

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT,
IN AND FOR UTAH COUNTY, STATE OF UTAH.

D-8

Prove Reservoir Company,
a Corporation, Plaintiff.

vs.

Prove City, et al. Defendants.

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SEPARATE DEMURRER OF

J. C. WHITING,

Comes now J. C. Whiting, one of the defendants named in the above entitled action, by Chas. J. Wahlquist, his attorney, and files his separate; special, demurrer to plaintiff's complaint filed herein, and as specific grounds for his said demurrer alleges:

I. That the Court has no jurisdiction of the subject matter of the action so far as this defendant is concerned, for the reason that the rights of this defendant, as confirmed to him by Article XVII of the Constitution, have heretofore been defined by this court.

II. That the Court has no jurisdiction of the subject matter of the action, as against this defendant, for the further reason that the relief asked for is in excess of what the Court has the authority to grant or the power to enforce.

III. That the Court has no Jurisdiction of the subject matter of this action nor to grant the relief prayed for, as against this defendant, for the reason that such relief contemplates a confiscation of the property of this defendant and a conversion of the same to the use of the plaintiff without compensation to this defendant therefore, in violation of the Constitutional rights of this defendant.

IV. That the complaint does not state facts sufficient to constitute a cause of action against this defendant. There being no specific allegations relating to the actions of this defendant, and the general allegations in paragraphs 35 and 36 being, so far as this ~~plaintiff~~ defendant is concerned mere conclusions of the pleader, and not supported by any statement of fact in said complaint.

Wherefore this defendant ought not to be compelled to incur the expense of defending in this action, but should be permitted to remain in the peaceable enjoyment of his rights, unmolested by the plaintiff.

Service of copy accepted this
13th day of March, 1914.

Ab. Hatch
Atty for Plaintiff.

Chas. J. Wahlquist
Attorney for Defendant J.C. Whiting

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT,
IN AND FOR UTAH COUNTY, STATE OF UTAH.

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No. 2888 Civil.

Provo Reservoir Company,
a Corporation, Plaintiff,

vs.

Provo City, et al, x x x
J. C. Whiting, et al, Defendants.

SEPARATE ANSWER

of

J. C. Whiting.

Comes now J. C. Whiting, one of the defendants named in the above entitled action, and answering plaintiff's Complaint filed herein, admits, denies, and alleges as follows :

1. This defendant denies that he has knowledge or information sufficient to form a belief with reference to the allegations of paragraphs 1 to 23 inclusive, paragraphs 28, 29, 29a, 29c, 29d, 30, 31, 32, 33, 37, 38, and 39 of said complaint, and defendant admits the allegations of paragraphs 24, 25, 26 and 27 of said complaint ;

2. Answering the allegations of paragraph 29(b) of said complaint this defendant denies specifically that Plaintiff is the owner of all "The Water right decreed to 'The William Wright Estate' in civil action No. 357, in the above entitled court". And this defendant denies specifically that said water right decreed to "William Wright Estate" was limited to or "Consisting of 200 minute feet of the waters of Provo River for 100 hours each and every 14 days; and all the waters of what is known as 'Enoch Spring' and the 'Little Springs'."

3. Defendant admits that "200 minute feet of the waters of Provo River for 100 hours each and every 14 days and the 'Enoch Spring' and the 'Little Springs'," constitute a portion of and are included in the water right awarded and decreed to "The William Wright Estate" in said decree; and defendant admits that John W. Hoover is the owner of one-tenth of the said "Enoch Spring" and "Little Springs", as against this defendant.

4. Defendant admits that from the 30th day of June in each year, or at such other time, not earlier than the 15th day of June of any year, ~~xxx~~ when plaintiff shall release for irrigation the waters impounded in its

reservoirs at the headwaters of Provo River, the plaintiff is entitled to the use of that portion of the water right decreed to the "William Wright Estate" designated and described in said decree as " 200 minute feet of the waters of Provo River for 100 hours each and every 14 days," and that during said period of each and every year plaintiff is entitled, as against this defendant, to the use of nine-tenths of the waters of "Enoch Spring" and the "Little Springs" as named in said decree;

5. This defendant alleges that prior and up to the 30th day of June of each and every year, or to such other time as plaintiff shall release for irrigation the waters impounded in its reservoirs at the headwaters of Provo River, which shall in no event be earlier than the 15th day of June of any year, this defendant is the absolute and sole owner of that primary water right and entitled to the use of the water ~~xx~~ described in the foregoing paragraph of this answer; and defendant further alleges that he is the sole owner of any and all other primary water right in Provo River decreed to the "William Wright Estate" (except the McAfee Springs) during the entire irrigation season of each and every year;

6. Defendant denies that plaintiff is entitled to "all the waters of Round Valley Creek, not exceeding three and one-half second feet, except sufficient to irrigate two acres of land "belonging to this defendant. And defendant alleges that by virtue of the decree herein referred to, and by purchase of other lands not included in the "William Wright Estate" at the time said decree was rendered, and the water rights appurtenant to said lands, this defendant is now the owner of a primary water right entitling him to the use of a sufficient amount of the ~~said three and one-half second feet of the~~ waters of Round Valley Creek to irrigate seven ^{during the entire irrigation season of each and every year,} and one-half acres of land, ~~and defendant further alleges that the use of the entire stream of 3 1/2 second feet for 12 hours each and every 14 days during the irrigation season is to reasonable and beneficial use thereof in irrigating said seven one-half acres of land;~~

7. This defendant denies specifically the allegations in paragraph 29(e) of plaintiff's complaint ;

8. Answering the allegations of paragraph 35 of plaintiff's complaint this defendant denies that he has ever questioned plaintiff's right to

store flood waters or commingle the same with the waters of Provo River and thereafter recover the same; and this defendant denies specifically that during the past two years, or at any other time, he has diverted from the Provo River or converted to his own use any water to ~~XXXXXX~~ ~~XXX~~ the use of which the plaintiff was entitled;

9. Answering paragraph 36 of plaintiff's complaint this defendant denies that he has used water wastefully or in excess of what is beneficial for the irrigating of his land; and defendant specifically denies that the plaintiff has any right to limit defendant's use of water, the right to the use of which was acquired prior to the adoption of the Constitution of the State of Utah, or to attempt to say what is a sufficient quantity of water for defendant to ~~XXX~~ apply to his lands, so long as such use is not an infringement upon the rights of the plaintiff ;

10. This defendant further alleges that for more than twenty years past, whenever the waters in Round Valley Creek, at the point where it empties into the Provo River, have exceeded three and one-half second feet, this defendant and his predecessors in interest have taken and used of the waters of said Round Valley Creek, in excess of the said $3\frac{1}{2}$ second feet, sufficient water to irrigate forty-five acres of land; That said use has been peaceable, open, notorious, uninterrupted and continuous so long as the supply of water existed in each year, and adverse to the plaintiff and to the whole world, and under a claim of right. And this defendant now alleges that he is the owner of a "secondary" water right from said Round Valley Creek sufficient to irrigate forty-five acres, during each and every year, so long as the flow of water in said Round Valley Creek exceeds three and one-half second feet ;

11. Defendant further alleges that for more than twenty-five years past, whenever the volume of water in Provo River has exceeded the total volume of water adjudicated upon by this court in civil action 957, this defendant and his predecessors in interest have peaceably, openly, notoriously, uninterruptedly, continuously during such period of each year, adversely to plaintiff and under a claim of right, diverted from said Provo River and used upon the lands now owned by this defendant sufficient of said waters to irrigate ten acres of meadow, and this

defendant now claims as and of a right, as against this plaintiff, a secondary water right from Provo River for ten acres of land, so long as the natural flow of said Provo River is in excess of what is required to supply all water rights decreed by this court in its decree in Civil action 957 herein referred to, irrespective of how late in any year such volume of water may continue to flow ;

12. That the lands owned by this defendant are riparian to said Provo River and to said Round Valley Creek; that during irrigation a large percent of the water will find its way back to the natural channel before any of the water will have soaked into the ground to a depth sufficient to irrigate meadow land, and that therefore a larger volume of water is necessary for irrigating defendant's land and can be used thereon without waste of water than would be necessary, or could be beneficially used, upon lands not riparian to said streams; And that 4 second feet for a period of two hours per acre is a reasonable amount of water for use under the said secondary right, and is in fact less than what ~~plaintiff~~ defendant and his predecessors in interest have been diverting from the natural stream.

Wherefore this defendant prays that the plaintiff take nothing as against this defendant by its complaint, and that defendant's rights to the use of water be defined, decreed, confirmed, and forever quieted as follows:

I. A "Primary" right to the use of sufficient of the waters of Round Valley Creek to irrigate seven and one-half acres of land during the entire irrigation season of each and every year;

II. A "Secondary" water right in Round Valley Creek sufficient to irrigate forty-five acres of land, whenever the water in said Round Valley Creek shall exceed three and one half second feet;

III. A ^{pr} primary right to the continuous use of ~~xxx~~ nine-tenths of "Enech Spring" and the "Little Springs" and to the use of 200 second feet from the Provo River for 100 hours every 14 days from the beginning of the irrigation season until the 30th day of June of each and every year, or until such time (not earlier than the 15th day of June in any year) as the Provo Reservoir Company shall release for irrigation the waters impounded by it in its reservoirs at the headwaters of Provo River; and

IV. A "Secondary" water right from the Provo River for Ten acres so long as there is sufficient water in said river to supply all the water rights adjudicated in the decree referred to in plaintiff's complaint.

V. Defendant prays for general relief.

Chas. J. Wahlquist
Attorney for defendant J.C. Whiting.

State of Utah,)
) (ss.
County of Wasatch.)

John C. Whiting, being first duly sworn, on his oath says: That he is one of the defendants named in the above entitled action, that he has read the foregoing answer, and all of it, and knows the contents thereof, that the allegations therein are true of his own knowledge except as to allegations made upon information and belief and that as to all of those he verily believes them to be true.

John C. Whiting

Subscribed and sworn to before me this 20 day of April, 1914.

W. L. Laughlin
Notary Public.

My commission expires

June 6, 1915.

Service of copy of the foregoing answer
accepted this 22 day of April, 1914.
A. L. Hatch
One of plaintiff attorneys

No. 2888

In the 4th District Court,
Utah County, State of Utah,

Provo Reservoir Company,
Plaintiff,
vs.

Provo City, et al,
Defendants.

Separate Answer of
J. C. Whiting,

Filed April 24, 1914.

A. U. Robinson

Clerk.

J. M. Chapman
Deputy