34.82% and Alta to pay 65.18% of the cost and expense thereof; and
>
> (2) Orem was granted the right to use *all* of Alta's share (65.18%) of the winter water October 15 to May 1 of each year for twenty

years, for which Orem agreed to pay Alta the sum of $5,000.00 per year.

As to both (1) and (2) above, appellant signed a Waiver Of Notice of the meeting of the stockholders of Alta to consider and act on such agreement (Exh. 17) and the trial court found that appellant is legally bound thereby (Fdg. 11, R. 91, 92).

As to (1) above, Alta's contribution was based upon its total of 187 5/6ths shares of stock outstanding, which includes the 2 shares of stock owned by appellant. Appellant did not separately contribute to the payment of such expenditures save and except as a stockholder of Alta owning 2 shares of stock.

As to (2) above, Orem contracted for the total of Alta's share of the winter water of the Alta Springs based upon its total of 187 5/6ths shares of outstanding stock, and again this includes the 2 shares of stock owned by appellant. Thus Orem rented from Alta all of the winter waters of Alta Springs which otherwise would be distributed to Alta shareholders, including appellant with his 2 shares of stock.

On May 16, 1958 Orem and Alta entered into a "Water Exchange Agreement" (Exh. 5) which essentially accomplished two things:

(1) The Orem District agreed to deliver to Alta up to 1350 acre feet of water on call during the irrigation season into the Alta Ditch, and to pay Alta an additional $5,000.00 per

year. If Alta took less than 1350 acre feet per year the Orem District agreed to pay Alta $5.00 per acre foot for each acre foot less than 1350 acre feet taken. The agreement was for ten years.

(2) Alta granted to Orem all of Alta's share of the waters of Alta Springs during the irrigation season (being approximately May 1 to October 15) based upon the total of 187 5/6ths shares of Alta stock outstanding, which again includes the 2 shares of stock owned by appellant.

The foregoing Agreement expired by its own terms on November 1, 1965. On June 28, 1966 Orem and Alta entered into a new Agreement, renewing the prior summer Water Exchange Agreement for an additional ten years, with some modifications (Exh. 6). This Agreement granted Orem the right to use all of Alta's share of the Alta Springs during the irrigation season based upon Alta's 187 5/6ths shares of outstanding stock, which included the 2 shares of stock owned by appellant. Orem agreed to deliver to Alta Deer Creek water on call, or its equivalent, in exchange therefor and to pay Alta $5,000.00 annually. Thus Orem acquired by exchange all of Alta's share of the waters of Alta Springs during the irrigation season which otherwise would be distributed to its stockholders, including appellant under his 2 shares of stock. The trial court found that said Agreement was duly author-

ized and executed by the parties thereto and is valid and is in full force and effect and is binding upon plaintiff (Fdg. 12, R. 92).

In 1958 appellant replaced said 4 inch steel pipeline with a 6 inch transite pipeline and equipped the same with a meter at a point where said 6 inch pipeline enters his property. Appellant did not consult with representatives of either Alta or Orem concerning such change (Fdg. 9, R. 91).

The Minutes of the Orem City Council meetings reflect no minute entries pertaining to appellant's connection from October 12, 1949 until October 3, 1960. With the consummation of the Water Exchange Agreement between Orem and Alta in 1958 the whole of the Alta Springs was placed in the Orem City water system continuously during the entire year (Tr. 35). At about the same time appellant moved his residence to the property in question. Thereafter his uses increased (Tr. 144). Since Orem had contracted with Alta for all of its share of the Alta Springs, inquiries by the Orem City Council were made as to the basis of appellant's connection as reflected by the Minutes of October 3, 1960, October 17, 1960 and November 7, 1960. On May 8, 1961 appellant met with the Orem City Council to discuss his water connection and represented to the Council that he had an agreement with Orem City to allow the City to use the 2 shares of Alta water in exchange for the equivalent in culinary water from

the 14 inch pipeline (Exh. 12), which was not the fact (Tr. 57, Fdg. 10, R. 91).

Having determined that no agreement respecting appellant's connection existed, on July 17, 1961 the Orem City Council decided that a contract should be drawn up and City Attorney Wentz was instructed to draw one up — which he did, and which was sent to appellant (Exh. 23). A draft of the proposed agreement was offered in evidence by appellant and was received (Exh. 27). However, appellant emphatically denied that he ever received the proposed agreement (Tr. 184). Yet H. V. Wentz testified that appellant subsequently appeared at a Council meeting and brought the proposed agreement with him, but appellant refused to sign it (Tr. 183, 184). This is borne out by the Minutes of the meeting of October 16, 1961 (Exh. 12). At that meeting appellant threatened that if the City did not agree to his terms he would run his own line up to the head of Alta, put in a tank, etc. (Exh. 12).

This controversy continued until 1966 when the Orem City Council brought the matter to a head by notifying appellant that if the matter was not resolved by August 1, 1966 his connection would be shut off (Exh. 12 — Minutes of August 1, 1966 and August 8, 1966). The end result was that appellant then commenced this action. Orem City permitted the connection to remain pendente lite and filed its Counterclaim for the reasonable value of water used by appellant during the preceding four year period

and for all water used by him during the pendency of this action (R. 30, 31).

During the early part of the irrigation season of 1966 when no Water Exchange Agreement was in effect, Orem and Alta went back to the turns basis of dividing the waters of Alta Springs (Tr. 268). On two separate occasions during that period appellant was out of water in his pipeline. To accommodate appellant the Orem City water master arranged with the Alta water master to turn some water into the Orem 14 inch pipeline such that it would flow down and into appellant's pipeline so he could get a drink (Tr. 269, 295).

Orem City is also the owner of 41 shares of stock of the *new* Alta Company and the water represented thereby is used from the Alta Ditch for irrigation purposes on a turns basis, the same as other shareholders of Alta (Tr. 287, 288).

Appellant's meter was read periodically by the Orem City water master beginning in 1960, with one reading in 1960, six in 1961, one in 1962, three in 1963, none in 1964 and two in 1965. Beginning on August 2, 1966 appellant's meter was read monthly (Exh. 38). In 1963 appellant's meter became inoperative because gravel in the pipeline became lodged in the meter, thereby preventing the impeller from turning (Exh. 12 — November 4, 1963, Tr. 213). Water continued to flow through the pipeline but was not measured by the stopped meter. The meter

reading showed that during the period from October 5, 1962 to August 1, 1966 a total of 9,189,200 gallons of water was metered through appellant's meter, which was less than the actual quantity used because of the inoperative period of the meter (Tr. 213). During the period from August 1, 1966 to October 31, 1967 a total of 5,307,000 gallons of water was measured through appellant's meter, which is an accurate measurement of the quantity of water actually used by appellant during that period (Exh. 38, Tr. 259).

The water rates for all water sold and delivered by Orem City, both within its corporate boundaries and outside thereof, are fixed by ordinance. Ordinance No. 45 (Exh. 35) was in effect from August 28, 1962 to August 5, 1963 when Ordinance No. 52 (Exh. 36) was adopted and remained in effect until May 9, 1966 when Ordinance No. 104 (Exh. 37) was adopted and has remained in effect since. All three ordinances recite that the rates fixed therein are determined to be the reasonable value of the water delivered and sold.

The witness James Twitchell applied the applicable rates as fixed by the above ordinances to the quantities of water metered through appellant's meter (Exh. 38) and testified that the reasonable value of the water delivered to appellant was (Tr. 273)

October 5, 1962 to August 1, 1966	9,189,200 gallons	$1,249.85
August 1, 1966 to October 31, 1967	5,307,000 gallons	614.60
	Total	$1,864.45

The testimony of the witness Twitchell stands uncontradicted in the record. Appellant did not attempt to qualify the testimony of the witness Twitchell (Tr. 274) and offered no evidence contrary thereto. Yet the trial court found in favor of appellant and against Orem City on this issue (Fdg. 17, R. 93) and dismissed Orem's counterclaim therefor with prejudice (R. 97).

ARGUMENT

POINT I.

APPELLANT HAS NO ENFORCEABLE AGREEMENT WITH OREM FOR THE USE OF ITS PIPELINE AND FACILITIES TO CONVEY ANY WATER.

Under Point 5 of appellant's Brief he asserts that he has a valid and enforceable agreement with Orem for the use of its pipeline and facilities for the carriage of what he contends to be *his* Alta Spring water. Yet during the trial appellant's counsel advised the trial court that appellant was not seeking a determination on whether appellant had an enforceable right to maintain his connection to the Orem City 14 inch pipeline or to utilize the pipeline to convey any water (Tr. 22, 23). Likewise, appellant's counsel advised the trial court that appellant was not claiming an interest in or ownership of any

pipeline belonging to Orem City (Tr. 58).

Those issues were squarely raised in Orem's Amended Counterclaim (R. 67), wherein it sought an adjudication that

> (1) plaintiff (appellant) has no right to use or maintain the connection to Orem City's 14 inch pipeline or to take any water therefrom; and
>
> (2) plaintiff has no right to convey any water by means of Orem City's 14 inch pipeline or its other diversion works and conveyance facilities.

On these issues the trial court found that

> (1) appellant's connection to the Orem City 14 inch pipeline and his use of water therefrom was permissive only, and that permissive connection and permissive use of water have been terminated (Fdg. 9, R. 91); and
>
> (2) no agreement, either in writing or otherwise, has been entered into between plaintiff (appellant) and defendants (Orem) or any of them, granting to plaintiff any right to use defendant Orem City's 14 inch pipeline or its other diversion works or facilities to convey any water from the Alta Springs to plaintiff's property (Fdg. 10, R. 91).

And based on those findings the trial court concluded that plaintiff has no right to use or maintain a connection to Orem City's 14 inch pipeline or to

convey water through said pipeline or defendant Orem City's other diversion works and conveyance facilities (Concl. 9, R. 94, 95).

Appellant does not directly challenge the foregoing findings, nor does he urge that they are unsupported by the evidence. He simply ignores them and merely talks about an "arrangement" which he concludes followed from the conduct of the parties.

We submit that such findings are clearly supported by the evidence. In fact there is no evidence to the contrary. Even appellant's evidence supports them. Thus appellant's own Exhibit 12, containing excerpts from the Minutes of the Orem City Council Meetings touching on this subject, clearly shows that no mutual understanding was ever reached between appellant and Orem City respecting the connection or the delivery of water through appellant's connection. We so note from the early Minutes of August 30, 1948 that "the Council made no decision on the matter;" and on September 20, 1948 that "it was understood that Mr. Park would not have to pay for the water used this year, but thereafter;" and on October 12, 1949 that "Dean E. Park was present to ask the Council to consider him tapping the 14 inch line. . . . He was told that it was felt that the project could be worked out . . . and that it would probably be agreeable with the Council."

Shortly thereafter appellant's connection to the 14 inch Orem City pipeline was made for him by the

contractor who was then installing the 14 inch pipeline for Orem City (Tr. 30). Appellant paid the contractor for the connection (Tr. 12). Appellant's own witness, L. V. Beckman, then Orem City Engineer, who designed the connection and supervised the construction testified that the connection was made with the understanding that appellant would pay for the water (Tr. 42).

From 1949 until 1958 appellant's use of the water through his connection was limited to the watering of some lawn, a few trees and some horses (Tr. 141). In 1958 appellant moved his residence onto the property and his uses increased to supplying his residence and the irrigation of approximately 10 acres of pasture land in addition to his lawns, shrubs and the like (Tr. 144, 145). At about the same time appellant replaced his 4 inch steel pipeline with a 6 inch transite pipeline and equipped the same with a meter at a point where his 6 inch pipeline enters his property, without consulting with any of the defendants (Fdg. 9, R. 91).

With the consummation of the Water Exchange Agreement between Orem and Alta in 1958 the whole of Alta Springs was placed in the Orem City water system continuously during the entire year. Since Orem had contracted with Alta for all of its share of Alta Springs water, including the water represented by the 2 shares of stock owned by appellant, inquiries were thereafter made by the Orem City Council as to the basis of appellant's connection to

the Orem City 14 inch pipeline. Thereafter appellant repeatedly represented to the various City Councils that he had an agreement with Orem City to maintain the connection and use the water (Exh. 12 — Minutes of October 3, 1960; October 17, 1960; and May 8, 1961). Yet appellant, himself, testified that the agreement he claims is represented only by the Minutes of the Orem City Council and that *nothing* was signed by him or Orem City (Tr. 57).

In July, 1961, after it was determined that no agreement existed, the Orem City Council directed City Attorney Wentz to draw up an agreement for the Council's consideration and for the comment of appellant (Exh. 12 — July 17, 1961). This Attorney Wentz did (Exh. 12 — August 28, 1961) and a draft of the proposed agreement (Exh. 27) was sent to appellant with a cover letter dated September 22, 1961 (Exh. 23), but appellant refused to sign it (Exh. 12—October 16, 1961, Tr. 179, 182, 183, 184).

In spite of the above appellant contends that he has a valid and enforceable agreement with Orem for the use of its pipeline and facilities and for the carriage of what he contends to be *his* Alta Spring water. Yet appellant cites no facts in evidence from which it could be concluded that such an agreement had ever been made. He merely talks about an "arrangement" as set forth in his proposal at the Council meeting held on October 12, 1949, which he quotes verbatim on page 29 of his Brief, and says that he and Orem City operated under that arrangement

for some seventeen years. If that were so, we ask appellant why did he lease 1 3/4ths shares of his 2 shares to other stockholders of Alta during the entire period from 1949 until 1957? Why then did he not install his meter until 1958? and if the so-called "arrangement" was for him to obtain water for *irrigation* purposes, which is all the Minute talks about, what is the basis of his claim for culinary water?

The fact is that appellant was permitted to hook onto the Orem City 14 inch line with the understanding that appellant would pay for the water. Yet appellant has never paid Orem City one cent for all of the water he received from Orem City's 14 inch pipeline (Tr. 143). Appellant was sent a minimum bill in July, 1961 (Tr. 234) but appellant denies he received it (Tr. 137). Yet Orem City received a letter from appellant's attorney relative to the bill (Exh. 12 — August 28, 1961). And the reason why continued billings were not made is *not* because "both parties were operating under the arrangement reflected in the Minutes," as suggested on page 30 of Appellant's Brief, but *was* because the City Manager instructed the billing department "to quit billing Dean Park, because the City was negotiating and settling this with Dean Park" (Tr. 242). However, the matter was not settled and was finally brought to a head in 1966 when the Orem City Council notified appellant that if the matter was not resolved by August 1, 1966 his connection would be shut off

(Exh. 12 — August 1, 1966; August 8, 1966). The end result was that appellant commenced this action.

Upon the evidence as a whole the trial court found the facts against appellant as to any claimed agreement. And those findings, being amply supported by substantial evidence, should not be disturbed and must be affirmed on appeal under the well known appellate rules *Weight v. Miller*, 16 Utah (2d) 112, 396 Pac. (2d) 626 (1964); *Thorley v. Kolob Fish & Game Club*, 13 Utah (2d) 294, 373 Pac. (2d) 574 (1962); *Lowe v. Rosenlof*, 12 Utah (2d) 193, 64 Pac. (2d) 418 (1961).

In addition to the above there are at least two other reasons why appellant's argument must fall. First, the alleged agreement which appellant contends for must, to be enforceable, be in writing under the Statute of Frauds which was pleaded (R. 64). Specifically the alleged agreement claims either

(1) a water right or

(2) a contract for the perpetual delivery of water and/or

(3) an agreement which by its terms cannot be performed within one year from the alleged making thereof.

As to (1) and (2) above, a water right is considered to be an interest in real property. *In re Bear River Drainage Area*, 2 Utah (2d) 208, 271 Pac. (2d) 846 (1954). And so under (1) above,

to be enforceable, the alleged agreement must be in writing under the provisions of *Section* 25-5-1, *Utah Code Annotated* 1953 as claiming an interest in real property. Or if it properly comes under (2) above, it is for the leasing for a longer period than one year of an interest in real property and is governed by *Section* 25-5-3, *Utah Code Annotated* 1953. And in any event the alleged agreement could not under appellant's claimed terms be performed within one year from its alleged making back in 1949. *Section* 25-5-4, *Utah Code Annotated* 1953.

Appellant concedes through his own testimony that no written agreement was ever executed. As he puts it, the agreement he claims is represented only by the Minutes of the Orem City Council and *nothing* was signed by him (Tr. 57). Nor will the principles of part performance under *Section* 25-5-8, *Utah Code Annotated* 1953 help appellant since what he did was contrary to his own proposal, like leasing all but a fraction of his 2 shares to third persons. His best performance was to take all of the water he wanted from Orem City's 14 inch pipeline without paying one red cent therefor.

The second reason why the alleged agreement must fail is because it would be in violation of *Article XI, Section* 6 of the *Utah Constitution*, which in part provides that

> "No municipal corporation, shall directly or indirectly, lease, sell, alien or dispose of any waterworks, water rights, or sources of water

supply now, or hereafter to be owned or controlled by it; . . ."

And so appellant's claimed agreement would result in a perpetual enforceable easement through Orem City's 14 inch pipeline and diversion facilities which would divest Orem City of an interest in that part of its waterworks system. This would clearly be in violation of the constitutional prohibition. Thus in the case of *Genola Town v. Santaquin City*, et al, 96 Utah 88, 80 Pac. (2d) 930 (1938), rehearing denied 96 Utah 104, 85 Pac. (2d) 790 (1938), this Court held that an agreement by a municipal corporation to deliver a specified quantity of water in perpetuity is a parting of a water right and is void under Article *XI, Section* 6 of the *Utah Constitution* unless there is an exchange of water rights of equal use value, which this Court found there to exist. It was there pointed out that the foregoing constitutional provision should be narrowly or strictly construed since it was meant to secure to communities their water systems and prohibit any sale or lease to private parties. Likewise in *Hyde Park Town v. Chambers*, 99 Utah 118, 104 Pac. (2d) 220 (1939) this Court held that a contract whereby the Town acquired a right of way for its pipeline over private property in exchange for granting the landowner a right to tap the pipeline for his own use was void as being in violation of *Article XI, Section* 6 of the *Utah Constitution.*

Although appellant's counsel advised the trial

court that appellant does not claim any interest in or ownership of any pipeline belonging to Orem City (Tr. 58), the effect of his claimed agreement is just that, and as such would be clearly void. Apparently what appellant suggests, without saying it, is that Orem City ought to be estopped from denying appellant the right to continue such connection. The trial court specifically found against appellant on his claim of estoppel (Fdg. 15, R. 93) and concluded that estoppel did not run as against Orem or Alta (Concl. 5, R. 94). Nor does appellant anywhere in his Brief assert a claim of estoppel as against Orem. And in any event the law is against appellant on that score. Thus, in the *Genola Town* case, supra, this Court stated on page 937 of the Pacific Reporter

> "While in some cases a party may be estopped from taking advantage of the unconstitutionality of an act (Tite v. State Tax Commission, 89 Utah 404, 57 Pac. (2d) 734), the representatives of a municipality must act within their powers and the city cannot be estopped from declaring its own acts unconstitutional."

We respectfully submit that both under the law and the facts of this case there is no basis for appellant's claim that he has an enforceable agreement with Orem City for the use of its pipeline and facilities for the carriage of any water, and the Findings, Conclusions and Judgment of the trial court in that respect must be affirmed.

POINT II.

APPELLANT HAS NO RIGHT TO DIVERT WATER DIRECTLY FROM THE ALTA SPRINGS BY REASON OF HIS OWNERSHIP OF 2 SHARES OF STOCK IN THE ALTA COMPANY, OR OTHERWISE.

Although this issue is one primarily between appellant and Alta, it does involve Orem since with the consummation of the Pipeline And Water Rental Agreement in 1956 and the Water Exchange Agreements in 1958 and 1966 Orem has contracted with Alta for all of Alta's share of the waters of Alta Springs based upon its 187 5/6ths shares of stock, which includes the 2 shares of stock owned by appellant. And so this issue is important to Orem since if appellant were to prevail Orem did not receive what it had contracted for with Alta.

Appellant contends on page 12 of his Brief that he has two bases for his claim to ownership of a pro-rata share of the waters of Alta Springs, i.e.

(1) as a successor to a stockholder of the *old* Alta Company; or

(2) as the owner of 2 shares of stock in the *new* Alta Company.

The trial court found squarely against appellant as to (1) above, to-wit:

> "13. The rights of plaintiff (appellant) to the use of water herein are represented by and are limited to his rights as the owner of 2 shares of stock of defendant Alta Ditch & Canal Company. . . ."

Such finding is clearly supported by the evidence. Thus appellant as the successor in interest to Verena C. Crandall acquired only such rights as she had. Verena C. Crandall was one of the new incorporators of the *new* Alta Company and subscribed to the Articles of Incorporation as the owner of 2 shares of stock (Exh. 7). In so doing she conveyed and transferred to the *new* Alta Company all of her right, title and interest in and to the Alta Springs and other property there involved (Exh. 7, Ar. XIV; Exh. 3, para. 14 of Fdgs. of Fact). Not only is such finding in this case supported by substantial evidence but it could not be otherwise.

As to (2) above, the trial court further found

> ". . . Said rights of plaintiff (appellant) to the use of water as a stockholder of defendant Alta Ditch & Canal Company are in all respects upon the same basis as other stockholders and are subject to the same terms, conditions and agreements. . . ." (Fdg. 13, R. 92)

Apparently appellant concedes that he is a stockholder in the *new* Alta Company since he argues at length that by virtue of his stock ownership he is the owner of an aliquot share of the waters of Alta Springs. This he says comes about because the Alta Company is a mutual irrigation company and as such is only a corporate water master. He then cites case after case which talk about mutual irrigation companies, without comparing the charters of the particular company with that of Alta. In so doing he completely ignores the fact that when his prede-

cessor in interest, Verena C. Crandall, subscribed to the Articles of Incorporation of the *new* Alta Company she, as all other subscribers, conveyed and transferred all of her right, title and interest in and to the waters of Alta Springs to the new Alta Company. This she acknowledged under Article XIV of the Articles of Incorporation, and the court in Civil No. 15460 expressly so found and appellant is bound thereby, i.e.

> "14. . . . all of the individual users having or claiming any stock in said old corporation or any rights in the Alta Ditch or Springs, except plaintiff (Orem City), at the time of signing said Articles of Incorporation, *conveyed and transferred to said new corporation* their right, title and interest in and to said Alta water, springs and other property here involved." (Emphasis added)

But even so, none of the cases cited by appellant in his Brief hold that a shareholder in a so-called mutual irrigation company is entitled to his pro-rata or aliquot share of the waters from a *specific source.* And in our research we have been unable to find any case which so holds. Rather, those cases say that shareholders of the so-called mutual irrigation company are entitled to their pro-rata or aliquot share of the waters distributed by the company, whatever be their source, whether exchange waters or otherwise.

Thus in *Genola Town v. Santaquin City, et al,* 96 Utah 88, 80 Pac. (2d) 930 (1938), rehearing

denied 96 Utah 104, 85 Pac. (2d) 790 (1938), one of the issues was whether the 60 shares of stock in the Summit Creek Irrigation Company being exchanged for a continuous flow of water, plus other considerations, was an exchange of water rights of equal use value so as not to be violative of the constitutional prohibition contained in *Article XI, Section* 6 of the *Utah Constitution.* In sustaining the trial court's finding that such exchange was of equal use value, this Court noted that a certificate of stock in a mutual irrigation company is actually a water right in the sense that it entitles the holder to an aliquot share of the waters of the company according to the *method of distribution.* Any inference by appellant that it carries with it the right to a particular source of water is wholly unwarranted.

The case of *St. George City v. Kirkland, et al,* 17 Utah (2d) 292, 409 Pac. (2d) 970 (1966) does nothing more than re-affirm the above and is of no help to appellant here. Likewise the case of *Baird v. Upper Canal & Irrigation Company,* 70 Utah 57, 257 Pac. 1060 (1927) is of no help to appellant here. In fact, in the *Baird* case, supra, it was exchange water for which she successfully sought to compel her connection and the delivery of her aliquot share.

The most widely accepted definition of a "mutual water corporation" is that stated in *Kinney's Treatise on the Law Of Irrigation,* Volume 3, Chapter 75, Section 1480, Page 2659 as follows:

"Mutual water corporations may be de-

> fined as those private corporations which are organized for the express purpose of furnishing water only to the shareholders thereof, and not for profit, or hire."

Whether Alta fits that definition leaves some room for doubt since it is being operated for a profit, i.e. cash dividends on its stock. Be that as it may, the relationship between private incorporated water companies, whether organized as mutual corporations or as a corporation for profit or hire, is that of contract; and the rights and duties of both parties grow out of the contract implied in a subscription for stock and construed by the provisions of their charters or Articles of Incorporation. Ibid *Kinney's*, Section 1482, Page 2662. Important here is the fundamental proposition stated by *Kinney* on page 2665 of his Treatise as follows:

> "But whatever may be the basis of incorporation of these mutual companies, in the absence of anything to the contrary in the Articles of Incorporation or By-Laws, *each share of stock is made the exact equivalent* to *any other share;* and each shareholder in such company is entitled to that proportion of the water carried through its ditch or canal that the amount of his shares or stock bears to the whole amount of the shares or stock of the corporation." (Emphasis added)

And so, contrary to the foregoing fundamental concepts, appellant urges on page 25 of his Brief that his 2 shares of stock have been given a separate status, and he urges upon this Court that he is en-

titled to use his water through a separate system for a purpose different than the irrigation purposes which Deer Creek water will serve just as well. And so we ask, why, when his rights are based upon the same contract as are other stockholders, and why, when his 2 shares of stock are the exact equivalent to any other 2 shares, should he be entitled to any rights different from or superior to other shareholders or to enjoy a preferred and superior use of water through a separate system? Neither fair play, common sense or the fundamental principles of law will permit such result. And we submit that appellant has cited no case, no authority nor any legal principle to support his contention that he is entitled to his share of the corporate water supply from the Alta Springs.

Next appellant asserts that absent his consent Alta could not contract away his right to take water directly from the Alta Springs which had by common consent and practice been given an independent status. Yet appellant cites not a single case in support thereof. We say that appellant's rights as a stockholder of Alta are no different than any other stockholder, and his 2 shares of stock are the exact equivalent of any other 2 shares of stock. And we submit that the case of *Beggs et al v. Myton Canal & Irrigation Company et al*, 54 Utah 120, 179 Pac. 984 (1919) is controlling here and is clear authority for the proposition that the Board of Directors, upon confirmation of a vote of the majority of the out-

standing stock, can enter into binding agreements to lease and exchange the waters of the corporation and it does not require the unanimous consent of all stockholders. The will of the majority controls, and so long as there is no discrimination to the rights of the minority as *stockholders* (as distinguished from claimed superior rights as appellant asserts here) the action of the majority is binding on the corporation and all stockholders thereof. The remedy of appellant, as a dissident minority stockholder, is to sell his stock, for he, as a hold-out, cannot deprive the majority of the shareholders of the benefits of the lease and exchange agreements.

Under the Water Rental and Water Exchange Agreements the stockholders of Alta get a guaranteed quantity of water in excess of what their share from Alta Springs would otherwise be, and they get the exchange waters when they want it on call, with all of the benefits of storage in Deer Creek Reservoir. Thus they don't have to take water when their lands are still wet in the spring, nor when it rains, and they can hold it in storage for use during the late summer months, thereby giving them the diversity in the crops which they raise. On top of that, they get $10,000.00 per year. And when Orem contracted with Alta it contracted for *all* of Alta's share of the Alta Springs based upon its 187 5/6ths shares, which includes the 2 shares of stock owned by appellant. To adopt appellant's view would be to say that Orem did not get what it contracted for, nor what it has been paying for since 1956.

It is true that the Alta Spring waters *as now gathered, transported and treated* meets public health standards for drinking purpose whereas the exchange Deer Creek waters as delivered in the Alta Ditch do not. But that came about through the expenditure by Orem and Alta of some $32,000.00 in covering the Alta Springs (Exh. 31), to which appellant did not contribute one cent save and except as a stockholder of Alta, plus the construction by Orem of 4,445 feet of 14 inch pipeline from its headhouse to its steel tank reservoir. We say that appellant has had a "free ride" for far too many years and should not be heard to complain upon its termination.

Be that as it may, the trial court from its advantaged position found (Fdg. 14, R. 93) that

> "14. Plaintiff (appellant) was at all times aware of the Pipeline and Water Rental Agreement and the Water Exchange Agreements involved herein. He consented thereto, made no objections thereto and benefited therefrom. Even though plaintiff consented thereto defendant Alta Ditch And Canal Company had the legal power to enter into the Pipeline and Water Rental Agreement and Water Exchange Agreements herein without the consent of plaintiff. Said Pipeline and Water Rental Agreement and Water Exchange Agreements are valid and in full force and effect and are binding upon the plaintiff."

And there being substantial evidence in the record to support the foregoing Finding, it cannot be disturbed on appeal.

Likewise the trial court correctly concluded (Concl. 6, R. 94)

> "6. That plaintiff (appellant) is not entitled to quiet title to any of the waters of Alta Springs, is not entitled to divert any water directly from Alta Springs and is not entitled to injunctive relief as against any of the defendants herein."

The trial court then entered its judgment dismissing with prejudice the Amended Complaint of Appellant (R. 94), which we submit was in all respects correct and proper and must be affirmed herein.

POINT III.

THE TRIAL COURT ERRED IN DISMISSING OREM'S COUNTERCLAIM FOR JUDGMENT AGAINST APPELLANT FOR THE REASONABLE VALUE OF WATER DELIVERED BY OREM CITY FROM ITS 14 INCH PIPELINE AND USED BY APPELLANT DURING THE PERIOD FROM NOVEMBER 1, 1962 TO OCTOBER 31, 1967.

In Orem's original Counterclaim filed on November 18, 1966 Orem City made its claim against appellant for the reasonable value of the water received by appellant from the Orem City pipeline during the period from November 1, 1962 to October 31, 1966 and for the reasonable value of the water received by appellant therefrom if he continued to use the same during the pendency of this action (R. 31). In Orem's Amended Counterclaim filed on November 13, 1967 Orem City made its claim against appellant current to cover the period November 1,

1962 to October 31, 1967 for the sum of $1,834.45 (R. 67, 68).

The trial court found against Orem on that part of its Counterclaim (Fdg. 17, R. 93) and dismissed Orem's claim with prejudice (R. 97). Orem timely filed its Cross Appeal from the judgment of the trial court in dismissing that part of Orem's Counterclaim (R. 107, 108).

The evidence is undisputed that during the period from October 5, 1962 to August 1, 1966 the quantity of water delivered to appellant by Orem City through the appellant's connection was at least 9,189,200 gallons (Exh. 38, Tr. 259, 272). Likewise the evidence is undisputed that during the period from August 1, 1966 to October 31, 1967 the quantity of water delivered to appellant by Orem City through the appellant's connection was 5,307,000 gallons (Exh. 38, Tr. 259). The meter readings from which those quantities were determined are in evidence (Exh. 38) and are undisputed and apparently are accepted by appellant. During part of the year 1963 appellant's meter was inoperative and only a portion of the water actually passing through his pipeline was measured thereby (Exh. 12 — November 3, 1963, Tr. 213, 279). However, Orem claims payment only for the quantities actually metered.

Likewise the evidence is undisputed that the applicable Orem City ordinances fix the rates as the reasonable value of the water (Exhs. 35, 36, 37). In fact Orem City is the only distributor of domestic

and municipal water in that area and of necessity its rates fix the reasonable value. Furthermore, Ordinances Nos. 45, 52 and 104 (Exhs. 35, 36, 37) each specifically provide that the rates thereby fixed are declared to be reasonable and uniform with respect to the class or type of service to be performed. The rates applied to the water delivered to appellant are those uniformly applied to all users of water from the Orem City system situated outside of the corporate boundaries of Orem City. James Twitchell, witness for Orem City, applied the applicable rates fixed by the respective Ordinances to the water delivered to appellant and testified that the reasonable value thereof (Tr. 273) is

October 5, 1962 to August 1, 1966, 9,189,200 gallons	$1,249.85
August 1, 1966 to October 31, 1967 5,307,000 gallons	614.60
Total	$1,864.45

Appellant did not attempt by cross examination to qualify or discredit the above (Tr. 274), nor did he attempt to refute the same on rebuttal. Appellant's only answer was that during the period from October 5, 1962 forward plaintiff's claimed entitlement to the Alta Springs would have exceeded the above quantities by some 18,000,000 gallons. This was supposedly computed by appellant's witness, L. V. Beckman (Tr. 277), yet there was no evidence that all of such alleged excess went into the Orem

system and that such did not take into account the fact that the appellant's meter was inoperative in 1963 (Tr. 278). Nor does it take into account the times when Orem City turned the Alta Springs water out of its system during run-off and rain storms and the like.

More important is that appellant completely ignores the fact that Orem had contracted for and paid Alta for all of such waters in cold, hard cash and delivered appellant's share of the Alta Company's water into the Alta Ditch. How then can appellant be heard to say that Orem City had the use of his water and is entitled to a set-off therefor? All other stockholders of Alta receive their culinary water from the Orem City system and they pay for it at the rates fixed by the Ordinance (Tr. 289). And so we ask, how can appellant expect to be treated otherwise? Not only that, but he expects a continuous flow delivery of water which has been rendered fit for drinking purposes through the efforts and expenditures of Orem and Alta and under pressure so he cannot only use the same for domestic purposes but to water when he wants to 10 acres of pasture and lawns through a pressure sprinkler system and not pay one red cent therefor. This in spite of the fact that it is in violation of *Section* 28-3-1, *Orem City Revised Ordinances* (Exh. 34), which makes it unlawful for any user of water from the Orem City system to use the water taken therefrom for irrigation purposes.

The fact is that appellant has had a "free ride" for too many years and he, like anyone else, should pay for the water he has received from the Orem City system at the same rates as all other users similarly situated. Orem has always stood ready and willing to deliver water to appellant through his connection in accordance with the provisions of *Section* 10-8-14, *Utah Code Annotated* 1953. All Orem asks is that appellant pay for the water he uses at the same rate as all other users similarly situated.

We respectfully submit that the evidence is undisputed that appellant has had the use and benefit of some 14,500,000 gallons of good quality domestic water from the Orem City 14 inch pipeline, which has an undisputed reasonable value of $1,864.45. And the trial court having adjudicated that appellant was not entitled to any of the waters of the Alta Springs, there is no basis upon which it could find against Orem City on its claim for the reasonable value of the water delivered to appellant herein. Accordingly, the trial court clearly committed error and we respectfully submit that the judgment must be reversed in that respect with instructions to enter judgment in favor of Orem City and against appellant in the undisputed sum of $1,864.45.

CONCLUSION

We respectfully submit that the Findings Of Fact, Conclusions Of Law and Judgment of the trial court must be affirmed insofar as they

(1) dismissed plaintiff's Amended Complaint with prejudice

and adjudicated that

(2) plaintiff's only right as against defendant Alta Ditch & Canal Company is as the owner of 2 shares of stock of said defendant and plaintiff has been afforded all rights and privileges thereunder;

(3) the Pipeline and Water Rental Agreement and Exchange Agreements are valid and in full force and effect and are binding on plaintiff, and that plaintiff is not entitled to divert any water directly from Alta Springs; and

(4) plaintiff has no right to use or maintain the connection to Orem City's pipeline or to convey water through said pipeline or through said defendant's other diversion works and facilities.

We respectfully submit that Finding Of Fact No. 17 and Conclusion Of Law No. 10 respecting Orem's Counterclaim for the reasonable value of the water delivered by Orem City and used by plaintiff herein must be set aside as being contrary to the undisputed evidence and in conflict with the Findings Of Fact and Conclusions Of Law that plaintiff is not entitled to divert any water directly from Alta Springs for use on his property herein. Accordingly, the judgment of the trial court dismissing Orem City's Counterclaim for the reasonable value of the

water delivered by Orem City from its 14 inch pipeline and used by appellant herein must be reversed with instructions to enter judgment in favor of Orem City and against appellant in the undisputed sum of $1,864.45 as the undisputed reasonable value of the water delivered by Orem City and used by appellant herein.

Respectfully submitted
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